

On Rules-based Order

1. There is a certain irony in a prisoner of law receiving a prize given by lawyers. Something must have gone very wrong when one who pledged to serve the law receives recognition instead for allegedly breaking the law. So perhaps this is a good opportunity to reflect on the lawyer's relationship with the law, or more broadly, the rules-based order – whether national or international ones.
2. As lawyers, we were trained on law as it should be – as impartial guardian of justice and freedom, grounded in truth and equality, enacted in a democratic spirit. We build our theories and practices, including professional rules, norms, and principles on how to understand and interact with the law, based on such an idealized conception of what law is. But this is akin to building our practice on a myth.
3. For the real world is a much less happy place; most of humanity do not live under conditions of justice or anywhere near it. They must live with law that oppress, not protect. They are exploited by laws that they have no say in making or shaping. Laws that suffocate them never touch the elites. The people out there experience the law as it is, not as how it should be – as high principles that sound good but taste bad.
4. For lawyers who are not content to live in a myth, how should we conduct ourselves with regard to the real laws? When the constitution mandates a Party's absolute leadership, does allegiance to the law requires honouring one-party rule? When a law is secretly made and suddenly sprung on the populace, do you accept or reject its authority? When you know full well that senseless and burdensome rules are only selectively imposed on the disfavoured, do you console disregard of the law or insist on equal enforcement? When rights written into laws are in practice honoured in the breach, and when renouncing those rights is the surer path to safety, do you advise your clients on the law-as-it-is or the law-as-it-should-be? For this is the reality myself and my colleagues are living with, day in day out.
5. The idolization of law is of course, not limited to lawyers.
6. A common refrain by politicians across the world these days is the need to uphold a "rules-based international order." Not rights-based, not values-based, but rules-based. Perhaps the concept of "rules" is seen to be less political, more neutral, less divisive. Agreeable to both democrats and autocrats alike. But herein lies the catch – autocrats like this formulation too precisely because a rules-based order can serve them just as well.

7. Rules, or laws, do not run themselves, but are dependent on people who make them, interpret them and enforce them. They are not divine, absolute truth, but rather creatures of habits and accidents, design and oversight, aspirations and baseness. Ultimately, laws are statements of power. Far from being a panacea for a troubled world, laws propped up by unjust power could bring about the greatest nightmare.
8. History is strewn with examples of the law's crimes. The most oppressive state is seldom the failed state that abjures law and order, but a pervasive state that excels at using law to order society to unsavoury ends.
9. The Holocaust did not happen because of a lack of rules, but because of rules made by the Nazi. Apartheid was not a natural order, but the result of rules imposed by a white minority. Millions of Uighurs were not interned because of arbitrary reprisal, but because of a systematic policy implemented through a plethora of rules and regulations. And in the city I call home, a national security law unilaterally imposed by Beijing made "criminals" out of many friends of mine, who are scholars, legislators, lawyers, journalists, unionists and activists – namely, law-abiding citizens doing what they have always done, what they consider their duty.
10. An unjust system also needs rules to function and to perpetuate, just as much as a just system needs them. Indeed rules can often cloak injustice with a veil of institutional legitimacy, facilitating the implementation of evil at scale through bureaucratic efficiency and indifference.
11. When the Great Firewall of China becomes a routine fact of life backed up by the authority of laws, few continues to acknowledge it as the gross human rights violation that it is anymore. But surely this massive infrastructure to wall off free information is a daily violation of the rights to information, expression and communication of billions. Further, in producing a trapped audience that amounts to one-sixth of the world's population, it provides a solid base for disinformation and prejudice to take root and spread, which in turn exports pressure to censor and poisons debates well beyond the Chinese border. Yet tech companies – local and foreign alike – are untroubled by their participation in the world's largest attempt at thought control, since they can always say that they are merely "complying with legal requirements." Law thus becomes an excuse to calm our conscience, numbing us to the part we play in evil.
12. "Rules are rules," say the officials, say the judges, say the prison warden. And the elephant in the room snorts. Who made the rules, anyway?
13. The problem goes beyond bad actors intentionally making bad laws. It is also about how laws are applied to the real world.

14. Where a law is explicitly made for an objectionable purpose, we can easily point that out and say, let's repeal this, or even, let's disobey this. But situation of such moral clarity is relatively rare. More often, what we face is the illegitimate use of otherwise legitimate laws.
15. In Hong Kong, thousands of protesters are currently incarcerated by a colonial era law on public order, not by a Beijing-made law. Our police's favourite weapon for bludgeoning free speech is a long dormant British law, the law on sedition. And last month, a man who took some photos on a hilltop with hand-held slogans was arrested for allegedly breaching regulations protecting the countryside. We also see money laundering laws cited as reason to refuse bank service to NGOs and dissidents, laws on foreign agents abused to strangle and slander rights organisations, and fire and building regulations weaponised to harass shops and groups with pro-democracy sympathy.
16. Laws on money laundering, public order and fire safety of course have their place in any legal system. Yet again, laws do not enforce themselves but are enforced – and observed – by men. In a society suffused with the lopsided power of the state, such imbalance inevitably corrupts the execution of laws. When state power goes unchecked, the legal system as a whole is degraded, which cannot be saved by blaming it all on a few bad laws.
17. The opposite side of the same coin is the increasing impotence of so called “good” laws, chief among them being human rights laws. Yes, our constitution largely adopts the ICCPR, but that has not stopped the continuing crackdown on civil society. Officials unabashedly proclaim their respect for rights while trampling on them with impunity. Without people committed to – and with the power to – realizing them, human rights laws are but decorative frills on the statute book.
18. Dictators have little qualms in publicly “committing” to the loftiest principles since they are not bound by them. Instead of allowing such commitments to constrain their action, they use those words to constrain how reality can be perceived, such that their “righteousness” can never be shaken. Forced labour in Xinjiang does not exist. Allegation of torture is foreign propaganda. Nothing happened on Tiananmen Square on that fateful day 34 years ago. With the law on the side of the state, contradictory voices and facts are easily suppressed, discredited and eliminated from view. As shown by the fact that I must speak to you from prison, and the fact that most Chinese people would never know why Xu Zhiyong and Ding Jiaxi are imprisoned – or even heard of their names.
19. Impunity at home transposes to impunity abroad. In a world order built on the concept of sovereign states, a government's global action is constrained only in so

far as effective constraints exist domestically. Thus the Chinese government is not shy of acceding to, or themselves proposing, rules of international engagement that sounds fairly high-minded, because hardly anyone – least of all its own people – can hold it to account. It can propose the building of a “community with a shared future for mankind” while destroying every sense of community among its people producing a most atomised society. It can tout respect for diversity in a so-called Global Civilization Initiatives, while running a ruthless machinery of censorship and engaging in harsh repression against cultural and religious minorities. It can advocate sustainable development while hobbling all grassroots attempt to monitor environmental ills. It argues for the democratization of international institutions while assuming even more totalitarian control. It urges respect for a people’s choice of their own system of governance while never giving that choice to its people. Still we see more and more countries, from Chile to Nigeria, from Serbia to Indonesia, and even UN Secretary General Guterres expressing support for these “major global initiatives” proposed by Xi.”

20. When other countries sign onto these seemingly benign initiatives of China, they should be aware that they are not entering into genuine, mutual agreement of principles but a propaganda drive to reshape reality. The power of these initiatives has less in their content but more in their number of “adherents.” The more people echo these formulation, the more prestige to the proposer, the more credible is their version of reality. The form of these words become all important while the words themselves lose meaning. It is in fact, Havel’s story of the greengrocer repeated on a global scale.
21. If the problem is just about empty promises and misused provisions, then the rules-based order is perhaps still salvageable. All we need to do is to call out the rule-breakers, and when the opportunity comes, reactivate those neglected provisions. Or can we?
22. Not if the meaning of the rules has completely changed.
23. Again the experience of Hong Kong provides a cautionary tale. Much of the worst violations in human rights of the past few years were sanctioned by or enforced through the courts, but not because judges suddenly forget our human rights laws. Rather those laws are reinterpreted in a way that is compatible with gross human rights violation, through subtle shift in the meaning of words and concepts integral to that discourse.
24. For example, the concept of “national security” used to have a fairly definite ambit, and internationally recognised as a legitimate reason to restrict rights. However, since the advent of the National Security Law, the term has taken on an ever more

expansive and partisan meaning, to the point that a common citizen speaking her mind can be considered a national security threat justifying indefinite pre-trial detention – if her views might contradict with that of the Party’s. The language of rights and balance is still there, but the substance has completely changed. And there is little pushback from the judiciary to such shift in meaning of “national security”; instead the Party’s narrative on the term is swallowed whole in the name of deference, and entrenched through successive case law.

25. Here we see how sensible legal principles developed in a democratic context, such as deference or emphasis on legislative intent, could lead to contradiction and injustice when transplanted to an undemocratic system. For the “legislative intent” behind laws such as the National Security Law is quite clear, and if an independent court, groomed in the common law tradition, sincerely sees its mission as the implementation of such intent, then even an “independent court” would in practice become the enforcer of the Party’s partisan will.
26. In a similar vein, the scope of what counts as peaceful protests has been steadily compressed by an ever looser interpretation of “violence,” which led to lengthy jail terms for thousands of protesters who have not themselves committed any act of violence, but were merely present at, or near to, scene where violence erupted. Thus we find even first aiders and mediators sentenced to years of imprisonment as “rioters,” all while the right to “peaceful” demonstration is expressly honoured. A similar trend is occurring in the realm of what counts as hate speech, where criticism, or even just sarcasm, are increasingly equated with the stroking of hatred. Indeed what you are listening to right now is likely to fall within that amorphous realm of “inciting hatred” by the standard of new Hong Kong, and thus, not entitled to free speech protection in our law.
27. Thus while on the surface we still speak the same language of rights as adopted from international instruments and precedents, in practice a huge gulf has emerged between our courts’ understanding of rights and international standards. Words and their meaning are ultimately, malleable, and judges are not miraculously insulated from how the wider society perceives words and constructs narratives. Indeed, quite the opposite: a healthy legal discourse cannot be had without the courts engaging in an open, continuous conversation with the society on importance principles such as justice and rights, through citizens and lawyers who brought and defend cases, construct arguments, highlight injustice, and criticize or celebrate key judgments. Where such conversation is largely free and democratic, we might manage to approach justice; but where such conversation is stunted or captured by partisan interests, or worst, by an overbearing state, legal discourse suffers.

28. I have already alluded to, but cannot fully explore in this short speech, the myriad ways the Party-state can influence judicial reasoning. Such shift in meaning and interpretation does not occur overnight, and thus is all the harder to detect and resist. Each step built on the last, with plausible sounding legal justification, until step by innocuous step we end up in a completely unrecognisable place, where prisoners of conscience populate our prisons. Protestations that our judiciary is still “independent” is really quite beside the point; the Party simply has little need of old style, explicit direction of individual cases when political control already permeated every pores of society. Such overt interference is rather, a last resort and a sign of failure. When the “independent” court is “voluntarily” jailing dissenters and destroying civil society, why interfere?
29. What happened in Hong Kong is not an anomaly but a warning. The Party’s power to redefine words and subvert their meaning does not stop at the Chinese border. And while during the Cold War, where one can identify and counter a distinct communist ideology and phraseology, today’s China is instead speaking the same liberal language of rights, democracy and peace. Crucial differences of course still exist, but are camouflaged under a raft of comforting phrases. For those of us who live under the Party’s rule, we know of course these familiar terms carry very different meanings in Party-speak. Rights are not about what individuals can assert against the state, but about empowering the state to safeguard the “rights” of the people. Democracy is not about citizens holding leaders accountable through free association, expression and election, but about leaders “graciously” listening to the voice of the people through controlled channels. And peace is about ensuring submission to the Party’s order through whatever means, not the rejection of war nor hatred.
30. With China’s growing stature, its way of using and interpreting words is inexorably seeping into international discourse. Sometimes it is pure power play, as when it strongarmed other nations into echoing its proposals and positions. At other times it is a matter of practicality; if one wish to communicate with China, its way of understanding key concepts in that dialogue cannot just be laughed away. Recently the media has reported on voices from the US calling on US and Chinese leaders to come to some agreement on how to define “national security” – a seemingly sensible suggestion to accommodate differences, but see what happened when the Party redefined “national security” in Hong Kong. And what is next? Should they go on to seek agreement on how to define human rights, or even democracy? Ceding to the state the authority to define words is a treacherous path, but when China is playing that game, others may be sorely tempted to follow.

31. There is still another way whereby party-speak slips in, that is through the logic of our own values. When the Chinese government proposes stuff like “peace, development, fairness, justice, democracy and freedom” as “common values of human kind,” it is at once saying something very different from the liberal understanding, yet with a vocabulary and logic we cannot reasonably reject. Surely we do not deny that things like democracy and justice are important, shared values, right? So what does it matter if we call them “universal values” or “common rules of human kind”? But of course it does matter; the concerted effort to replace “universal values” with “common values” is part of the same attempt to take away the power of articulating values from ordinary people, and putting it into the hands of the state. While there is no single authority on what is meant by “universal values,” the “common values of humankind” is the Party’s property, and thus, can be easily moulded to the Party’s liking, same with many seemingly benign formulation of the Party. When one adopts them out of courtesy or indifference, the Party gains another foothold in its war on meaning.
32. As party-speak gets increasingly mixed into international principles and rules, the danger is that the meaning of these principles would itself become distorted and confused, losing any conceptual coherence and hence, the ability to set standard, guide conduct or communicate values. Just see how the so-called “One China Principle,” which attains almost universal agreement, can in fact mean almost anything depending on the speaker. Instead of signalling consensus, the dominance of such a “norm” only prevents the clear articulation of genuine differences, which in turn compromise efforts to resolve them. Or see how the principle of “One Country, Two Systems,” the basis on which the U.K. agreed to hand over Hong Kong, is said to be more “accurately implemented” even as it is being violated. The greatest threat to the current rules-based order has not in the express renunciation of existing rules, but in their appropriation and subversion. The body of that rules-based order may live, but its soul could be lost.
33. In highlighting how a rules-based order can fail us, I am of course not advocating that we give up on having rules altogether. Far from it. But I do say that we should drop the pretense that law is independent of politics, or that a lawyer can do his job just as well by turning a blind eye to the power dynamic in a society. Rather, how parties, witnesses, jurors and judges interact are all affected by it. The letters of the law are but a skeleton; it is power that fills in the gap and animates them, not to mention, writing them down in the first place. The law constrains power to certain extent but never determines its action; on the other hand, neither can power take form and act on the world without the law. In that sense all effective order – as opposed to disorder – must be rules-based, except perhaps the smallest unit where

the will of the powerful can directly mediate everything. The key questions are thus not whether an order is rules-based, but what kind of rules it is based on, and what kind of power animates it. Is the law a skeleton for a human being or a shark? Is the resulting order a healthy one in harmony with itself, or a Frankenstein with wing for an arm and an atrophied leg? But perhaps the Frankenstein is in fact a kind-hearted creature, while the physically healthy man is a ruthless murderer.

34. If what we are after is a just order, we must also work on building a just distribution of power instead of just worshipping rules. Only when power is genuinely shared could laws be the shared expression of a community instead of the will of a few. Only when values hold greater power than force, could laws function as a rational system of principles instead of a litany of brute commands. And only when laws faithfully express a community's values could they deem the members' respect and allegiance, instead of evoking only fear and resentment.
35. The questions of who, and what, has power in a society are in fact, intertwined. Values can have power only when power is fairly equally distributed among a people. For values are values only when backed by conscientious commitment, else they are just window dressing for ulterior interests. Just see how communism has all but lied in "Communist China" despite its prominence in official discourse. Since the voice of conscience can only come from within, and cannot be delegated nor centralized, conscience has power only when individuals have power. Thus, law as values is possible only when individuals have a share in state power, when each touched by the law can judge it and mould it in turn, in accordance with his own conscientious understanding of the law's values.
36. Law-as-values is not about rigid principles set in stone, but is itself a living conversation conducted on an egalitarian basis. As such it must allow for uncertainty and contradiction, and does not guarantee success or lasting agreement. That order has nevertheless emerged out of such cacophony is the great miracle of the liberal experiment, and a testimony to the existence of universal values among humanity, which alone can anchor such a dynamic and pluralistic order.
37. In contrast, when individuals are disempowered, dominated by the outsized power of the state machinery or factional interests, laws inevitably degenerate into expression of force. For law-as-force does not require giving space to conscience or debates. Indeed, the grooming of obedient, unquestioning "soldiers" is often the quicker way to amassing overwhelming power, which ensures the stability of the resulting "rules- based order."
38. With the rise of authoritarianism, what is at risk is not the existence of a rules-based order, but the authority of values in that order. A values-based order does not

necessarily follow from a rules-based order, a distinction often overlooked by those who have always lived under a liberal order. Nor is the battle between law-as-values and law-as-force settled once and for all once important values are enshrined in foundational legal documents. Rather, laws as genuine statements of values are a rare and fragile achievement made possible only through hard-won democratization of power and sustained through the constant effort and vigilance of people committed to those values. Or in other words, it depends on whether we can keep the conversation on values alive and inclusive – which is where Hong Kong has failed. What has disappeared there is not a rules-based order, nor an ostensibly liberal constitution, but the guiding power of liberal values in the day-to-day working of that order. It is a fate that may befall more shall we fail to defend our values, head-on. We must put values back at the centre of our laws and our politics instead of dismissing them as the quaint preoccupation of the idealists. Difficult and no doubt, contentious debates on the content and implication of universal values cannot be sidestepped in order to placate dictators, appease demagogues, or secure material gains. This way lies the confirmation of the power of force over values, and paves the path to their further erosion. In that sense defending the rights of people everywhere is far more than just about helping others, but is at the heart of the battle to define ourselves and the order we have built. Are we truly a community of principles, or are we just as cynical as the dictator next door? Are we sincere about building a world order based on values, or are we happy with whatever kind of order so long as we are on the winning side?

39. As far as inclusiveness is concerned, it is indisputable that the current international order is heavily dominated by the West, and thus still quite far from the ideal of law-as-values. But the way to improve it is not by giving more voice to the non-western dictators, which could only deepen the silence of the hitherto voiceless. Rather ordinary people must be empowered to join in the conversation on values through the building of democracy everywhere. Again, a difficult and not uncontroversial task, often decried as “interference” when such efforts and solidarity are extended across border. Yet if we are to abandon the quest for democracy, we shall have no hope of ever building a just international order based on values.
40. As lawyers, our trade is needed in any kind of rules-based order, good or bad, just or unjust. Yet the dignity of our profession cannot survive in just any kind of order. Instead, it is bounded up with the dignity of the law, with whether the law reflects our autonomy or denies it. In that sense the building of democratic institutions that alone can safeguard the law’s dignity is also a lawyer’s duty, which is why all three of us receiving this prize today are jailed for working for democracy in China, a

fight that may seem unrelated to our profession but is in fact, central to it. It is a fight we cannot waver from, even when knowing that the laws we served would likely condemn us. For sometimes confronting the law-as-it-is is the only way to respect the law-as-it-should-be – and the highest service a lawyer can offer her fellow men.