Keynote Address delivered on 25 January 2019 at the Conference on “Towering Judges” held at the Chinese University of Hong Kong on 25-26 January 2019

Kemal Bokhary

1. Some judges have left landmarks in the law. Having spent a lifetime in the law, I have studied many of those landmarks. The judges with whom I have had the privilege to work include judges of the kind being considered at this conference.

2. Such judges are of course not limited to those of the common law system. As it happens, however, my focus will be on that system. But that is due only to the limits of my experience.

3. There are judges who have raised the law to the requisite level in times of need. I will speak to you about some of them.

4. I am particularly pleased to notice that the judges of whom other participants will speak include my lifelong friend Chief Justice Li. They also include Chief Justices McLachlin and Barak, both of whom I have had the privilege of meeting.

5. The first judge of whom I will speak is Lord Denning. He was outstanding even in the company of judges like Lords Reid, Wilberforce and Diplock.

6. When I was reading for the Bar, I spent a lot of time in the public gallery of Lord Denning’s court. I often left my law books and went there. And there I found myself, like Dante in the

opening canto of his *Inferno*, upon “a sunlit hill above a shadowed forest”.

7. After speaking of Lord Denning, I will speak of some of the great judges with whom I have sat. They include Lord Nicholls of Birkenhead and Lord Cooke of Thorndon.

8. Donald Nicholls once said to me “Denning has changed the way English lawyers think forever”.

9. Robin Cooke told me of asking Lord Denning which of the great judges of the past would he most liked to have sat with. Would he say Sir Edward Coke and Lord Mansfield? After all, they were the supporters of his coat of arms. Lord Denning hesitated. He seemed to consider it easier to do justice when sitting on his own. But Robin persisted with the question. And Lord Denning eventually answered it. He said that he would have liked to have sat with Professor Geoffrey Cheshire. I am confident that all the academics present today love Lord Denning. Now you may love him even more.

10. Having paid tribute to the legal academy, let me do the same for the legal profession. I do simply by citing something which Queen Victoria said at the ceremonial opening in 1882 of the Royal Courts of Justice in the Strand. She described the judiciary and the legal profession as the chief security of her Crown and the liberties of her people. That is, I suggest, a most insightful statement as to the law’s role in society. There is - more at some times than at others - a tension between security and liberty. The law must always maintain an acceptable balance.

11. Of the judges with whom I have sat, the one whom I admire the most is Donald Nicholls.

12. True to his Chancery roots and consistently with his devotion to justice, he chose “Let Equity Prevail” as his motto and as the title of his memoirs.

13. Study his judgments, and you will discern an unrivalled talent for developing the law to meet new needs without compromising continuity. It was a privilege - and an education - to be a member of the panel in the case of *Cheng v Tse* (2000) 3 HKCFAR 339 in which he brought a new orientation to the defence of fair comment in the law of defamation, advancing the cause of free speech. Even as there is a right to free speech, so is there a right to reputation. As always there is a balance to achieve. Whenever the law finds itself at a crossroads, it stands in need of a judge like Lord Nicholls.

14. Among Robin Cooke’s many qualities was a crystal clear vision of, and an abiding commitment to, the idea of a common law of the world. It is a strength of the Court of Final Appeal that our jurisdiction is an eclectic one. Robin was a major source of guidance and inspiration to me in my efforts to contribute to the building of that jurisprudence.

15. I once asked Robin Cooke whom he rated higher, Sir Owen Dixon or Sir Anthony Mason. Robin paused for a moment. Whereupon I suggested that Tony was the even greater of the two. And Robin agreed.

16. The Mason Court - as the High Court of Australia of Tony’s time is known - transformed the law of its country. Their Honours did so by, among other achievements, the recognition of native title and the recognition of implied constitutional rights. Tony’s service as an overseas judge on the Court of Final Appeal was long and

distinguished. True it is that I - always the liberal, too much so some people may say - felt driven to dissent in a number of cases in which he was in the majority. But that in no way diminishes my respect or affection for him.

17. Sir Anthony Mason and Lords Cooke, Nicholls and Hoffmann are among the first overseas judges appointed to the Court of Final Appeal. Appointed to that court at the age of 50, I sat at their feet to learn of their wisdom. Speaking of Lord Hoffmann, I commend as compulsory reading his article “Language and Lawyers” in the 2018 volume of the Law Quarterly Review.

18. The more judges I mention by name in the present context, the more conscious I become of how many others I could so name if time so permitted. At any rate, having spoken of Sir Anthony Mason, let me just say that Sir Gerard Brennan was a worthy successor to him as Chief Justice of Australia. And Gerry, too, rendered very valuable service as an overseas judge of the Court of Final Appeal.

19. Turning to judges of bygone eras, I come first to Judge Bao, the Sung Dynasty judge whose dates are AD 999 to 1062. The concept of the righteous judge is embedded in Chinese thought by accounts through the ages of his conduct. He and the other pure officials of traditional China were reviled during - but only during - the Cultural Revolution. They were before then - as they are now - revered in China.

20. Coming back to the common law, I have now to make a selection from the very many things that can be said about Sir Edward Coke - advocate, law officer, judge, parliamentarian, law reporter and writer.

I select his admirable and inspiring conduct in the *Commendams Case* which led to his dismissal in 1616 as Chief Justice of the Court of King's Bench. King James 1 had sent the judges of that court a message telling them not to proceed further in that case until he had been consulted. Led by Coke, the judges nevertheless proceeded to judgment without consulting the king.

21. After they had given judgment, they wrote to the king. They explained that it would have been contrary to their judicial oaths to have consulted him as he had asked. The king summoned them into his presence. He put to them this question: "In a case where the king believes his prerogative or interest concerned, and requires the judges to attend him for their advice, ought they not to stay proceedings till his Majesty had consulted them?" All the other judges answered "Yes". Coke alone answered thus: "When the case happens, I shall do that which shall be fit for a judge to do." His dismissal followed soon afterwards.

22. For laying down the principles by which equity became systematic and predictable, Lord Nottingham, who was Lord Chancellor in the 17th century, is called "the father of equity".

23. Lord Mansfield, who was Chief Justice of the Court of King's Bench in the 18th century, is called "the father of English commercial law". He created that law by incorporating the law merchant into the common law. There was a time when the customs and usages which formed the law merchant had to be proved afresh in each case. No such case provided any precedent. From his early study of the writings of continental jurists, Lord Mansfield was familiar with the law merchant. Sitting with juries

in the Guildhall, he made commercial precedents. He did so by taking special verdicts on the state of the relevant customs and usages, and then giving reasoned judgments on the basis of those verdicts.

24. Professor AV Dicey said that what Lord Mansfield achieved by this method could not have been legislated for in the political climate of the time. The number of cases by which English commercial law was thus judicially created is vast. Lord Bingham of Cornhill, himself a great judge, tells us that Lord Mansfield "heard and decided, it would seem, well over 100 cases dealing with insurance, mostly marine insurance, and over 450 cases concerned with bills of exchange and promissory notes."

25. Lord Camden was always a great champion of the freedom of the press and the freedom of the individual. As a judge he did a lot for these freedoms. In 1752 he was counsel for a printer who was being prosecuted for seditious libel. He won for his client a verdict of acquittal from the jury. That he did by his argument - even though it was contradicted by the judge when directing the jury - that the question of whether or not the words complained of amounted to libel was for the jury, and not the judge, to answer. For decades afterwards, all the judges (apart from Lord Camden himself) continued to maintain that the question was for the judge, and not the jury, to answer. Eventually the passage of the Bill which became Fox's Libel Act 1792 was secured by Lord Camden's speech in the House of Lords in its legislative capacity. By that Act it was finally declared and enacted that - as Lord Camden had been saying for so long - the question was for the jury, and not the judge, to answer.

26. Chief Justice Marshall of the United States Supreme Court was quintessentially a judge of the kind which this conference is about. I do not expect that statement ever to be questioned. But what if it were? Then it would suffice simply to invite attention to the case of *Marbury v Madison* 5 US 137 (1803).

27. That is of course the case in which the Marshall Court pioneered the judicial remedy by which even primary legislation would be struck down if incompatible with any provision of an entrenched constitution. There is more - much more - that can be said of this judge. But there is no need to say any more.

28. Mr Syed Ameer Ali had a distinguished career in the academic sphere, at the bar, in politics and on the bench. I once asked Chief Justice Bhagwati of India, also a great judge, who was the greatest of all the judges from the Indo-Pak subcontinent who had served on the Judicial Committee of the Privy Council. He answered "Ameer Ali of course."

29. In its heyday as the British Empire's court of last resort, the Judicial Committee of the Privy Council's jurisdiction extended to a quarter of the world both by land area and human population. Ameer Ali was on that remarkable court from 1909 to 1928.

30. But it is not of his great achievements there that I wish particularly to tell you. Rather would I refer to a case which he heard very early in his career when sitting as a magistrate in Calcutta. An old woman was brought before him on a charge of attempted suicide (which was then a crime). He asked her why she had attempted to take her own life. She told him that her son and the son's widow having predeceased her, she had been reduced to

begging, which she no longer felt up to doing. He dealt with her by ordering that she be paid a monthly allowance out of his court's poor box.

31. Courts of summary jurisdiction constitute the principal interface between the public and the judiciary. A form of order frequently made by our magistrates' courts was much improved by an initiative the credit for which goes to Lord Scott of Foscote.

32. Richard Scott is of a Chancery background. We were fortunate that Richard was a member of the panel in a case concerning the power to bind over (*Lau Wai Wo v HKSAR* (2003) 6 HKCFAR 624). By his judgment, we held that it was insufficient, despite long usage, simply to bind over a person to keep the peace and be of good behaviour. Legal certainty required that the bind-over order make it clear what the person bound over is prohibited from doing. This brought to such orders the precision with which injunctions are expressed.

33. Reverting to judges of times past, I come to Lord Justice Scrutton. He was a pre-eminent commercial judge. His famous book on charterparties is now in its 23rd edition. Those without more would be sufficient contributions to the law. But there is more. He said in *Ex Parte O'Brien* [1923] 2 KB 361 at p 382 that "[y]ou really believe in free speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous".

34. With that I wholeheartedly agree. According human rights is often onerous and at times even risky. Sacrificing human rights to expediency may sometimes yield short-term gains. But the long-term effects will be harmful. And the road back will be hard.

35. This brings me to Lord Atkin who was one of Lord Justice Scrutton's pupils. Many cases attest Lord Atkin's greatness.

36. When he was in the Court of Appeal, he regularly sat with Lords Justices Bankes and Scrutton to form what many people consider the strongest division of the Court of Appeal that there has ever been.

37. Ironically perhaps, Lord Justice Scrutton was not on the panel in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110. It was in that case that Lord Justice Atkin gave his seminal judgment on the relationship between banker and customer. That judgment was most timely as banks were then in the course expanding their services beyond the very wealthy and to the public at large.

38. Of Lord Atkin's cases in the House of Lords, two are particularly noteworthy. One of them is *Donoghue v Stevenson* [1932] AC 562 in which Lord Atkin led a 3 to 2 majority by which the law of the tort of negligence was revolutionized infinitely for the better. The other is *Liversidge v Anderson* [1942] AC 206. This time Lord Atkin was in a minority of one to 4. In favour of liberty, he delivered a since vindicated dissent of extraordinary power even by his standards.

39. The quality of Lord Atkin's thoughts was always matched by the neatness of his expression of them. His cases in the Judicial Committee of the Privy Council include *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1 in which he said (at p 2) that "[f]inality is a good thing, but justice is a better."

40. Turning from the domestic sphere to the international one, I would single out Judge Tanaka of the International Court of Justice for mention. By his celebrated dissent in the *South West Africa*

Cases (Ethiopia v South Africa) (Second Phase) (1966) ICJ Rep 6, he identified the true source of human rights. These rights, he explained, have always existed with human beings independently of, and before, the State.

41. Some judges are better known for things other than their judicial work. Saint Thomas More is best known for his authorship of Utopia, his dying for his beliefs and his canonization. But something should be said of his work as Lord Chancellor. He became aware that the common law judges were unhappy with his practice of intervening through equity to mitigate the hardship of the law which they applied. So he gave them a dinner at which told them why he had intervened as he had in each of the cases concerned. They accepted that they could not in like cases have done otherwise than he did. Whereupon he offered not to intervene in future if they themselves were to do equity. But they would not agree to this. So he continued to intervene as and when necessary.

42. Sir William Macpherson of Cluny is one of my best friends. Bill gave many important judicial decisions. But to the general public he is best known for his report on the murder of Stephen Lawrence. He was one of Lord Mance's pupil masters. Jonathan Mance is someone whom I have known for five decades. When at the Bar, Jonathan frequently came to do cases in Hong Kong. He has not forgotten us. Recently, he came to Hong Kong and delivered at the Project Citizens Forum on 8 December 2018 a timely and valuable speech on the rule of law.

43. Lord Denning's report on the Profumo Affair became a best-seller. That was no doubt due partly to the nature of the subject-matter. But it was also due partly to Lord Denning's exceptionally readable mode of expression. In due course, particularly when he

was Master of the Rolls, he became well-known to the general public for his judicial decisions. Sir Christopher Slade told me of an incident at a reception in Lincoln's Inn. A man, not a lawyer, went up to Lord Denning and asked him: "Are you the great Lord Denning". And Lord Denning said "Yes".

44. The contribution to the law of some judges includes their extra-judicial writings. Coke's *Institutes*, Hale's *Pleas of the Crown* and Blackstone's *Commentaries* were relied upon by the United States Supreme Court in *Roe v Wade* 410 US 113 (1973). Mr Justice Holmes's book *The Common Law* remains a part of his fame.

45. Have focused on the judges, I should acknowledge the good work constantly being done by lawyers in many and varied areas of activity. Nor are the lawyers on their own. Mrs Eleanor Roosevelt was not a lawyer. But she was one of the architects of the Universal Declaration of Human Rights adopted in 1948. She described it as "a common standard of achievement for all peoples of all nations." Emerging from the horrors of the Second World War, the world turned to human rights for preserving peace.

46. As for us lawyers, our endeavor is to do justice while we are in the law and, finally, to leave the law better than we found it. If my grandchildren come to think that I - helped by their grandmother throughout - did that, or at least tried my best to do it, then that would be good enough for me.