

The 3rd Chancellor Tuanku Muhriz Lecture

WHITHER THE RULE OF LAW?

3 December 2018

The Rt Hon The Lord Thomas of Cwmgiedd

Chancellor of Aberystwyth University

It is a great privilege and pleasure to have been invited to deliver the 3rd Chancellor Tuanku Muhriz Lecture and to be doing so as Chancellor of Aberystwyth University on the day that our two Universities are drawing more closely together. It is a particular honour as this is a lecture in honour of the Chancellor of this University. The Chancellor is a most distinguished alumnus of Aberystwyth University where he read law, a Fellow of the University and Royal Patron of the Alumni Club of Malaysia.

Introduction

1. This well renowned lecture named in his honour provides an opportunity to reflect on and share the experience of the lecturer with a focus on good governance, public affairs, integrity and law. As the title indicates, I intend to speak on the subject of the rule of law. You may wonder why, as it is now universally accepted that each state should be subject to the rule of law; wherever you go, everyone believes in the rule of law. What then is the point of this lecture?
2. However I do not believe there is any state where we can take the rule of law for granted or where it is not necessary to strive to uphold and maintain it. We therefore need to evaluate the scope of the rule of law, what the judiciary can do and what else is needed to uphold and strengthen the rule of law and embed it in the culture of each state. If simply spoken, the title of this lecture – whither the rule of law? - you might think I thought it was withering or in decline; indeed the rise of populism in the West would give support for that view, but the question was framed in terms of where was the rule of law going? I wanted to explore various steps that have been or should be taken to strengthen the prospects for the rule of law. The key is, I believe, embedding the rule of law in the culture of each state, so that it is not merely something lawyers speak of but is part of the everyday life of the state.

The scope of the rule of law

3. I must begin by saying briefly what is meant by the rule of law. I need to do no more than to summarise what is meant by the rule of law, as the exposition by Lord Bingham, a former Lord Chief Justice of England and Wales, in his very short book *The Rule of Law* contains all that need or could be said; other bodies such as The Council of Europe's Venice Commission have carried the work further and distinguished jurists such as Chief Justice Sultan Azlan Shah have provided comprehensive definitions.
4. However, it may be helpful to what I wish to say just to remind everyone of the key characteristics of the rule of law - that the Executive Government should be ruled by law and be subject to it; that the rule of law requires compliance with and implementation of

law made by a Legislature within an accountable democratic process; there must be legal certainty and the prohibition of arbitrariness and abuse of power; access to justice must be provided before independent courts; there must be equality before the law.

5. Again it is not necessary for me to spell out the benefits of the rule of law as they are well known - underpinning economic prosperity, nationally and internationally, facilitating the good order of society in each state and between states and ensuring that the Executive Government of each state is held to account by ensuring it acts within the law.

The role of the judiciary

6. In a time of great change and some turbulence, the cornerstone of the rule of law is the independence of the judiciary and its interdependent relationship with the Executive Government. I had the privilege of addressing these issues here in Malaysia last year when I delivered the Sultan Azlan Shah lecture.
7. That independence, however, can nowhere be taken for granted. Two years ago in November 2016, as the Vice Chancellor has mentioned, the UK Executive acquiesced in newspapers abusing the judiciary. One carried a headline identifying three judges as “Enemies of the People” – a phrase truly drawn from Robespierre and the French Revolution and commonly used by Hitler, Stalin and other dictators. We had decided that the constitution of the UK required the approval of Parliament before the Executive could give notice to exit the European Union under Article 50 – a typical constitutional dispute between the Executive and the legislature as to where the power lies that has been litigated over the centuries. At the time, this was not a decision that the Executive or those supporting Brexit wanted; they were then worried that Parliament might not approve the giving of the notice; hence the abuse of the judiciary in which the Executive acquiesced. As soon as it became apparent that Parliament would approve the giving of the notice, the language of the attack was muted.

The need to embed the rule of law in the culture of each state

8. Given such events in an old democracy, I do not think that the judiciary can be expected to protect and strengthen the rule of law on their own. As Alexander Hamilton, one of the US Founding Fathers, remarked, and it is as true today as it was then, the judiciary is the weakest of the three branches of the state – far weaker than both the legislature and Executive. What else therefore needs to be done to give support to upholding the rule of law and the judges as the cornerstone of the rule of law? The rule of law in my view must depend to an extent on the support given to the judiciary in its task, but much more in establishing the rule of law as a daily part of the life of state institutions, of the professions and the public and the acceptance of the rule of law and the impartial and independent delivery of justice as central to the society of each state.
9. I intend to look at each in turn and begin with the institutions of the state, other than the Executive and the judiciary, and ask what they are doing to help embody the culture of

the rule of law and what they should be doing¹. Necessarily, I will draw on my experience in the UK, but I very much hope it will reflect what is happening elsewhere.

The steps to be taken in relation to the other institutions of the state

The legislature

10. It is convenient to begin with the legislature. The interdependent relationship between the legislature and the judiciary requires the legislature to understand the role of the judiciary, respect and support the judiciary and to refrain from interfering with the proper responsibilities of the judiciary.
11. First and foremost, the legislature must set an example and respect the decisions of the courts in individual cases, even if the decisions are unpopular or cause disquiet. In the UK, one of the most striking examples of the failure to do this has been the decision on two different occasions by members of the legislature to name individuals in cases where the public and the press has been prohibited by the courts from identifying them. The naming of them in Parliament gave the press in each case the right to publicise the name and so render nugatory the decision of the court. Without doubt such action undermines the rule of law. Fortunately in each case this was action of an individual member of the legislature. The overwhelming majority of the legislature did not approve of what was done by the individuals. Moreover these are rare examples, but have to be noted, as the legislature must not act in a way that undermines the rule of law.
12. More important, as it is needed more frequently, is support for the judiciary in upholding the rule of law. In some states, where there are either close connections between politicians and lawyers during the course of their respective careers or where those appointed as judges will usually have some political affiliations, establishing good relations with the legislature may not be difficult. In a state like the UK, where over the years there has been an increasing separation between lawyers and politicians and where in the last 40 years only one member of Parliament has been appointed a judge and very few judges have had any political affiliation, the first task is to establish a relationship.
13. In either case, it is important that there is an open and transparent relationship between the legislature and the judiciary which promotes the rule of law as central to society and its culture. One illustration of this is the practice that evolved in the UK (but few others) of the two most senior judges, the President of the Supreme Court and the Lord Chief Justice, each year having a formal evidence session before a select committee of each House of Parliament in which questions can be asked in public over a whole range of subjects, obviously excluding cases that have been decided, are under consideration or likely to come before the courts. My own personal experience and that of my immediate predecessor (who was the first to do this) and of the Presidents of the Supreme Court (who have done this) is that this has been a desirable change². In this way, the judiciary

¹ Time does not permit me to deal with the role of the media (in the view of some the fourth branch of the state) in relation to judiciary and the rule of law. I set out my assessment last year at paragraphs 27 and following of the Michael Ryle Memorial Lecture 2017 delivered in the Houses of Parliament: <https://www.judiciary.uk/wp-content/uploads/2017/06/lci-michael-ryle-memorial-lecture-20170616.pdf>

² In addition to this, there are regular meetings on an informal basis where issues can be discussed

is able to express its concern to the legislature transparently and in public³ and the legislature is able to understand better the position of the judiciary. The giving of evidence in public provides the judges with a form of explanatory accountability⁴ for the administration of justice, such as the running of the courts. This is quite distinct from the accountability judges have for their judgments; this is provided by open justice and the giving of public reasoned judgments. This form of accountability for the administration of justice is beneficial, as in the modern era no arm of the state can be perceived as unaccountable.

14. It was against this background of relations with Select Committees of the Houses of Parliament that many in the legislature were critical of the failure of the Lord Chancellor, the UK's Minister of Justice, to defend the judiciary against the abuse by the media in describing judges as "enemies of the people". I had decided that this Ministerial failure could not go unanswered by the judiciary. I was therefore very glad that the Select Committee of the House of Lords afforded me the opportunity in public to criticise openly the Minister in the House of Lords for failing to carry out her constitutional duty to defend the judiciary⁵. That is my own personal experience, not only of the support that can be given to the judiciary, but also of the legislature itself acting to uphold the rule of law. It is the experience I have discerned elsewhere when the judiciary has taken the trouble to establish a good understanding in the legislature of the fundamental importance of the rule of law and in embedding its culture in the state. The importance of this cannot be underestimated.
15. There are five other state institutions critical to the rule of law. In each, it is possible to see an important plank in the much firmer embedding of the rule of law as the foundation of their conduct.

The Civil Service and government lawyers

16. First is the Civil (or Government) Service and in particular the lawyers employed by the Executive and the legislature. In the UK in the late 1970s and early 1980s there was a vast growth in judicial review, due in the view of Government lawyers to well publicised cases alerting citizens to the possibilities of judicial review and "an increasing willingness on the part of the judiciary to intervene in the day-to-day business of Government coupled with an imaginative interpretation of legislation". The Government lawyers produced in 1987 a little booklet called *The Judge over your Shoulder*⁶ with a sketch of a benevolent male judge on its cover – the judges were then almost all male. The booklet set out very clear guidance on what steps should be taken by those advising Ministers so that they

³ The sessions are broadcast on Parliament TV and a transcript made available on Parliament's website.

⁴ The Judicial Executive Board published a paper on the accountability of the judiciary of England and Wales in October 2007 after a report of the Constitution Committee of the House of Lords in July and October 2007. <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf>

⁵ <https://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/CC220317LCJ.pdf>

⁶ The booklet has been revised from time to time; after an interval of 12 years it was revised in 2018. It can be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746170/OYS-OCT-2018.pdf

would comply with the law in their decision making and so embed the culture of compliance with the rule of law.

17. Although the role of the Government lawyer has become more sophisticated, the culture established in the early days of trying to ensure that Ministers complied with the law has been largely successful. A public demonstration of this is the fact that although the number of cases brought against the Executive has continued to rise markedly, very few are successful. There are many instances (which unfortunately I cannot presently detail) where robust and clear advice has been given which has stopped the Executive undermining the rule of law. This culture of adhering to the rule of law has been a remarkable achievement of Government lawyers and more generally in the civil service. Even in areas where there is no domestic remedy (as is generally the case with treaty obligations), there is, in my experience, a very robust attitude to getting the Executive to comply with such obligations – the most striking being implementing the decisions of the European Court of Human Rights. Much of this work by the Civil Service and its lawyers goes without acknowledgement, but it has been a remarkable achievement in the UK and other countries where the Civil Service is sufficiently robust and independent to do this. In many states, Government lawyers are vital to the upholding of the rule, but do so unidentified and without the praise that is truly due to them.

The public prosecutor

18. Second is the public prosecutor whose independence is again critical to the rule of law, but about which far less attention is paid than the independence of the judiciary. There are two distinct points to be made – non-interference by the Executive and legislature with decisions made by the prosecutor and the right of the public to seek review of decisions. Each goes to the culture of the rule of law.
19. It is well established in England and Wales, many common law countries and some civil law jurisdictions that there is no duty to prosecute. The discretion whether to prosecute rests on the prosecutor to make that decision independently of the Executive – a principle which had to be established in common law countries by the courts, which themselves respect that discretion by not interfering with the exercise of the discretion, save in circumstances where it is shown that discretion was unlawful⁷. The position is similar in most European states⁸ where prosecutors should not be subject to any influence or interference outside the prosecution service. Indeed in any democratic state neither the legislature nor any Executive or governmental body should seek to influence a particular decision taken by public prosecutors in relation to individual cases in order to determine how a prosecution in any particular case should be conducted, or seek to persuade public prosecutors to change their decisions. This is, in my view, a principle of universal application essential to the rule of law.
20. However, it happens from time to time that the discretion is exercised by prosecutors by failing to prosecute a crime where a victim considers there should be a prosecution; what

⁷ *R (Corner House) v Director of the SFO* [2009] AC 756 at para 30-42; this applies to all prosecutors: *Moss & Sons v CPS* [2012] EWHC 3658.

⁸ See the Opinion of the Consultative Council of European Judges, Opinion No 12

is required to ensure in such circumstances that the public retains confidence in the rule of law? In 2013, the public prosecutor in England and Wales, the Director of Public Prosecutions, established a process where a more senior prosecutor, sometimes the Director himself, reviews the decision⁹ where there is a complaint; in continental Europe a similar regime has been established by legislation. The process demonstrates the accountability of prosecutors to the public, provides the opportunity to show that the exercise of the discretion must be reasoned and provides a good example to a victim of crime that the rule of law provides a remedy for a perceived failure by a state institution.

21. In this very important area, everything possible should be done to ensure that the public prosecutor is accorded an independent discretion, free from arbitrary interference, particularly political interference, but a discretion to be exercised within the bounds set by law as ultimately determined by the judiciary. In the ways I have described, this strengthens the rule of law and again embeds the necessary culture.

The police

22. The third state institution critical to the rule of law is the police. Their functions include the investigation of crime and in some cases a discretion whether or not to prosecute. Where a discretion to prosecute is given to the police, again this must be exercised independently of the Executive and other interests, just as for the prosecution¹⁰. Similarly, although the principle has taken some time to emerge in England and Wales, it is now generally accepted that although overall policing policy is subject to democratic accountability, the police must be able to make operational decisions in individual cases without external influence¹¹, but subject to the duty to act lawfully under the authority of the courts¹². As Lord Denning once expressed the position of the police as independent decision makers:

“But in all these things he is not the servant of anyone, save of the law itself.....The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.”

23. As experience in almost every country has shown that improper influence over the police can result in arbitrary action inimical to the rule of law, ensuring the independence of the police in the way described by clear governance structures is therefore again essential to the maintenance of the rule of law and embedding it in the culture of the state.

The intelligence services

24. The fourth state institution of importance to the upholding of the rule of law is the intelligence (or securities) services. It might at first sight to be thought surprising that I should include these, as the state has to be protected from threats to its very survival and many think that the intelligence services should be able to get on with their task in

⁹ The Victim's Right to Review Scheme, established following the decision in *R v Christopher Killick* [2011] EWCA Crim 1608

¹⁰ *Fisher v Oldham Corporation* [1930] 2KB 364, *R v Commissioner of Police for the Metropolis ex p Blackburn* [1968] 2 QB 118 at 136 and 139.

¹¹ The Royal commission on the Police in 1962, Cmnd 1728, para 87

¹² *R v Chief Constable of Surrey ex p ITF* [1998] UKHL 40

whatever way is necessary. Experience has, however, shown how necessary it is to have proper controls over the intelligence services to ensure that the intelligence services exercise their duties in accordance with the rule of law. The use of surveillance powers, particularly as revealed by the documents disclosed by Edward Snowden (the US citizen who enabled publication of immensely sensitive documents) was the main impetus¹³ for a review in the UK of the surveillance powers of the intelligence services¹⁴ and their exercise in accordance with the rule of law.

25. The review recommended in 2015 that a law should be drafted that made clear the limits and safeguards for the exercise of intrusive powers by the state and that all warrants for surveillance or other intrusion should be subject to judicial supervision or authorisation. The recommendations of the review were largely implemented by making the law clear¹⁵ and establishing an Investigatory Powers Commissioner – a senior judge or retired senior judge - with deputies who are also judges or former senior judges¹⁶. The first Investigatory Powers Commissioner is a serving member of the Court of Appeal on temporary assignment to that post. The establishment of this office gives the public confidence that powers are being exercised in accordance with the rule of law.
26. The operations in Iraq and Afghanistan and other events gave rise to much debate about the methods intelligence services could use in interrogation¹⁷, largely arising out of the US use of harsh interrogation techniques such as waterboarding apparently authorised by the Department of Justice counsel. The culture of the intelligence services in the UK had been to comply with the rule of law and not to participate in or condone the use of torture or other cruel, inhuman or degrading treatment in the obtaining of intelligence. In 2010 this culture was formally embodied in guidance. In 2017 the Investigatory Powers Commissioner was asked to take responsibility for oversight of the guidance and enforcing compliance with the rule of law.
27. Both of these developments, particularly the second, have been remarkable steps. Their ready acceptance by the intelligence services was founded on the culture of the intelligence services that I have described, but the developments also promoted public confidence in the range of the pervasiveness of the rule of law and its culture in the governance of the state.

The armed forces

28. The fifth state institution is the armed forces. It has always been accepted that the armed forces are subject to the ordinary criminal law when operating within the UK and elsewhere, but the wars in Iraq and Afghanistan have given rise to questions as to the extent of their other obligations when on active duty elsewhere. This is a developing area

¹³ Together with the decision of the European Court of Justice in *Digital Rights Ireland*, Joined Cases C-293/12 and C-594/12

¹⁴ *A question of trust*: a review by Donald Anderson QC (now Lord Anderson), June 2015

¹⁵ Investigatory Powers Act 2016

¹⁶ It is necessary that senior judges are deployed for this function, as they may have to refuse to authorise a surveillance warrant personally authorised by the Home Secretary.

¹⁷ *R (Binyam Mohamed) v Secretary of State of Foreign and Commonwealth Affairs* [2009] 1 WLR 2579; *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWCA 1737 Admin, [2013] 1 All ER 161; affirmed on appeal.

and the application of law which, other than the Geneva Conventions, has been the subject of some debate. Although perhaps as recently as half a century ago, there might have been the view that the law played a very limited role, or in some cases, no role in armed conflict, that is no longer the case. There is today a general acceptance of international humanitarian law; the controversy relates to its extent.

29. There is a debate sometimes expressed in emotive terms, exemplified by the use of the term “lawfare” by some generals to decry the application of the rule of law to warfare. They say you should not be going to lawyers before you decide what to do. I do not agree, as military action wherever undertaken should be in accordance with the rule of law. On analysis, the area of argument is not as to the principles, but as to the extent of the applicable principles. This is a very significant advance.
30. I hope that the reference to these state institutions will show how important it is not only to ensure that structures are put in place to establish the necessary degree of independent decision making in accordance with the law, but also how important it is to embed a culture that requires all state institutions, whatever their nature, to operate in accordance with the rule of law. The state and its institutions must set an example and, when they do, they promote the embedding of the rule of law in the culture of the state.

Non-state actors

31. Although actions of the type I have outlined in respect of state institutions are essential, in a modern state non-state actors are of very significant importance.
32. Let me first take the professions. The traditional professions – law and medicine being the pre-eminent examples - have long adhered to professional standards and codes of conduct which govern their day-to-day practice and the maintenance of standards on which we all depend. They are a form of soft law. As the law has been the profession of my life may I feel safest taking the legal profession as the profession to examine more closely.
33. No amount of law and regulation can make the legal system work acceptably, if there is not the underpinning of ethical codes which ensure that ethical conduct is at the core of the work of a lawyer. For example, a lawyer must always act on the principle that the spirit of the code should triumph over the letter of a code. Ethical standards must be instilled from the start of a professional career as the culture in which all lawyers must work. Senior leaders must not only instil this culture but set an example. In the courts judges can give effect to this culture through the duty owed by all who practice before the court - a duty which overrides any duty to the client. There must be accountability for adherence to those standards with clear transparency. Judges in the UK are now much more prepared to expose to public criticism those who fall below those standards¹⁸, because they found that disciplinary proceedings under regulation have not been sufficiently speedy or effective as they should be; the courts cannot operate without the

¹⁸ In 2012, the High Court introduced hearing where there had been a failure to conduct immigration appeals in accordance with proper standards: see *R (Hamid) v Home Secretary* [2012] EWHC 3070 (Admin). Further principles of what is known as the *Hamid* jurisdiction are set out in *R (Sathivel, Ajani and Ncube) v Home Secretary* [2018] EWHC 913 (Admin)

highest standards of integrity and competence. There should be public recognition and appreciation of those who abide by standards; it must be made clear that those who act with integrity and in performance of their duty are those who are trusted by the courts and by their professional colleagues. They win the highest accolade – universal respect. The interaction of incentive of this “carrot” and the deterrence provided by the fear of “stick” provides the necessary tools for ethical conduct to underpin the rule of law in the day to day work of lawyers.

34. But what of other and newer professions – bankers, financiers, technologists and scientists? In my view they should in truth be in no different a position to the traditional professions. Can I take bankers and financiers as example of the need to progress the implementation of ethical standards and codes of conduct for other professions to underpin their compliance with the rule of law?
35. In the West, as all know, enormous damage was done to economies and standards of living by the financial crisis of 2008 and the following year. The fact that it happened and that few have been made accountable has demonstrated a deficiency in the effectiveness of the laws and the regulations that governed the banking and financial sector. Although much has been done to improve such laws, that will not be enough without a change in culture and the adoption of proper professional codes; bankers must see themselves as professionals with codes of conduct and standards and see themselves operating under these if they are to act under the rule of law. Some argue that this is not possible, but a little thought about the way our law developed shows that this is not so.
36. As reflected in the basic principles on which commercial law was developed in most states, everyday business life is conducted on the assumption that you choose carefully the person with whom you do business and enter into business only with a person in whom you believe you can trust. That is so because it is quite impossible to devise a legal or regulatory regime that can supervise the conduct of another party to a bargain. Unless you wish to buy yourself a dispute (and I have only known a very few who do), you would never contemplate entering into a contract with someone whom you did not trust. It is perhaps a marked feature of a failure to understand this principle that has led many to believe a good contract can solve all the problems. That is to misunderstand the limited role that a legal or regulatory regime can achieve. In the fair and proper operation of markets and commerce, we cannot afford to leave underdeveloped work on codes of ethics and standards. In the UK the Banking Standards Board¹⁹ is making progress in drafting codes and standards for bankers and financiers, but the work needs to be completed and adopted everywhere. It is an essential part of underpinning the rule of law and embedding the culture of the rule of law in the state.
37. But what of the position of business more generally where there is no involvement of the professions? There is a perception, which has a firm basis in reality, that large businesses do not respect and sufficiently follow the rule of law. Frequently cited examples are the environment or employment practices. They are perceived as being unaccountable and acting with impunity. Some analyses show that there are at least four problems – (1) the

¹⁹ <https://www.bankingstandardsboard.org.uk>

difficulties in access to justice through the availability of affordable and effective remedies against corporate wrongdoing; (2) the problems of establishing jurisdiction over corporations, particularly in the digital sector; (3) the use of corporate structures to shield the corporation from liabilities incurred by its subsidiaries and (4) the limited scope of the application of “human rights” to corporations.

38. In the West the ingenuity of lawyers and an acceptance by some in the Executive that more needs to be done to enable actions to be brought against big corporations to secure remedies for wrongdoing, has led to the more creative use of procedure to enable ordinary people to bring actions with proper funding and protection against adverse awards of costs. There is now real pressure to make businesses subject to human rights obligations, building on the 2011 United Nations Guiding Principles on Business and Human Rights²⁰ - the framework to “protect, respect and remedy”.
39. This is a vast topic. Time does not permit me to go into the complexity in more detail, but it is of central importance to the rule of law. We cannot expect the ordinary citizen to have faith in the rule of law or see its culture embedded, unless professions such as bankers develop and apply proper professional standards and changes are made, in the way I have outlined, to ensure that corporations can be made accountable for failure to follow the law and are not perceived as being able to act with impunity.

The public and the need to explain

40. Many have spoken, as have I (as the Vice Chancellor said in his generous introduction)²¹, on the need for the importance of the rule of law to be given greater prominence in education; and for judges, lawyers and others involved in the justice system to do more to make its work better understood and its importance realised by school visits, encouraging the public to visit courts on open days, using the media and the like.
41. However, what matters even more is a demonstration of the effectiveness and benefits of the rule of law to all. Here, as I have indicated, real progress is needed, particularly in relation to non-state actors.
42. There is one matter above all that undermines public confidence in the rule of law – corruption. In some states what is most evident is the provision of bribes; in others corruption is more prevalent through the use of undue influence or inducements, such as promotion for doing something “helpful”. It is unnecessary for me to say more than this, as it is a problem that is recognised in every country. The failure to act in relation to corruption is not only corrosive of the rule of law, but a real obstacle to embedding the culture of the rule of law as it undermines confidence.

Globalisation and the need to work together

43. Although I have spoken largely of the UK and the West, the issues are issues that are unsurprisingly the same worldwide, particularly with the advent of the digital or fourth

²⁰ https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

²¹ See for example the 31st Sultan Azlan Shah lecture, 2017

industrial revolution and globalisation. We therefore have a great deal to learn from each other and to do so together.

44. On the institutional front, for example, it is important that judiciaries are working more closely together – I was delighted Malaysia has joined the recently established Standing International Forum of Commercial Courts²².
45. But there is much to be done by other bodies, including Universities. It is so welcome that this lecture today marks the formalisation of cooperation between UKM and Aberystwyth. These are important steps in learning from each other.

Conclusion

46. I have set out steps that should be taken and must now answer the question I posed in the title to this lecture. The advance of the rule of law and making state institutions more accountable to the rule of law has resulted in some politicians and populists criticising the institutions of justice and undermining them. There are many illustrations of this, but one of the most recent events was in the United States where the President called one of the Federal District Judges on the Ninth Circuit an “Obama Judge”, because of a decision he had made. The Chief Justice of the United States, Chief Justice John Roberts intervened to say:

“What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”

The President responded by saying:

“Sorry Chief Justice John Roberts but you do indeed have “Obama judges” and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an “independent judiciary”, but if it is why are so many opposing view (on border and safety) cases filed there... We need protection and security – these rulings are making our country unsafe! Very dangerous and unwise!”

47. The fact that this happened in one of the oldest democracies in the world shows we should not take the rule of law for granted, particularly as populism is on the rise. Whilst such examples as this are easy to find (as for example, Hungary), what has happened in Poland recently has shown that progress can be made through some of the steps I have outlined. The Law and Justice Party which forms the Executive in Poland passed a series of measures in an attempt to lessen the independence of the judiciary whom they perceived as opposing their populist policies, including removing the more senior judges by imposing a retirement age which forced the retirement of the President of the Supreme Court. There is nothing new in such a ploy; FD Roosevelt contemplated this when preparing to pack the US Supreme Court because it would not pass his New Deal legislation in the 1930s. In the course of the last month, the legislation imposing the retirement ages in Poland has begun its course of repeal and the President of the Supreme Court of Poland is to be restored to office – partly as a result of internal public pressure from those who had begun to appreciate the

²² <https://www.sifocc.org/>

importance of the rule of law and partly as a result of pressure from the European Union.

48. There is the basis for optimism as shown by the acceptance of the rule of law, by the events such as those in Poland and by the identification of the steps which I have outlined in this lecture. We must remember that however independent and robust the judiciary of any state may be, it cannot uphold the rule of law on its own. In each state there is the necessity to do all that can be done to press for the kind of steps I have described to be taken. The rule of law is never to be taken for granted in any state. It needs constant vigilance. It needs embedding in the culture or DNA of every state. If we do all of these, then the answer to my question is clear.