THE RULE OF LAW IN AN EVOLVING DEMOCRACY

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No democratic arrangement is perfect. All are open to abuse. Still democracy's blessings are self-evident. Hong Kong's democracy is evolving, and still far from fully realised. Everybody agrees that an increase is needed. But the pace and form of the increase are matters of political controversy. Absent full democracy, can the rule of law prevail? Yes, but only on certain conditions. There has to be independent judicial stewardship of an entrenched constitution. Powers must be properly separated. Human rights must be protected conformably with international norms.[1] And the existence of the rule of law must not be treated as justification for delay in democratic development. Without defining the rule of law, these conditions illustrate its nature.

I. Judicial Independence and an Entrenched Constitution

Our judiciary – as I have previously explained in Hong Kong[2], in Mainland China [3] and overseas [4] – is independent. And it is well served by an able profession, a learned academy, a free media and an alert population.

Hong Kong's constitution is entrenched. Initially our constitutional instruments were the Letters Patent and the Royal Instructions. In 1991 they were joined by the Bill of Rights which is modelled on the International Covenant on Civil and Political Rights. Today our constitution is the Basic Law. It came into force upon the handover by which Chinese sovereignty of Hong Kong was resumed on 1 July 1997. By its preamble, the Basic Law declares the "one country, two systems" principle. It is pursuant to this principle that Hong Kong's system is preserved different from the Mainland's. Article 2 authorises Hong Kong to exercise "a high degree of autonomy". The Basic Law is a national law. So it is beyond the power of our Legislative Council, being a regional legislature, to repeal or amend.

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1 There must indeed be, as it is neatly put in D Clark & G McCoy *The Most Fundamental Right* (Oxford University Press, Oxford, 2000) at 9, "an internationally acceptable minimum". We strive for the maximum.

2 Hon Mr Justice Bokhary *Effective Judicial Review: a Cornerstone of Good Governance* (eds C Forsyth, M Elliott, S Jhaveri, M Ramsden and A Scully Hill, Oxford University Press, Oxford, 2010) at Chapter 11.

3 Hon Mr Justice Bokhary "The Current State of Judicial Review in Hong Kong" (Address to the Peking University School of Transnational Law in Shenzhen, China, 15 September 2009) published as an occasional paper by that law school.

4 Hon Mr Justice Bokhary "Hong Kong's Legal System: The Court of Final Appeal" (Lecture, Law School of the Victoria University of Wellington in Wellington, New Zealand, 6 November 2002 published by that law school as Occasional Paper No.13).
And the presentation at the Inner Temple referred to above, available at <www.innertemple.org.uk>

Being thus entrenched, our constitution is safeguarded by the judicial power of constitutional review (in other words, judicial review in the *Marbury v. Madison*[5] sense). Unconstitutional legislation is struck down.

At least in theory, constitutional review jurisdiction has existed in Hong Kong ever since the creation of our legislature in 1843. The pre-handover Legislative Council owed its existence and powers to the Letters Patent. And the Hong Kong courts have made it clear, at least since 1913, that if the Legislative Council purported to pass any enactment beyond the scope of the Letters Patent, the courts "would have no hesitation in pronouncing it bad".[6] But the legislative power provided by the Letters Patent was to "make laws for the peace, order and good government of the Colony".[7] And the Privy Council has always made it clear that words like "peace, order and good government" authorise "the utmost discretion of enactment".[8] They confer "law-making power … in the widest possible terms".[9] That left little (if any) real scope for constitutional review.

In practical terms, the Hong Kong courts had six years' pre-handover experience of constitutional review. That was under our Bill of Rights which was entrenched upon introduction. Such entrenchment was by a simultaneous amendment to the Letters Patent. This amendment prohibited the Legislative Council from restricting rights and freedoms enjoyed under the International Covenant on Civil and Political Rights as applied to Hong Kong. That means the Bill of Rights (which is taken almost word for word from that Covenant and is the embodiment of its application to Hong Kong). In addition to the rights and freedoms which it enumerates, the Basic Law also guarantees those contained in the Bill of Rights. It does so by art 39. This far-reaching article also provides that the International Covenant on Economic, Social and Cultural Rights and the international labour conventions as applied to Hong Kong shall remain in force and be implemented by law.

There are many provisions of the Basic Law which reflect Hong Kong's status as an international financial centre. Indeed one of them obliges the Hong Kong Government to "provide an appropriate economic and legal environment for the maintenance of" that status.[10] Another mandates a "low tax policy".[11] And the effect of yet another is to oblige the Hong Kong Government to "strive" for a balanced budget.[12] None of this is to say that the Basic Law runs counter to Mr Justice Holmes's famous statement that

5 *Marbury v. Madison* 5 US 137 (1803).
6 *R v. Ibrahim* (1913) 8 HKLR 1 at 18.
7 Letters Patent 1917-1992, Art VII(1).
8 As stated by Lord Halsbury LC in *Reil v. The Queen* (1885) 10 App Cas 675 at 678 and repeated by Lord Macmillan in *Croft v. Dunphy* [1933] AC 156 at 164.
9 As it was expressed by Lord Diplock in *Rediffusion (Hong Kong) Ltd v. Attorney General* [1970] HKLR 231 at 244.
10 Hong Kong Basic Law, Art 109.
11 Ibid at Art 108.
12 Ibid at Art 107.

a constitution "is made for people of fundamentally differing views".[13] Thus the Basic Law also obliges the Government to formulate policies for the "development and improvement" of our pre-handover social welfare system.[14]

Some things are inherent in every – and inalienable from any – member of humankind. Human rights are not confined to the individual rights and freedoms traditionally protected by the common law. Under the impetus of the respect for human dignity which is their driving force, they extend to include the basic human needs which are generally the province of social welfare legislation. Hong Kong's leading constitutional scholar, Professor Yash Ghai, recognises the judiciary's role in developing economic, social and cultural rights.[15] In this role more than in any other, the judiciary's approach should be conditioned by what Thomas More called the "form of philosophy which knows the dramatic context, so to speak, tries to fit in with it, and plays an appropriate part in the current performance".[16]

Hong Kong's economic success is connected with civil liberties, and we are liberal though not fully democratic.[17] We understand that it is the business of the rule of law to see that the struggles within society are conducted peacefully, in a democratic spirit, with tolerance and with reason for hope.[18]

II. Separation of Powers

As for the separation of powers, there is no failure to keep Hong Kong's three branches of government sufficiently separate. Indeed the distance between the executive and the legislature could, without compromising such separation, be reduced to enhance the legislature's capacity to influence the executive. Hopefully such influence would conform with Mr Justice Holmes's view that "legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts".[19]

Upholding the rule of law should be the business of a partnership between all three branches of government, with the constitution providing the articles of partnership.

13 *Lochner v. New York* 198 US 45 (1904) at 75-76.
14 Hong Kong Basic Law, Art 145.
15 Yash Ghai *Human Rights, Southern Voices* (ed. William Twining, Cambridge University Press, Cambridge, 2009) at 152-153.
16 Thomas More *Utopia* (Penguin Books, 1965 Paul Turner translation) Book One at 63.
17 Chris Patten *Not Quite the Diplomat* (Allen Lane an imprint of Penguin Books, 2005) at 14 & 284
18 A talk which I gave on *The Economic and Legal Environment provided by the Rule of Law in Hong Kong* subsequently published in (2007) 5 Trust Quarterly Review 9.
19 *Missouri, Kansas and Texas Railway Co. v. May* 194 US 267 (1903) at 270.

III. Basic Law Rights, Freedoms, Principles and Practices

Whether a constitution protects and promotes human rights depends on its provisions and how the judiciary interprets and applies them. Under the Basic Law, the Court of Final Appeal, at the apex of our judiciary[20], has dealt with the following rights, freedoms, principles and practices:-

- Property rights (under art 6 which mandates the protection of "the right of private ownership of property according to law").[21]
- State ownership of land and granting of leases (under arts 7 and 120 to 123 which deal with such ownership and grant and also the continuation of pre-handover leases).[22]
- Maintenance of previous laws (under art 8 which is key to Hong Kong's separate system under the "one country, two systems" principle).[23]
- Abode (under art 24 which allocates the right of abode in Hong Kong).[24]
- Equality (under art 25 which guarantees equality).[25]
- Free speech (under art 27 which guarantees the freedoms of speech, the press, publication, association, assembly, procession, and demonstration and the right to form and join trade unions and to strike).[26]
- Free assembly (under art 27 above).[27]
- Freedom of the person (under art 28 which (i) provides that freedom of person shall be inviolable, (ii) prohibits arbitrary or unlawful arrest, detention, imprisonment, bodily search or deprivation or restriction of freedom of the person and (iii) absolutely prohibits torture or any unlawful deprivation of life. Here it should be pointed out there is no capital or corporal punishment in Hong Kong.).[28]
- Freedom from torture (under art 28 above).[29]

20 With the High Court as the highest trial court, the Court of Appeal as the intermediate appellate court and the Court of Final Appeal as the supreme court.

21 *HKSAR v. Wong Hon Sun* (2009) 12 HKCFAR 877.

22 *China Field Ltd v. Building Appeal Tribunal (No.2)* (2009) 12 HKCFAR 342.

23 *Unruh v. Seeberger* (2007) 10 HKCFAR 31; *Solicitor (24/07) v. Law Society* (2008) 11 HKCFAR 117 where reference is also made to art 18(1) (which refers to art 8) and art 84 (which refers to art18); *China Field Ltd v. Building Appeal Tribunal* (*No.2)* (above n 21).

24 *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4; *Chan Kam Nga v. Director of Immigration* (1999) 2 HKCFAR 82; *Lau Kong Yung v. Director of Immigration* (1999) 2 HKCFAR 300; *Chong Fung Yuen v. Director of Immigration* (2001) 4 HKCFAR 211; *Tam Nga Yin v. Director of Immigration* (2001) 4 HKCFAR 251; *Fateh Muhammad v. Commissioner of Registration* (2001) 4 HKCFAR 278; *Ng Siu Tung v. Director of Immigration* (2002) 5 HKCFAR 1; *Prem Singh v. Director of Immigration* (2003) 6 HKCFAR 26.

25 *Secretary for Justice v. Chan Wah* (2000) 3 HKCFAR 459; *So Wai Lun v. HKSAR* (2006) 9 HKCFAR 530; *Secretary for Justice v. Yau Yuk Lung* (2007) 10 HKCFAR 335.

26 *HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442; *Cheng v. Tse* (2000) 3 HKCFAR 339; *Medical Council v.Helen Chan* [2010] 3 HKLRD 667.

27 *Yeung May Wan v. HKSAR* (2005) 8 HKCFAR 137; *Leung Kwok Hung v. HKSAR* (2005) 8 HKCFAR 229.

28 *Re Yung Kwan Lee* (1999) 2 HKCFAR 245; *Lau Cheong v. HKSAR* (2002) 5 HKCFAR 415; *Yeung May Wan v. HKSAR* (above n 25); *So Wai Lun v. HKSAR* (above n 24); *Mo Yuk Ping v. HKSAR* (2007) 10 HKCFAR 386; *Hin Lin Yee v. HKSAR* [2010] 2 HKLRD 826.

29 *Secretary for Security v. Prabakar* (2004) 7 HKCFAR 187.

- Freedom and privacy of communication (under art 30 which guarantees those fundamentals and provides that they may not be infringed on any grounds "except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences").[30]
- Freedom of movement and travel (under art 31 which guarantees those freedoms and freedom to emigrate).[31]
- Freedom of choice of occupation (under arts 33 and 41 which guarantee that freedom).[32]
- Confidential legal advice (under art 35 which guarantees "the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of … lawful rights and interests or for representation in the courts, and to judicial remedies").[33]
- Access to the courts (under art 35 above).[34]
- Legal representation in the courts (under art 35 above).[35]
- Reasons for decision (under (i) art 39 which entrenches the whole of the Bill of Rights and (ii) art 10 of the Bill of Rights which provides for fair and public hearings).[36]
- Reasons without delay (inherent in what is due from those who owe judicial duties).[37]
- Legal representation at disciplinary hearings (under art 39 entrenching the "fair and public hearing" guarantee provided by art 10 of the Bill of Rights).[38]
- Right to competent, independent and impartial tribunals (under art 39 entrenching the "fair and public hearing" guarantee provided by art10 of the Bill of Rights).[39]
- Right against self-incrimination (under art 39 entrenching art 11(2)(g) of the Bill of Rights which provides that everyone charged with a criminal offence has the right "not to be compelled to testify against himself or to confess guilt").[40]

30 *Koo v. Chief Executive* (2006) 9 HKCFAR 441.
31 *Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480; *Director of Immigration v. Lau Fong* (2004) 7 HKCFAR 56; *Official Receiver v. Chan Wing Hing* (2006) 9 HKCFAR 545;
32 *PCCW-HKT Telephone Ltd v. Aitken* (2009) 12 HKCFAR 114.
33 *Solicitor v. Law Society of Hong Kong* (2006) 9 HKCFAR 175; *Akai Holdings Ltd v. Ernst & Young* (2009) 12 HKCFAR 649.
34 *Ng v. Max Share Ltd* (2005) 8 HKCFAR 1; *Hin Lin Yee v. HKSAR* (above n 28).
35 *Stock Exchange of Hong Kong v. New World Development Co. Ltd* (2006) 9 HKCFAR 234.
36 *Swire Properties Ltd v. Secretary for Justice* (2003) 6 HKCFAR 236.
37 *Yeung May Wan v. HKSAR* (above n 27).
38 *Lam Siu Po v. Commissioner of Police* (2009) 12 HKCFAR 237; *Chiu Hoi Po v. Commissioner of Police* (2009) 12 HKCFAR 597.
39 *HKSAR v. Wong Hon Sun* (above n 21); *Medical Council v. Helen Chan* (above n 26).
40 *Koon Wing Yee v. Insider Dealing Tribunal* (2008) 11 HKCFAR 170.

- Benefit of post-offence laws reducing penalties (under art 39 entrenching art 12(1) of the Bill of Rights which provides, among other things, that "[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby").[41]
- Freedom of thought and conscience (under art 39 entrenching art 15 of the Bill of Rights which guarantees freedom of thought, conscience and religion). [42]
- Participation in public life (under art 39 entrenching art 21 of the Bill of Rights which guarantees, among other rights, the right to take part in the conduct of public affairs, directly or though chosen representatives, and the right to vote and to be elected at genuine periodic elections based on equal and universal suffrage and by secret ballot). [43]
- Equal protection of the law (under art 39 entrenching art 22 of the Bill of Rights which guarantees equality before the law and equal protection of the law).[44]
- Legal certainty (under art 28, flowing from art 39's "prescribed by law" requirement and under two articles of the Bill of Rights entrenched by art 39 of the Basic Law, namely art 5(1) which prohibits any deprivation of liberty except on grounds established by law and art 11(1) which guarantees the presumption of innocence.).[45]
- Right to work (under art 39 referring to art 6 of the International Covenant on Economic, Social and Cultural Rights by which the States Parties expressly recognise the right to work and undertake to take appropriate steps to safeguard this right). [46]
- Adequate housing (under art 39 referring to art 11(1) of the International Covenant on Economic, Social and Cultural Rights which includes "adequate food, clothing and housing" among the rights which the States Parties agree to take appropriate steps to realise).[47]
- Indigenous rights (under art 40 which provides that the lawful and traditional rights and interests of the indigenous inhabitants of the "New Territories" ie the rural or originally rural areas of Hong Kong shall be protected). [48]

41 *Seabrook v. HKSAR* (1999) 2 HKCFAR 184.
42 *Ma Bik Yung v. Ko Chuen* (2006) 9 HKCFAR 888.
43 *Secretary for Justice v. Chan Wah* (above n 25); *Lai Tak Shing v. Secretary for Home Affairs* (2007) 10 HKCFAR 655.
44 *HKSAR v. Wong Hon Sun* (above n 20); *Medical Council v.Helen Chan* (above n 26).
45 *Shum Kwok Sher v. HKSAR* (2002) 5 HKCFAR 381; *Lau Wai Wo v. HKSAR* (2003) 6 HKCFAR 624.
Morter v. HKSAR (2004) 7 HKCFAR 53; *Noise Control Authority v. Step In Ltd* (2005) 8 HKCFAR 113; *Sin Kam Wah v. HKSAR* (2005) 8 HKCFAR 192; *Mo Yuk Ping v. HKSAR* (2007) 10 HKCFAR 386; *B v. Commissioner of the Independent Commission Against Corruption* (2010) 13 HKCFAR 1; *Medical Council v. Helen Chan* (above n 26).
46 *Yeung Chung Ming v. Commissioner of Police* (2008) 11 HKCFAR 513.
47 *Ho Choi Wan v. Hong Kong Housing Authority* (2005) 8 HKCFAR 628.
48 Secretary for Justice v. Chan Wah (above n 24); *Lai Tak Shing v. Secretary for Home Affairs* (above n 43).

- Citation of overseas precedents (under art 84 which provides that the Hong Kong courts "may refer to precedents of other common law jurisdictions"). [49]
- Trial by jury (under art 86 which provides that "[t]he principle of trial by jury previously practised in Hong Kong shall be maintained").[50]
- Fair trial (under art 87 which provides that in all proceedings "the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained").[51]
- Trial without delay (under art 87 above).[52]
- Presumption of innocence (under art 87 above).[53]
- Presumption of requirement of *mens rea* (under art 87 above and art 11(1) of the Bill of Rights above entrenched by art 39 of the Basic Law).[54]
- Protection of public sector pay and conditions of service (under arts 100 and 103 which contain elaborate provisions designed to protect the public service after the handover).[55]
- Realistic and prompt compensation for the taking of property (under art 105 which guarantees such compensation).[56]
- Continuation of leases (under art 120 above).[57]
- Government rent (under art 121 above).[58]
- Continuation of treaties (under art 153 which provides for the post-handover continuation of pre-handover treaties).[59]
- Vested rights (under art 158 which provides that judgments previously rendered by the Hong Kong courts will not be affected by subsequent interpretations of the Basic Law by the Standing Committee of the National People's Congress in Beijing).[60]
- Proper approach to rights and freedoms.[61]

49 *China Field Ltd v. Building Appeal Tribunal (No.2)* (above n 22).
50 *Leung Fei Wah v. HKSAR* (2006) 9 HKCFAR 118; *Kissel v. HKSAR* (2010) 13 HKCFAR 27.
51 *Tse Mui Chun v. HKSAR* (2003) 6 HKCFAR 601; *Koon Wing Yee v. Insider Dealing Tribunal* (above n 39) where the right to a fair trial was dealt with under art 10 of the Bill of Rights entrenched by art 39 of the Basic Law. *Kennedy v. Cheng* (2009) 12 HKCFAR 601; *Kissel v. HKSAR* (above n 50).
52 *Yeung May Wan v. HKSAR* (above n 27).
53 *Tse Mui Chun v. HKSAR* (above n 50); *Chou Shih Bin v. HKSAR* (2005) 8 HKCFAR 70; *HKSAR v. Lam Kwong Wai* (2006) 9 HKCFAR 574; *HKSAR v. Hung Chan Wa* (2006) 9 HKCFAR 614; *Tong Yiu Wah v. HKSAR* (2007) 10 HKCFAR 324; *Chiu Wing Nam v. HKSAR* (2007) 10 HKCFAR 613; *Qamar Sheraz v. HKSAR* (2007) 10 HKCFAR 696; *HKSAR v. Ng Po On* (2008) 11 HKCFAR 91; *Yeung Chung Ming v. Commissioner of Police* (above); *Mo Yuk Ping v. HKSAR* (above n 29) where reference is made to the presumption of innocence under art 11(1) of the Bill of Rights entrenched by art39 of the Basic Law.
54 *Kao, Lee & Yip v. Koo Hoi Yan* (2009) 12 HKCFAR 830.
55 *Secretary for Justice v. Lau Kwok Fai* (2005) 8 HKCFAR 304.
56 *Director of Lands v. Yin Shuen Enterprises Ltd* (2003) 6 HKCFAR 1; *Ying Ho Co. Ltd v. Secretary for Justice* (2004) 7 HKCFAR 333; *Dragon House Investment Ltd v. Secretary for Transport* (2005) 8 HKCFAR 668; *Secretary for Transport v. Delight World Ltd* (2006) 9 HKCFAR 720.
57 *Dragon House Investment Ltd v. Secretary for Transport* ibid.
58 *Commissioner of Rating and Valuation v. Agrila Ltd* (2001) 4 HKCFAR 83.
59 *Re Yung Kwan Lee* (above n 28).
60 *Ng Siu Tung v. Director of Immigration* (above n 24).
61 *Yeung May Wan v. HKSAR* (above n 27); *Leung Kwok Hung v. HKSAR* (above n 27).

- New rights.[62]
- Constitutional horizontality.[63]
- Suspension of declarations of unconstitutionality to afford an opportunity for corrective legislation.[64]

IV. How They are Interpreted

A bill of rights is mere tinsel unless it results in the fulfilment of its promises. The Court of Final Appeal recognised from the outset that Basic Law entitlements must be interpreted generously. Constitutional cases, I have added extra-judicially, should be decided in "a manner which is fully faithful both to the letter and to the spirit of the constitution, and which accords with the highest ideals of the people at their best".[65] Since saying that, I have noticed and been encouraged by Sir Leslie (later Lord) Scarman's statement that without judicial power to invalidate legislation for unconstitutionality, the "aspirations" of British society would not be fulfilled.[66] And the "spirit" of the constitution? Well, whatever Professor AV Dicey thought of constitutional review, he did understand it to mean treating statutes "as void if they are inconsistent with the letter or *spirit* of the constitution" (Emphasis supplied).[67]

On the bench and in every other sphere of legal activity, lawyers must of course operate within the limits of reality even when pursuing the highest ideals and aspirations. But this is not for one moment to deny that the way forward often lies very far away from the line of least resistance however tempting that line may sometimes appear. Ultimately the law's progress depends on those lawyers who see the way and continue along it no matter how arduous, daunting and discouraging that may prove. It is not a primrose path, but the right one.

"The fundamental institution in modern democracy", it has been said, "is the constitution, whether this be a written or an unwritten one".[68] I agree. There is practically no limit to the reach of a constitution. Thus by art 1 of the new Japanese Constitution introduced after the Second World War, the Emperor renounced his divinity. The interpretation and application of a constitution, whether written or unwritten, must proceed upon some abiding philosophy. And where better to find that philosophy than in the best side of human nature? After all, a constitution sustains and is sustained by the core values of the people. Opponents of constitutional review have been known to suggest that it involves "judicial supremacy". It does not. The true position was famously explained by Alexander Hamilton in *Federalist*

62 *Bahadur v. Director of Immigration* (above n 30); *Director of Lands v. Yin Shuen Enterprises Ltd* (above n 56).
63 *Leung Lai Fong v Ho Sin Ying* (2009) 12 HKCFAR 581.
64 *Koo v Chief Executive* (above n 30).
65 *Making Law in the Courts* (2002) 10 Asia Pacific Law Review 155 at 160.
66 L Scarman *English Law – The New Dimension*, 26th series of the Hamlyn Lectures (Stevens & Sons, 1974) at 77.
67 AV Dicey *The Law of the Constitution*, (10th ed Macmillan & Co Ltd 1961) at 131.
68 Chief Justice Muhammad Munir in *Federation of Pakistan v. Khan* PLD 1955 Federal Court 240 at 254.

Paper No.78[69]. Constitutional review, he there pointed out, supposes not that judicial power is superior to legislative power but that the power of the people is superior to both. It has been said that a fundamental right is "a restriction on sovereignty for the benefit of the individual".[70] So it would be if one is thinking of *parliamentary* sovereignty. But if sovereignty belongs to *the people*, then fundamental rights and freedoms are products of sovereignty and not restrictions thereon.

V. Bold and Creative Statutory Interpretation

Sometimes legislation conflicts or appears to conflict with fundamentals. How are the courts to deal with such legislation? In the absence of any written constitutional instrument, it would have to be done through statutory interpretation. As to that, it has been said that "bold and creative statutory interpretation may at some point embrace a limited degree of entrenchment".[71] I see the point. Much can be achieved by statutory interpretation properly conducted. But any "entrenchment" achieved thereby would, I think, be very limited indeed.

VI. Declarations of Incompatibility

Where constitutional rights and freedoms are contained in a written instrument, there are several possible arrangements for judicial protection of those rights and freedoms against legislative inroads. I will mention two. One is the sort of arrangement provided for by the Human Rights Act 1998.[72] The other is constitutional review. As to the former, making declarations of incompatibility in the expectation of remedial legislation is probably as far as courts can go without questioning absolute parliamentary supremacy. (I use the expressions "parliamentary supremacy" and "parliamentary sovereignty" interchangeably when referring to the concept of Parliament being, as it was recently put, "supreme and sovereign"[73]). Of course the executive is not and has never been the least dangerous branch of government.[74] And where the executive controls the legislature and is determined to maintain an inroad into fundamentals, no declaration of incompatibility would be effective.

The anthropologist's view of law as "a part of the machinery by which a certain social structure is maintained"[75] is one which lawyers can accept. But even where parliamentary supremacy has become a part of the social structure, there may be things more important to society than continued judicial

69 Alexander Hamilton *Federalist Paper No. 78* 14 June 1788.

70 By Professor A Gledhill in *Changing Law in Developing Countries* (ed. JND Anderson, George Allen & Unwin Ltd, 1963) at 81.

71 TRS Allan, *Parliamentary Sovereignty* (1983) 3 Oxford Journal of Legal Studies 22 at 31.

72 A valuable discussion of the similarities and differences between this United Kingdom statute and the New Zealand Bill of Rights Act 1990 is to be found in Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson: Bookers, 2007) paragraph 20.2.5 at 770-772.

73 *Re D (Children)* [2010] EWCA Civ 50 at 12.

74 The observations of Professor Martin Flaherty in *The Most Dangerous Branch* (1996) 105 Yale Law Journal 1725 are relevant to all jurisdictions and generously repay study.

75 A R Radcliffe-Brown *Structure and Function in Primitive Society* (First Free Press Paperback Edition Macmillan, 1965) 199.

acceptance of such supremacy in its absolute form. What if such acceptance is insisted upon in the name of democracy? Elections are sometimes won by exploiting prejudice. "The divine right of majorities", Lord Hailsham of St Marylebone said, "is just as fallacious in conception as the doctrine of the divine right of kings".[76] He said that after long experience at the Bar, in both Houses of Parliament, in the Cabinet and on the Bench. Speaking of kings, Mr Tony Benn MP said that "British prime ministers have more absolute authority than medieval monarchs".[77] Whether or not that is so, there should be no illusion as to the reality of parliamentary supremacy. It means, as Professor Vernon Bogdanor observed, that a government with an overall majority in the House of Commons enjoys "virtually unlimited power" and that what the governing party enacts becomes "ipso facto constitutional".[78] Are governments always benign? Baroness Helena Kennedy QC called it "wishful thinking".[79] Power tops the list of things that must not be absolute. "Forms of government", Mr (later Chief) Justice Dixon said, "may need protection from dangers likely to arise from within the institutions to be protected".[80]

Parliamentary supremacy is a common law construct. Suppose the British courts were faced with legislation under which Britain would cease to be a free society. Would they declare themselves powerless at common law to review the validity of that legislation? Suppose Britain adopted an entrenched constitution. Would the British courts hold such entrenchment meaningless?

Professor Lon Fuller has detected a tendency on the part of supporters of parliamentary sovereignty and its critics to join issue not on its wisdom but on points of law.[81] So let us proceed, for the moment at least, on the basis of that joinder. It has been said on high academic authority that every legal system must have a basic rule for identifying a valid piece of legislation and that this rule lies in the keeping of the judges, it being for them to say what they will recognise as effective legislation.[82] And even in fully evolved democracies there have been judicial[83] and extra-judicial[84] indications by judges of deep learning and vast experience that there can be circumstances in which the courts may have to revisit the common law's present acceptance of absolute parliamentary supremacy. These indications are all the more impressive for the softly spoken terms in which they are couched. Some people have

76 Lord Hailsham *A Sparrow's Flight: The Memoirs of Lord Hailsham of St Marylebone* (Fontana: Harper Collins Publishers, 1990) at 392.
77 John Mortimer *In Character* (Penguin Books, 1984) at 39.
78 Vernon Bogdanor *The New British Constitution* (Hart Publishing Ltd, 2009) at 15.
79 Helena Kennedy *Just Law* (Vintage: Random House, 2004) at 318.
80 *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1 at 187.
81 Lon Fuller *The Morality of the Law* (Yale University Press, Revised Edition 1969) at 115.
82 HWR Wade "Constitutional Fundamentals" in *32nd Hamlyn Lectures* (Stevens & Sons, 1980) at 26.
83 Lord Steyn, Lord Hope of Craighead and Baroness Hale of Richmond in *R (Jackson) v. Attorney General* [2006] 1 AC 262 at 302H-303A, 304D-E and 318D-E respectively.
84 Sir Robin Cooke (later Lord Cooke of Thorndon), *Fundamentals* [1988] NZLJ 158.
Lord Woolf, *Droit Public-English Style* [1995] PL 57.
Sir John Laws, *Law and Democracy* [1995] PL 72.
Lord Donaldson, *Hansard*, HL, at 746 (7 December 2004).

attacked them for not being supported by any citation of cases. Of course they are not. That is the whole point. How can there be a precedent on an unprecedented situation?

VII. Constitutional Review

Those thoughts bring us to constitutional review. It is true that this judicial power is most associated with the United States. But it is by no means un-English. Mr Justice Story spoke of "[t]he common law of England, the grand reservoir of all our jurisprudence".[85] And Chief Justice Burger saw *Marbury v. Madison's* "roots in English legal thought".[86] As we have recently been reminded[87], Sir Charles (later Lord) Bowen had written well over a hundred years ago[88] that the force used to suppress a riot "must always be moderated and proportioned to the circumstances of the case and the end to be attained". It is worth noting that ideas reflected in the constitutions proposed after the execution of Charles I and the abolition of the office of king included enumerating fundamentals and denying validity to legislation incompatible with them.[89] With the benefit of over two decades' experience at the Bar and nearly four decades' experience on the Bench, Lord Denning came to favour a judicial power to "set aside statutes which are … repugnant to reason or fundamentals".[90] Due to the controversy surrounding it, I will not say anything about *Dr Bonham's Case*[91]. I will refrain from discussing it even though tempted to do so by the Court of Common Pleas' statement in *Garland v Jekyll*[92], which the Court of Criminal Appeal repeated in *R v Casement*[93], that "we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law".

As it seems to me, there are some essentially English ideas which have come to be regarded as foreign. Like proportionality (articulated and applied, as we have seen, by Sir Charles Bowen so long ago), constitutional review may be one of them.

Nothing in favour of constitutional review can usefully be said to anyone implacably opposed to it. But there are several points worth laying before those willing to consider them. It is well to begin by recognising how deep the idea of an unwritten constitution runs in certain quarters. It is not merely a matter of Britain's domestic unwritten constitution. The Privy Council once referred to "the unwritten principles of the Constitution of the Empire"[94] (citing the principle that their Lordships will not in general function as a court of review in criminal cases). Might it not be better to have something

85 *United States v. Wonson* 28 F Cas 745 (1812) at 750.
86 The *Doctrine of Judicial Review* (1972) 25 Current Legal Problems 1 at 6.
87 By Sir John Mummery in *Tom Bingham and the Transformation of the Law* (eds Mads Andenas and Duncan Fairgrieve, Oxford University Press, 2009) at 301.
88 *Report of the Committee appointed to inquire into the Disturbances at Featherstone in 1893,* at 7234.
89 *Holdsworth's History of English Law* (Methuen & Co, 1924) Vol.VI at 157.
90 Lord Denning *What Next in the Law* (Butterworths, 1982) at 320.
91 *Dr Bonham's Case* (Hil. 7 Jacobi 1) 8 Co. Rep. 114a at 118a.
92 *Garland v. Jekyll* (1824) 2 Bing 273 at 296-297.
93 *R v. Casement* [1917] 1 KB 98 at 142.
94 *Dal Singh v. The King-Emperor* (1917) 25 Cox CC 705 at 706.

more certain and systematic than a collection of *unwritten* constitutional principles articulated from time to time by the courts? Properly drafted and expounded, written constitutions are not inflexible: only and rightly firm on fundamentals.

Sir Anthony Mason rejects the notion that constitutional review is at odds with parliamentary sovereignty.[95] He points out that in a federation, parliamentary supremacy means that the legislature is supreme within the limits of the powers assigned to it by the constitution. And, he continues, the inclusion in a constitution of entrenched fundamental rights and freedoms merely operates to limit the boundaries within which the legislature is supreme. There is nothing undemocratic in any of that. Do many (or even any) of us really vote for people so that they may exercise despotic powers or reduce our most cherished rights and freedoms?

In theory, the executive is always responsible to the electorate, either directly or indirectly through the legislature. But as long ago as 1960, Lord Radcliffe noted that practice was drifting steadily away from theory.[96] Has this trend abated or has it continued? Is it accelerating?

As humankind moved from nature to culture, each human being unavoidably shed a measure of individual autonomy. And the normative rules of behaviour needed to hold any given society together naturally multiply as that society grows more complex. But some entitlements "correspond to the nature of man and their protection to the nature of any true community".[97] They go to why communities are formed in the first place. And they ensure that whenever the benefits of living in community are paid for by some relinquishment of individual autonomy, the price is not too high. Suppose the executive laid rough hands on such entitlements. The next general election may be a long way off, and would no doubt involve many other issues as well. Short of how they may eventually vote, what can people do? To whom can they turn? There is, as Sir Jack Beatson said, a "fundamental imbalance between the executive and the legislature".[98] Some legislators may want "to look to measures and not to men".[99] But they could achieve little of immediate effect unless in the majority. And if they were in the majority, it would, in a parliamentary system, be their party or coalition which forms the executive. So they would be inhibited by party loyalty (or party whips). Legislators in other systems also face political restraints. Judges, on the other hand, owe loyalty only to the law – above all to the law of the constitution.

Sir Henry Maine famously pointed out that the reasons which actuate people in the maintenance of an institution may not necessarily have anything in common with the sentiment in which the institution originated.[100] And even where an institution should be maintained, there may be good cause for adapting it to meet new needs.

95 Anthony Mason in Geoffrey Lindell (ed) *The Mason Papers* (The Federation Press, 2007) at 220.

96 Lord Radcliffe *The Law & Its Compass* (Northwestern University Press. 1960) at 83.

97 Hans Kelsen *General Theory of Law and State* (Translated by Anders Wedberg, Harvard University Press, 1945) at 266.

98 J Beatson *Reforming an Unwritten Constitution* (2010) 126 LQR 48 at 71.

99 As Anthony Trollope put it in *Phineas Finn* (Wordsworth Edition 1996) at 26.

100 Henry Maine *Ancient Law* (Transaction Publishers Edition 2002) at 189.

Sovereignty "in king and parliament or in king alone"?[101] When those were seen as the only options, a verdict in favour of parliamentary sovereignty was inevitable. Nowadays the selection is wider. Unsurprisingly some (maybe many) people in Britain – the late Lord Bingham of Cornhill was among them – feel that "there are some rules which no government should be free to violate without legal restraint".[102] The unthinkable may have become desirable and doable. One day, perhaps before too long, the British people may be asked to choose between parliamentary supremacy and constitutional supremacy. Their choice should of course be made on a "properly informed" basis.[103] Even a gradual step in the development of an existing constitutional arrangement calls for careful consideration. Where a new arrangement is contemplated, only a thoroughly informed decision is apt to pass the ultimate test for a constitution, namely the test of time. It may involve some comparative constitutional law – approached with circumspection of course.[104] In such an exercise, analysing institutions would not be enough. It would be necessary to observe and appreciate how they work in practice. Does having constitutional review jurisdiction politicize a judiciary? The Hong Kong experience is that it will not if the judges take care to see that it does not. Even so, the British people might wonder whether constitutional review could, despite all its advantages, sometimes prove too blunt an instrument.

That is something which the Court of Final Appeal takes care to avoid. We have developed three main ways in which to avoid it.

VIII. Remedial Interpretation

First, we harmonise democracy and the rule of law by treating striking down "as a course of last resort".[105] Not striking down does not mean inaction. Where possible, we give the impugned statutory provision a remedial interpretation, reading it down to bring it within the constitution. We did that in, for example, *HKSAR v Lam Kwong Wai*[106] which concerned the constitutional right to be presumed innocent. Section 20 of the Firearms and Ammunition Ordinance[107] provides that any person who is in possession of an imitation firearm commits an offence unless he satisfies the court that he was not in possession of the imitation firearm for a purpose dangerous to the public peace or of committing an offence. On its face, that cast a persuasive burden on the accused. We considered a persuasive burden incompatible in the circumstances with the presumption of innocence. So we read the provision down to an evidential burden only. That is how it is now applied by the Hong Kong courts.

101 F W Maitland *The Constitutional History of England* (Cambridge University Press, 1908) at 255.
102 Tom Bingham *The Rule of Law* (Allen Lane an imprint of Penguin Books, 2010) at 170.
103 Ibid.
104 Jörg Fedtke, *Constitutional Transplants* (2008) 61 Current Legal Problems 49.
105 *Leung Kwok Hung v. HKSAR* (above n 26) at 299A.
106 See above n 53.
107 Firearms and Ammunition Ordinance, s 20, Cap.238.

We strike down statutory provisions only when that proves unavoidable: as in, for example, *Official Receiver v Chan Wing Hing*.[108] That case concerned freedom to travel. Under the Bankruptcy Ordinance[109], a bankrupt is discharged after the expiration of a prescribed period subject to any extension which a court might order. Such extensions are granted only on specified grounds and are subject to a statutory maximum. But a bankrupt who travelled out of Hong Kong was expected to notify his trustee in bankruptcy of his itinerary and where he could be contacted. And s 30A(10)(b)(i) of the Bankruptcy Ordinance provided that if a bankrupt leaves Hong Kong without giving such notification, the prescribed period shall not continue to run during his absence from Hong Kong and until he notifies the trustee of his return. We struck down s 30A(10)(b)(i) because it went beyond what was necessary to protect creditors and was therefore incompatible with freedom to travel.

If the problem can be solved by statutory interpretation, that is how we would solve it. This is possible because, as Lord Nicholls of Birkenhead has said, remedial interpretation can "modify the meaning, and hence the effect," of legislation.[110] You will not find a better explanation of reading down. This goes only to constitutionality. No political considerations are involved. Judicial decisions involve policy but not politics. Even if legislation is "unpopular"[111], provided that it is – or can be read down to be – constitutional, we would not restrict or impede its operation. We know that to do so would be, in Lord Wilberforce's words, "to weaken rather than to advance the democratic process".[112] The rule of law and the enforcement of fundamentals by an independent judiciary operate as democracy's ally, not as its enemy or rival.

IX. Preserving Statutes as Far as Constitutionally Possible

Secondly, we tailor striking down to preserve statutes as far as constitutionally possible. In other words, we keep the law as close to what the legislature has enacted as the constitution permits. It is the democratic thing to do. We recently[113] struck down the Insider Dealing Tribunal's statutory power to fine, and set aside the fine which it had imposed. That power had rendered the tribunal's proceedings criminal rather than civil. But the tribunal's findings of insider dealing were reached on a balance of probabilities and partly on compelled evidence. So those findings could not have stood if the proceedings remained criminal. Extinguishing the power to fine and the fine itself rendered the proceedings civil. That preserved the disqualification, disgorgement and costs which the tribunal had ordered under other provisions of the statute.

108 See above n 31.
109 Bankruptcy Ordinance Cap.6.
110 *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557 at 572A.
111 *R v. IRC, ex parte Rossminster Ltd* [1980] AC 952 at 998A.
112 Ibid.
113 *Koon Wing Yee v. Insider Dealing Tribunal,* above n 40.

Uniquely the striking down was of a provision unobjectionable in itself. Fining insider dealers is not unconstitutional, and insider dealing is punishable in Hong Kong even by imprisonment if duly and sufficiently proved in a *criminal* court. But on the intention which we attributed to the legislature, the power to fine was secondary to the features of the statutory *tribunal* scheme saved by striking down that power.

X. Suspension

Thirdly and finally, we will if necessary suspend the operation of a striking down order for a limited period to afford an opportunity for corrective legislation. We identified and exercised that power in the recent case of *Koo v Chief Executive* (*Koo's* case).[114] It concerned covert surveillance through the interception of telecommunication messages. That was being conducted under s 33 of the Telecommunications Ordinance[115] and an Executive Order[116] which created a departmental arrangement for the authorisation and review of such interception. But s 33 and the Executive Order lacked sufficient safeguards, and were declared incompatible with the freedom and privacy of communication. Having so declared, the High Court made a temporary validity order by which it was provided that s 33 and the Executive Order were "valid and of legal effect" for six months. The Court of Appeal affirmed that order. But we set it aside, substituting suspension for the same period.

Declaring a law or executive action unconstitutional normally leaves no void in the legal order, merely ridding it of an unconstitutional encrustation. But sometimes the striking down is of an unconstitutional way of doing something worth doing constitutionally. It may lead to corrective legislation eventually. But mere inconvenience in the meantime would not justify temporary validly or suspension. What if the problem went well beyond mere inconvenience? Exceptional circumstances may call for what Blackstone called "those eccentrical remedies, which the sudden emergence of national distress may dictate, and which that alone can justify".[117] The law will, as Lord Chief Baron Abinger once said, "amplify its remedies, and, without usurping jurisdiction, … apply its rules to the advancement of substantial justice".[118]

Temporary validity permits the executive to function under what has been declared unconstitutional. So does suspension. The essential difference between the two remedies is this. Temporary validity also shields the executive from legal liability for so functioning. But suspension does not. Temporary validity has been accorded in some jurisdictions. That was done in situations where doing so was necessary for the purpose of avoiding a virtual legal

114 See above n 30.
115 Telecommunications Ordinance s 33 Cap.106.
116 Article 48(4) of the Basic Law provides for the issuing of executive orders.
117 *Blackstone's Commentaries on the Laws of England* (9th ed, S Sweet, A Maxwell and Stevens & Sons, London, 1836) Book One, Chapter 7, at 251.
118 *Russell v. Smyth* (1842) 9 M & W 810 at 818.

vacuum[119] or a virtually blank statute book[120]. In such extreme situations chaos might, absent such a shield, remain even after corrective legislation. *Koo's* case was not of that nature. Even if we could accord temporary validity, nothing justified it in *Koo's* case.

Power to suspend an order is a concomitant of power to make it, but exercisable only when necessary. In a recent case[121] (*A's* case), certain Orders in Council made in purported exercise of statutory powers were declared *ultra vires* and quashed by the United Kingdom Supreme Court. Refusing suspension, the majority observed[122] that the Treasury did not suggest that suspension was necessary in that case as it was in *Koo's* case.

In *Koo's* case we were satisfied that a total absence of covert surveillance posed a public danger so grave as to justify granting a limited period of suspension to afford an opportunity for corrective legislation providing for covert surveillance under properly controlled conditions. But there was no shield from legal liability. This aspect of the *Koo* decision was stressed[123] by Lord Hope of Craighead in *A's* case.

XI. Entrenchment

Such consensus as underpins an unwritten constitution offers the bedrock on which to build a written one. The "global trend" is towards constitutional review.[124] While fundamental rights and freedoms are not necessarily secure just because they are entrenched and may subsist even where they are not entrenched, entrenchment's advantages[125] are plain. Its potential drawbacks are avoidable.

XII. Judicial Activism and Judicial Restraint

Some people seem to live in constant dread of the lengths to which "judicial activists" might go in the exercise of constitutional review. At the other extreme are to be found those who are equally and oppositely fearful that constitutional review might at any moment be rendered a dead letter by an excess of judicial restraint. I entertain little hope of allaying the anxieties of those at either of these extremes.

But to those who may be prepared to consider them, I offer these various but connected thoughts. Public confidence in the law, including the law of the constitution, is dependent on a measure of continuity. That should never be overlooked or underestimated. But this is not to say that the law can afford to stagnate. It must develop: gradually as a rule; sometimes rapidly; and exceptionally even by a quantum leap. As to the content of the law, the

119 *Federation of Pakistan v. Tamizuddin Khan,* PLR 1956 WP 306 and *Special Reference No. 1 of 1955,* PLR 1956 WP 598.

120 *Re Manitoba Language Rights* [1985] 1 SCR 721.

121 *A v. Her Majesty's Treasury* [2010] 2 WLR 378

122 Ibid at 464C-D.

123 Ibid at 468E-F.

124 Christopher L Eisgruber *Constitutional Self-Government* (Harvard University Press, 2001) at 76.

125 Described in *Wade and Forsyth on Administrative Law* (10th ed, Oxford University Press, 2009) at 24 as "valuable safeguards"

text is of course always important. But so is the spirit as a guide to intent, for the laws consist not in reading but in understanding.[126] As John Selden said, "[t]here is no stretching of power: 'tis a good rule, eate within yo$^{r.}$ stomacke, Act within yo$^{r.}$ Comission".[127] Crucial to the rule of law is a proper separation of powers. The separation between judicial power and other powers is a two-way street. Never usurping the functions of any other branch of government, the judiciary always guards against shirking its own duty through deference to any other branch. On all such matters, judges may differ – sometimes widely – on the right balance to strike. But we all agree that there is a balance to be struck.

Judges who serve on a court of last resort are often thought of as either "liberal" or "conservative". Whether or not you like such descriptions, care should be taken not to protest against them too much. The human composition of the bench does have – let us face it – an influence on the law's development. That is a fact which it would be as idle as it would be disingenuous to deny. I am often called a liberal judge, and I make no objection to that description. But whether liberal or conservative, we are all of us, first and foremost, judges. As judges, we are duty-bound to be fully faithful to the law viewed with all the objectivity that it is humanly possible to muster. That lies at the very heart of the rule of law. And there is no exaggeration in saying that it resonates with every beat of that heart.

XIII. For the Rule of Law to Prevail

Democracy and the rule of law are natural allies, and should operate as such. But that is not to say that they will always run along parallel lines. In practice they will often criss-cross. This may produce a tangle or it may produce a weave. Constitutional review jurisdiction must be exercised in a way that avoids the former and delivers the latter. That is what we have always endeavoured to do. We have so endeavoured independently, as a judiciary must always behave, and with fidelity to the letter and the spirit of a constitution carefully drafted along progressive lines.

It is on the lips of lawyers that the expression "the rule of law" is usually to be found. But the concept for which the expression stands belongs to everyone in full and equal measure. It covers how the law reacts to specific instances of injustice in order to counteract them and to how the law pro-actively delivers social justice across a broad spectrum. As James Harrington wrote, "the public interest (which is no other than common right and justice, excluding all partiality or private interest) may be called the empire of laws, and not of men".[128] This stands for a politically neutral judiciary, for the ideal of equal and effective justice according to law, for liberty, and against all that

126 *Non in legendo, sed in intelligendo leges consistunt: The Earl of Cumberland's Case* (Mich. 7 Jacobi 1) 8 Co. Rep. 166b at 167a.

127 Sir Frederick Pollock *Table Talk* (Quaritch, London, 1927) at 100.

128 James Harrington *The Prerogative of Popular Government* (1658) reproduced in John Toland *The Oceana and Other Works of James Harrington* (printed for T Becket and T Cadell in the Strand and T Evans in Covent Garden, 1771) at 224.

is oppressive or arbitrary. It has been said that "the overall constitutional system may be more democratic than the sum of its parts".[129] I believe that to be true and the rule of law to have a great deal to do with it.

The concept of the rule of law is often discussed in terms of what has been called "the set of values associated with" it.[130] That is perhaps what I am doing. Certainly I am discussing the rule of law without defining it. Such omissions are not uncommon. The usual explanation for them is that the concept is difficult to define. It is, I think, important to examine the nature of and reasons for this difficulty with some care. Otherwise it may form a nucleus around which build up doubts as to whether there really is such a thing as the rule of law. Undeniably there is no consensus as to an exhaustive definition. That is hardly surprising. Nor is it a matter for great concern. Not unnaturally, people tend in real life to think of the rule of law in terms of two practical things. One is the evil that it can avert. The other is the good that it can bring about. In their essentials, those two things remain constant. But the angle from which people look at them will inevitably vary from time to time and place to place. Moreover – still in real life – people naturally focus more on achieving a desired state of affairs than on defining it all the way down to the outer limits of its meaning. What can be said with confidence about the rule of law is that it stands for a real chance of justice according to law. It stands against both tyranny and anarchy. Like the air we breathe, its absence is more noticeable than its presence.

Otherness should be respected, not merely tolerated. And majority rule must protect minority rights. These are lessons which the past hopefully has – and certainly should have – taught humankind. Everywhere in the world, generation after generation, crisis after crisis and with eyes wide open to what democracy can and cannot achieve on its own, there will always be much to do in constantly developing ways for the rule of law to prevail.

129 Adrian Vermeule, *System Effects and the Constitution* (2009) 123 Harvard Law Review 4 at 33.

130 Robert G McCloskey *The American Constitution* (2nd ed, University of Chicago Press, 1994) at 11.