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Advancing the Rule of Law Abroad[†]

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It is a privilege to be able to speak to you today. One has only to check out your website to know what an active ABA Section you are. Under the leadership of Jeff Golden, you now have more than 20,000 members—far more members than most countries have lawyers—and your fifty-plus committees are extraordinarily busy.

Your strong presence in the international legal arena and prominence within the ABA is a powerful testament to the globalization of legal practice. It has come to be a given in this new century that, to be successful, law firms must develop problem solving expertise not only in domestic law, but also in the laws of the other nations in which their clients operate.

Of course, it is one thing for a firm to gain familiarity with foreign law for the purpose of advising clients; it is quite another to have to actually litigate in foreign lands. Today, I want to briefly discuss with you the serious problem of dysfunctional judicial systems around the world, particularly in the emerging democracies and economies, and what more can be done to address this problem. I say “what more can be done” because I fully recognize that considerable work already has been done over the past two decades. But the point I hope to leave you with today is that much more needs to be done and that new approaches must be taken if the Rule of Law, as we understand that term, is to acquire global acceptance.

In our country, most people take for granted our independent judiciary, which is the bedrock of our legal system and of our democracy.

The late Chief Justice Rehnquist, with good reason, called our independent judiciary “the crown jewel” of our constitutional democracy. An independent judiciary, a judiciary

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free from corruption and improper influence, is fundamental to our society of ordered liberty. In Federalist No. 78, Hamilton said that “‘there is no liberty, if the power of judging be not separated from the legislative and executive powers.’ . . . [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.”¹

Why do I feel it necessary to recite this familiar hymn of praise to our independent judiciary? I do it because when one looks over the legal systems of the world, a truly independent judiciary is decidedly the exception, not the rule. Judicial independence is virtually non-existent in autocracies where so-called “justice” belongs to the dictator. And in most democracies newly emerging from totalitarian tyranny, true judicial independence is still an unrealized aspiration.

It is no accident that many emerging countries are seeking to model their judiciaries, with necessary variations, upon the principles of judicial independence that Americans hold dear. For several years, I have been engaged with these fledgling judiciaries, particularly in Eastern Europe and the Far East. I have had the opportunity to see how legal systems elsewhere in the world operate, and the picture is not always pretty.

In China, there is not even a pretense of institutional judicial independence. The judiciary is seen as a means to advance the power of the state, not to check its excesses. China does not have the Rule of Law as we conceive it; it has Rule by Law. To be sure, China, largely under pressure from the business and investment communities, is seeking to improve the ability of its courts to adjudicate private disputes, but even there, the Supreme People’s Court has acknowledged the existence of what it openly calls “local protectionism”—the unwillingness of local courts to rule against established local interests. The recently announced Three Supremes policy in China calls for a legal system that prioritizes considerations of the party, the people, and the law, in that order. This policy orientation is not uncommon in Asia. Not that long ago in the Philippines under Ferdinand Marcos, the Minister of Justice openly argued that justice for the people occurs when the judiciary follows the executive.

And when the judiciary fails to toe the line, there are consequences. We have all witnessed what recently happened in Pakistan when the judiciary threatened the political viability of its President. In Albania a few years back, a powerful Prime Minister and a compliant parliament removed a Chief Justice from office after eight minutes of deliberation for his audacity in convening a conference of judges to promote the idea of judicial independence. And based on my experience, these examples are not isolated phenomena.

Corruption and other threats to the independence of many of the world’s judiciaries are not confined to the problem of an overbearing executive or political party. Individualized criminal corruption is persistent and widespread. In my country, such judicial criminality is rare, and when it is uncovered, the consequences for the wrongdoer tend to be swift and severe. But in many developing countries, and in varying degrees, financial corruption and other improper influences on judging are tolerated. Corruption also occurs in more subtle ways. *Ex parte* communications, visits to the judge by powerful people, and intimations from on high that the judge could be transferred or the judge’s children could be expelled from an elite school are the kinds of corrupting influences that are used to distort judicial outcomes.

1. THE FEDERALIST NO. 78 (Alexander Hamilton).

A couple of years ago, I spoke to a small group of international lawyers at an ABA Conference in Chicago, and I asked the group to estimate in how many of the 192 countries in the world was it more probable than not that a case would be decided on the merits according to law. The consensus estimate was no more than fifteen.

Of course, a number of prominent organizations have recognized the need for action to combat judicial corruption and build the Rule of Law internationally.

After the fall of the Berlin wall, it was the Chair of the ABA's Section of International Law, Homer Moyer, working with ABA President Sandy D'Alemberte, who established the ABA's Central European and Eurasian Law Initiative. ABA CEELI has placed more than 400 permanent legal representatives in Eastern Europe, the Middle East, and Central Asia to advise on legal and judicial reform and has inspired more than 5,000 lawyers and judges, including your speaker, to volunteer their services to the cause. And there have been tangible results from this enormous pro bono effort.

The work of the CEELI volunteer lawyers and judges in helping to write constitutions and laws and in building legal institutions for the twenty-six newly formed nation states from the former Soviet bloc has enabled nine of them to do well enough to join the European Union and ten to join NATO.

The World Bank is also vitally interested in the problem of corruption generally in developing countries. Obviously, the Bank does not want to see its lending programs frustrated by corruption in business and government. In denouncing corruption, the Bank's former President, James Wolfensohn, spoke of the demand in country after country for action to deal with the problem which "diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors."²

Wolfensohn's successor, Paul Wolfowitz, recognized that the general problem of corruption in business and government generally cannot properly be addressed in any country unless the judiciary of that country is healthy and functioning properly, without the taint of corruption among its judges. He turned the World Bank's energy and resources toward judicial and legal reform in the countries to which it lends and proposes to lend, and that continues today. And the United States government has not been idle. Offices and programs at the State and Justice Department are addressing the problem. And the judiciary has a Committee on International Judicial Relations (of which I am a member) to promote judicial exchanges and the advancement of Rule of Law objectives.

I think that all of us here can agree that transforming the judiciaries of developing countries is essential to preserving liberty and to allowing democracy to flourish. And it is also necessary if the economies of these countries are to expand. It follows that this transformation is also good for business in this country and for the world economy.

Broadly conceived, Rule of Law development is like a three-legged stool—all three legs are necessary if it is to stand. First, there must be laws in place to establish the institutions of judicial administration. Second, these institutions must be up and running, and there must be competent, well-trained people running them. And third, the Rule of Law must

2. President James D. Wolfensohn on *Strategic Issues of the World Bank Group*, TRANSITION NEWSL. (The World Bank Group, Washington, DC), available at <http://www.worldbank.org/html/prddr/trans/so96/art3.htm> (last visited Mar. 14, 2009).

have political support, which means, in a democracy, that the people must understand, support, and comply with it.

The Rule of Law work around the world to date has been largely focused on the first two legs, enacting the laws and building the capacity of the judicial institutions, and there has been much progress in these areas. Building political and popular support can be a far more arduous task. Some countries have embraced judicial reform and do have the political will for transformation. In others, the leaders only pay it lip service. Old corrupt habits and traditions do not change easily. Established leaders do not welcome judicial scrutiny.

But countries will not succeed in Rule of Law development unless the countries' leaders make it a top priority. If political will is absent, Rule of Law development will founder; indeed, in some countries there is little point in even starting Rule of Law programs. The costs are too high and the prospect of meaningful returns too low. If there is political will or the potential for building political will, however, then I believe that reform efforts have a good chance to be successful in fostering judicial systems that will serve the public with integrity, competence, promptness, fairness, and transparency. It is also important that such efforts aim to reflect and to incorporate the moral fabric of the society, for only then will a country's set of laws be perceived by the people to be legitimate and worthy of compliance.

The International Law Section has been a leader in constructing the first two legs of the triad. It is time for it to take the lead in building the third. Where political will is slow to materialize, action is needed. I do not suggest that you simply wait for Washington to act, whether the administration is Democrat or Republican. As I mentioned, Rule of Law development abroad has been a concern in Washington, but it is not at the top of the political agenda.

With your large membership and strong interest, The International Law Section should do at least the following:

- target influential leaders in developing nations to educate them in the importance to their countries of judicial reform and eliminating corruption;
- develop programs, including media outreach, to educate the public of these countries about the Rule of Law and the corroding effects of corruption;
- when your members travel to a developing country, find a way to reach out to the country's leaders; contact the ABA's Rule of Law Initiative in Washington to become informed about and stay current on the local situation;
- make your views known to the right people in Washington; insist that they attack the political and cultural barriers to Rule of Law development;
- and finally, coordinate closely with CEELI's successor, the ABA/Rule of Law Initiative, to determine the most effective ways to proceed.

Let me conclude by suggesting to you that what we consider to be part of a basic civics lesson is often novel and alien to citizens of countries emerging from totalitarian rule. In 1835, de Toqueville marveled that Americans, unlike citizens of other countries he had visited, displayed a "kind of parental affection" for the law. This observation is no less true today. Citizens in many developing nations have not been raised to respect the Rule of Law or even understand it, much less expect their judicial officers to safeguard it against government officials, criminals, or special interests who hope to improperly influence their decisions.

What is desperately needed in transitional democracies struggling to build worthy judicial and legal systems goes well beyond changes in laws and institutions. What is required in most countries is a tectonic, cultural shift wherein corrupting influences are abandoned and the law, impartially administered by judges of integrity, gains the full respect of the people. Only then can there be progress in establishing a Rule of Law that is essential for political, economic, and social progress.

