

# Do Hong Kong people embrace democratic values?

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## SPEAKING NOTE

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1. It is a great honour to be invited by the University of Hong Kong's Faculty of Law to give this seminar on Hong Kong people's perspectives on democracy, specifically to compare the values and beliefs held by the public and legal personnel respectively about the rule of law.
  2. Having been called to the Bar since 1983 and having served my constituents as a mandated delegate of the Legislative Council for 12 years, I am perhaps placed in a rather special position – with an internal perspective being a barrister, as an actor within the system, and also with an external perspective, as a representative of the public from outside the system.
- I. To what extent do you agree with this statement: “The most important thing in society is having a great leader instead of a good system.”?**
3. This inquiry, posing the concept of a “great leader” and “good system” as dichotomous and mutually exclusive choices, is essentially masquerading a higher question about the Hong Kong public's preference towards a system of rule of man versus rule of law. Looking at the statistics, it is not surprising at all that most actors within the system, scoring as high as 84.9% of the sample, would disagree with such a statement.
  4. As the Rt Hon Lord Neuberger of Abbotsbury, Non-permanent Judge of the Hong Kong Court of Final Appeal, President of the UK Supreme Court, said,<sup>1</sup>

“The rule of law is fundamental to any civilised society, and the rule of law means, at the very least, that a society is governed by laws which are properly enacted, clearly expressed, publicly accessible, generally observed, and genuinely enforceable.

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<sup>1</sup> Lord Neuberger of Abbotsbury NPJ, “*The Third and Fourth Estates: Judges, Journalists and Open Justice*”, Speech at the Hong Kong Foreign Correspondents' Club, 26 August 2014, §1.

Enforceability includes access to the courts for people to enforce rights and to defend themselves. Rights which are unenforceable are as bad as no rights at all. The rule of law also requires the honest, fair, efficient and open dispensation of justice.”

5. Indeed, for actors within the legal system, the rule of law is fundamental regardless of whether a leader or leaders, great or otherwise, is elected or appointed. In the same speech, Lord Neuberger explained,<sup>2</sup>

“Democracy is not faultless and it can lead to the tyranny of the majority – and, in extreme cases, it can lead to tyrants or worse; both Hitler and Mussolini came to power democratically. Politicians are frequently driven to take decisions based on expediency: that is not intended to be a criticism, it is 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. But this is a power which judges should exercise diffidently and cautiously.”

6. Such a belief in the rule of law is echoed by the Hon Chief Justice Ma, quoting from Lord Bingham of Cornhill,<sup>3</sup>

“But belief in the rule of law does not import unqualified admiration of the law, or the legal profession, or the courts, or the judges. We can hang on to most of our prejudices. It does, however, call on us to accept that we would very much rather live in a country which complies, or at least seeks to comply, with the principle I have stated than in one which does not. The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless. Better to put up with some choleric judges and greedy lawyers.”

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<sup>2</sup> *Ibid.* at §5.

<sup>3</sup> Hon Chief Justice Ma, “*Strength and Fragility in tandem: The Rule of Law in Hong Kong*”, Speech at the Bar Council of England and Wales Annual International Rule of Law Lecture 2015, §5.

7. Here Chief Justice Ma, quoting from Lord Bingham's book affectionately titled "*The Rule of Law*", described the hallmarks of societies without a "good system" in place and why rule of law is a necessary feature.
8. Do the public feel the same way about the importance of a "good system" over a "great leader"? Although more members of the public (48.7%) disagree that a "great leader" is more important than a "good system" than those who agree (29.8%), this figure does deviate substantially from the responses from actors from within the system.
9. Nonetheless there may be some truth in the public's yearning for a "great leader". While great leadership and good systems are clearly not mutually exclusive (unlike how the survey has put it) given the current political atmosphere, one may find good reason why "great leaders" are sought after, perhaps even more so than a "good system".
10. The "Occupy" protests and the subsequent Mong Kok riots were probably resultant from bad leadership and even worse governance, and judges in adjudicating these cases were often put in the wrong light by the public, with the latter thinking that judges must have and will take their own political views in these issues. The Hon Chief Justice Ma has said on one occasion,<sup>4</sup>

"Pressure groups and others including legislators have continually been complaining publicly about the acquittal of persons prosecuted in the Occupy protests. The concerns over the rule of law are that the courts, by acquitting the persons charged, have been acting inconsistently with public opinion and against the public interest..."

11. In the same speech, the Chief Justice continues by saying,<sup>5</sup>

"And yet, if one is analyzing cases determined by the courts, the more pertinent question must of course surely be whether the court has applied the law and acted in accordance with law, as opposed to applying extraneous factors (meaning non-legal matters such as political considerations). Put shortly, the existence or non-existence of the rule of law cannot be gauged by the outcome of a case alone. After all, and this is particularly so in public law cases, the individual parties or a

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<sup>4</sup> *Ibid.* at §2.

<sup>5</sup> *Ibid* at §11.

portion of the public (even the majority) may wish for a particular result, but whether or not the result is achieved is entirely dependent on the legal merits, and the result alone provides no clue as to whether the court has acted independently or in accordance with its constitutional mandate of applying the law and its spirit, and nothing else. It is perhaps convenient that this point to make reference also to the Judicial Oath in Hong Kong which requires a judge to uphold the law, act in full accordance with the law, and safeguard the law and administer justice without fear or favour, self-interest or deceit.”

12. In the Ceremonial Opening of the Legal Year 2015, the year shortly after the “Occupy” protests, the Chief Justice made this comment,<sup>6</sup>

“When the court made its decisions in the various injunction proceedings, it did so according to law and this was plain to see in the detailed, reasoned judgments that were given. When the Court of Appeal rejected applications for leave to appeal from the decisions of the Court of First Instance, the Court again did so explaining in detail the legal reasons for its conclusions. All this illustrates the practice of our courts: deciding cases strictly according to law thereby fulfilling the constitutional mandate of the Judiciary and being seen to do so by their reasoned judgments being made publicly available. This is the rule of law and the administration of justice operating in practice, and this is precisely how the Hong Kong Judiciary operates on a daily basis. It will always continue to do so in this way.”

13. The way I see it is that “great leadership” and “good systems” cannot possibly be seen as mutually exclusive options. While it is fundamental that a good system of rule of law in Hong Kong should be protected as the ultimate end, this is not to say that great leadership is not needed. In fact, bad leadership often leads to the erosion of an otherwise good system, and in many cases, bad executive governance might even place the judges in difficult positions to take decisions, basing, rightly so, completely on legal merits, with wide-ranging social, political and economic outcome that otherwise could easily been solved by the executive and legislative branches should they be functioning properly. Some issues may be easier to be solved on the executive end.

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<sup>6</sup> Hon Chief Justice Ma, “*Speech at Ceremonial Opening of the Legal Year 2015*”.

14. For this reason, while it is alarming that a not-so-insignificant portion of the public preferred a “great leader” over a “good system”, in the specific context of the Hong Kong political climate, this may actually not be a huge surprise given that the Hong Kong people have taken the rule of law for granted for many years, yet the most fundamental issues that have been plaguing Hong Kong have not yet been solved, primarily due to the lack of good leadership.

**II. To what extent do you agree with this statement: “Government officials are like parents; it is proper for them to decide what is good for us.”?**

15. Similar to the responses given to the first question, again, most actors from within the system (84.3%) disagreed that it is better for government officials to decide what is good for the public. Indeed, it is at the core of the common law system and its belief that decisions by public authorities are not perfect; they could be illegal, irrational, or a disproportionate response. For this reason, judges have often advocated the importance of judicial review in Hong Kong, and that measures taken against the government could perhaps be the secret to good governance.
16. In the Ceremonial Opening of the Legal Year 2016,<sup>7</sup> the Chief Justice said,

“Proper responsibility and accountability in the public sphere is called good governance, and good governance is another term for an adherence to the requirements of the law and to its spirit. In other words, it embodies the concept of the rule of law. This is the essence of that type of case known as judicial review and, most often, this type of case involves the Government or a department within the Government, although it can also involve other public bodies. In judicial reviews, the public interest is always engaged and the effects of a decision of the court in this type of case will almost always affect sections of the public beyond the immediate parties in court. Sometimes, the whole community is directly affected. **A decision of the court in public law litigation will often serve as a guide to good governance, whether looking at events in the past or perhaps more important, the future.** Although there may occasionally be inconveniences, judicial review overall serves the public interest and facilitates the well-

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<sup>7</sup> Hon Chief Justice Ma, “Speech at Ceremonial Opening of the Legal Year 2016”.

being of our society. This status should properly be recognised.”

17. The Former Chief Justice Andrew Li has also spoken on this issue,<sup>8</sup>

“It is of course a cardinal feature of a society governed by the rule of law that the citizen is protected through judicial review against any abuse of public power... It is fundamental to good governance that public powers should be exercised within legal limits and with fairness. This is essential for commanding the confidence and respect of the community in the process of government. In short, as is so aptly captured by the title to the Conference, judicial review is a cornerstone of good governance. It enhances the quality of governance by ensuring its legality and fairness.”

18. Looking at the statistics showing the public’s overall preferences towards a paternalistic government, the figures show a departure from how the sample answered the first question. 69.4% of the sample disagreed that it is proper for government officials to decide what is good for the people.
19. I would say that this result is unsurprising. As commented by the Former Chief Justice Li,<sup>9</sup>

“In Hong Kong, as elsewhere, the phenomenon of the striking growth in judicial review cases has resulted mainly from three factors. First, modern life has become increasingly complex. Inevitably, many areas of activities have to be subjected to state regulation in the public interest. This has led to a very substantial growth in the volume of legislation, with an increasing range of discretions vested in public officials.

Secondly, new constitutional instruments have been enacted. Executive and legislative acts may be challenged on the ground of inconsistency with the constitutional provisions, including the guarantees of fundamental rights and individual freedoms. In the Hong Kong context, the Basic Law and the Bill of Rights have enabled such challenges to be made.

Thirdly, with better education, citizens have higher expectations of public institutions and are more conscious of

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<sup>8</sup> Chief Justice Li’s Speech at “*Conference on Effective Judicial Review: A Cornerstone of Good Governance*”.

<sup>9</sup> *Ibid.*

their rights and freedoms. With improved access to legal representation, including that through legal aid, they are more prepared to invoke the law in seeking to protect their rights and freedoms.”

20. In viewing the two questions on the survey together, one could come to the inevitable conclusion that while the public does yearn for better executive governance (i.e. calling for a “great leader”), this should not be done at the expense of a good system (such as the rule of law). This can be clearly indicated by the staggering growth of the number of judicial and constitutional reviews lodged against the government in recent years.
21. This indicates two things – firstly, the public’s has made increasing number of calls for better governance from within the system itself *via* an established “good system”, i.e. the legal system and the rule of law, and secondly, at the same time, indicates and proves the point that the public generally does not prefer a system of paternalistic government and believes that it is good that a system is in place to check our government and its works.

**III. To what extent do you agree with this statement: “Interest groups having significant contribution to the society must have representatives in the Legislature.”?**

22. A question masqueraded to discuss the population’s preference towards functional constituencies, this question has more to do with one’s political views rather than one’s faith in the system of rule of law in Hong Kong. This is also the question where most interviewees responded with “unknown” or “don’t know” as their answers.
23. With 56.3% of those within the system disagreeing to the statement but only 24.3% of those outside the system disagreeing to the statement, this question perhaps raised the greatest difference in perception between the two sectors.
24. For those who are within the system who work with laws on a daily basis, their disagreements may **be attributable to an overall commitment towards equality before the law**. This means more than just seeking equality before the law when a dispute arises, but more generally in the making of the laws themselves. As most laws in Hong Kong when passed affect the entire population rather than just a narrow segment, it

would cause unfairness down the line when certain interest groups have more say than others in all the issues debated at LegCo. **Certain interest groups may of course give important and useful advice on specific issues, but to say that such groups “must have” representation at LegCo would certainly be a step that many who work within the system may be uncomfortable with.**

25. In contrast, most of the public (57.3%) actually agreed that interest groups having significant contribution to the society must have representatives in the LegCo. Again, one should view with the lens of the political climate in Hong Kong. Given that most functional constituencies in the current LegCo is not representative anyway, **the public may be swayed to see that it is perhaps a small step forward should the LegCo have representation for those groups that actually have a contribution to society.**

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