

**The Rule of Law Conference
University of Richmond
School of Law
12 April 2007**

“Enclaves of Justice”

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We seem to live in a wonderful world. Or so it *seems*, that is, when one considers that States all over the world unhesitatingly subscribe to numerous conventions and declarations reflecting near universal consensus to the effect of forbidding such things as slavery, discrimination against women, child labour, or persecution based on religion or race. And of course everyone is entitled to impartial and transparent justice. Now the rule of law may not create rights, but what are rights without the rule of law? And so every state proclaims itself *un Estado de derecho* – which happens to be just how Alberto Fujimori had the nerve to describe Peru under his rule.

This vision is an illusion. Worse, it is a fraud. To refer to it as unrealistic idealism would be to let ourselves off too easily, in effect claiming for ourselves good intentions. The fact is that we may be participating – at least negligently, and perhaps complicitly – in what I am tempted to call the Fraudulent Consensus on the Rule of Law.

For what good are these paper declarations? What is the meaning of these high-sounding promises if the law in fact is whatever may be decided at any given time by the agents of despotic tyrants, religious fanatics, or more or less organised criminals? The more dictatorial the regime, the more surrealistically gorgeous its constitution. What good is it, if judges are paid or intimidated by the powerful, or if – less dramatically but perhaps more insidiously – the courts simply don’t work?

We bear a heavy responsibility if we spend our time fiddling with pretty texts while the world burns.

I like to think of myself as an optimist, and I promise that the second part of my remarks are intended to be constructive and hopeful. But I am far from finished

with doom and gloom. Two insights, I venture, will help us see the Fraudulent Consensus for what it is.

First, our model for global development of the rule of law may be flawed and counterproductive. It may be harmful to consider that the rule of law is the norm, and that it is sufficient “to correct” deviations from the norm. We may be deluding ourselves, when looking at human institutions which purport to deliver justice, if we react with disappointed surprise whenever we see injustice. The error is to think that injustice is abnormal. It may be more realistic to think and act on the assumption that *justice is a surprising anomaly*. The reason to adopt this bleak premise would not be that we wish to assume the aura of ascetic realism, but rather that it does greater service to mankind. It enables us to see that the task is not to wag a disapproving finger whenever we come across an instance of injustice – as though this would suffice to nudge an ostensible system of justice to correct or at least condemn such exceptions. The monsters we are facing are entire systems, deeply entrenched, which are simply not delivering, and stand in the way of the most ardently desired objectives of human society.

And so I agree with the economist Raguram Rajan’s suggestion: *assume anarchy*. He wrote:

“Institution building is one area where international financial institutions and policymakers have learned from experience and have used common sense to devise practical approaches, without much guidance from academia. And there is hope, supported by a growing body of research, that more students of development are realizing that a better starting point for analysis than a world with only minor blemishes may be a world where nothing is enforceable, property and individual rights are totally insecure, and the enforcement apparatus for every contract must be derived from first principles – as in the world that Hobbes so vividly depicted.”¹

¹ Finance and Development, September 2004, p. 57.

The second observation might be that what we need is not legal analysis leading to ever more perfectly fraudulent texts, but an understanding of reality. Forget about law journals and internet exchanges producing theories about theories! What we need to understand is more likely to belong to the craft of sociology, or simply to that of old-fashioned responsible journalism. Fortunes have been spent studying issues of governance throughout the world, naturally including legal systems. Whether governance has improved as a result is debatable. But it is a fact that these well-intentioned programs have spawned – if one is willing to get out of the law library and away from sterile debates on the floor of the UN – a vast body of detailed reports on the state of judiciary systems around the world. These reports are readily available from international organisations, national development organisations, or private foundations. Over the past few years I have collected a great number of such reports, thousands and thousands of pages written by highly qualified development specialists. They are uniformly depressing.

To get the flavour, consider the titles of two recent World Bank studies. First, we find “The Inequality of Influence”, which introduces the concept of *crony bias*, associated with the subversion of institutions, tax avoidance, corruption and – for those who are not in on the game – the inclination at all cost to stay away from courts. Second, there is the admirably blunt title of “Misrule of Law”.

Around the world, whether in Eastern Europe, the former Yugoslavia, Ethiopia, Sri Lanka, Bangladesh, the reports uniformly conclude that ordinary citizens expect little from the courts, and that indeed they are right, due to long delays, political influence in the courts, ignorant judges, corruption, hostility toward women and the poor, expensiveness and lack of transparency. I might, for example, refer you to a report on the Ford Foundation in the Philippines, quoting these words by a local law professor:

“The Philippine legal system is best understood not as a set of institutions and processes, but as a network of personal connections affecting and dictating the [legal system’s] operations.”

The uniform desolation is occasionally interrupted by reports of even greater dysfunctionality. In Ecuador, on the 20th of April 2005 the then President Gutierrez was removed by a vote of Congress and then sought asylum in Brazil. This remarkable event followed an even more astonishing development four months earlier, in December 2004, when almost all of the Supreme Court judges were dismissed by a Congressional resolution, and by a majority decision the Congress appointed 31 new members. This arrogation of power flouted a referendum in 1997 by which the electorate had expressly removed the authority of the Congress to appoint and dismiss members of the Supreme court. The Special Rapporteur of the UN Commission on Human Rights observed, perhaps with the diplomatic understatement, that the “people of Ecuador have paid dearly for this level of politicization which has contaminated their courts.”²

A Colombian study presented in Bogotá in 1999 stated that 96.8% of the respondents in a survey believed that judges were “bought” by rich claimants. This was but one of a great number of similar conclusions of a study by Roberto Gargarella about access to justice throughout Latin America; the simple title of his report is “So far removed from the people”.

And I will not even name some countries in Africa and Asia where allegedly powerful commissions were established with grand fanfare to eradicate admittedly endemic judicial corruption, and where a few years later the attentive observer could note that there were not only no convictions – but not even a single prosecution.

Rather than continue with a drearily endless roll call of smaller countries, let us rather consider snapshots of three huge countries where much of the world’s population lives: Russia, China and India. Some glimpses will do.

Russia has lost almost 400 judgments in the European Court of Human Rights (“ECHR”) since 2002 – and won only ten. But this, one must surmise, is but the tip of the iceberg. More than 45,000 petitioners came before the Court in 2005, over 10,000 of them Russians, and the vast majority will never be heard due to the Court’s limited

² Preliminary Report of Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, UN Commission on Human rights, E/CN.4/2005/60/Add. 4, 29 March 2005.

resources. One can only imagine the dimensions of this iceberg, by which I mean ordinary Russians who would not dream of bringing an international case against their government, and at any rate would have no idea of how to go about it.

Last October, the Salvation Army won one of the Russian cases in Strasbourg after having lost, over many years, a series of cases in the Russian court where judges agreed with prosecutors that this Christian charity group which wears uniforms and calls its leader a general must be a paramilitary organisation seeking the violent overthrow of the State.

More alarming was the public accusation in January of this year that Russian officials had sought to poison the President of the ECHR when he was visiting the country. He and a Swiss colleague contracted violent blood poisoning and were reportedly “within minutes of death”. What is remarkable is that this public statement was made by the ECHR President himself, Luzius Wildhaber of Basle, one of Europe’s most distinguished jurists, who retired in January. And what is chilling in his statement to the *Neue Zürcher Zeitung* is that he had been the object in 2002 of “a vile form of blackmail” – his words, as quoted in the article – when a Russian ambassador turned up in his office and said that unless 13 Chechens challenging extradition from Georgia were sent to Russia, Russia would blame the European Court for the Moscow theatre siege when Chechen extremists took 850 people hostage.

As for China, the latest issue of the *Journal of International Arbitration*³ contains an article entitled “The Strange Case of Wang Shengchang”. Its author is identified as Wu Ming, the alias of an arbitration specialist who for reasons that will become apparent does not wish his real name to be known. Wang Shengchang, however, is the real name of someone who is well known in international circles. Until his peculiar arrest one year ago, he was the Secretary General of the leading Chinese arbitration association, CIETAC, which in fact, according to its own statistics, conducts more international arbitrations than any other institution in the world. He is a member of a number of leading international organisations devoted to

³ 24 J. Int’l. Arb. 63 (2007).

arbitration. The reason why his case is “strange” – at least to people attached to basic notions of justice – is that it is utterly opaque. He is believed to be incarcerated, but this cannot be ascertained. It is not known what he is charged with. There are rumours that he has “confessed” to various kinds of misconduct, but like everything else about his case, in the absence of the slightest bit of transparency, this remains speculation.

One rumour is that Mr Wang is accused of squandering State assets. This is peculiar in and of itself, since CIETAC, Mr Wang’s arbitration association, is supposed to be non-governmental. It is said, however, that its leadership structure includes a number of high government officials who try to ensure that CIETAC pay over a large proportion of its income to the Ministry of Finance. If true, this would be something of a fraud on users of CIETAC’s services, who believe they are dealing with a non-for-profit organisation. And it would certainly explain CIETAC’s sub-market rate wages to its staff and similarly low fees for arbitrators.

At any rate, if Mr Wang is accused and convicted of not maximizing the State’s occult revenues from this supposedly autonomous agency, he apparently faces seven years’ prison.

Another rumour is more sinister. It concerns Mr Wang’s role as arbitrator appointed by PepsiCola in a case heard in Stockholm. This was a high-profile matter; PepsiCola’s opponent was Sichuan Pepsi, controlled by the provincial government of Sichuan. Mr Wang voted with the Swedish president of the Arbitral Tribunal to render an award in favour of PepsiCola, over the protests of another Chinese arbitrator, nominated by Sichuan Pepsi. The case has caused much commotion. It is said that the Sichuanese authorities have appealed to the central government to ensure that the award is not enforced. Wu Ming, the unnamed author, writes that the case was “reportedly” even discussed at the level of the National People’s Congress. (The idea that parliamentary debates are off-limits to the public will doubtless be perplexing to many of us). The Chinese media have spoken of Mr Wang’s role in this case as having constituted a “national betrayal”. He is said to have illegally deposited \$80,000 – a portion of his fee for acting as arbitrator in Stockholm – in a Hong Kong bank, to have failed to disclose that in his student days he had served as an intern in

one of the law firms representing PepsiCola, to have contacted key witnesses, and above all to have “sold out the Motherland” by voting in favour of the foreign corporation. Chinese internet reports affirm that Mr Wang has “confessed” to such misdeeds – the punishment for which is undoubtedly severe.

The one thing we do know for certain is that Mr Wang’s once-prominent career is over. Whether he has broken the law in some way is not a matter any outsider can say for sure. The point is that if the Chinese approach to law is such that the life of a man of international prominence, someone on whose behalf a number of international organisations have experienced deep concern in unanswered communications to the highest levels of government, if such a person’s life may be shattered with such disdain for elementary principles of due process, one can well surmise how terrifying the law must appear to a little man who has become inconvenient.

I turn briefly to India as an illustration of injustice as a mere by-product of a lack of resources. The excruciating laboriousness of the Indian legal system is no myth. The Ministry of Law told the Indian Parliament on 9 July 2004 that there were 650,000 cases pending for more than a decade in the High Courts alone. The longevity of the 23 million cases on the docket of other courts is probably anyone’s guess. The Chief Justice of India, doubtless hoping to stimulate some budgetary support, pertinently observed that the country has only 10.5 judges per million citizens, the corresponding figure for the U.S. being 107.⁴ And one might wonder how many local judges are paid a prompt living wage, lest they be desperate to supplement their earnings. I cannot resist reading to you this rather poetic and, when you think about it, self-incriminating *obiter dictum* from a judgment handed down by the Indian Supreme Court in March last year: “Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through”.⁵

⁴ As reported in Jumeet Kachwaha, “The Indian Arbitration Law: Towards a New Jurisprudence,” [2007] Int. A.L.R. 13.

⁵ How many ways can one refashion the saying so widely attributed to Solon? Was he the first to say it, some 2,500 years ago? And what would be proper rendition in English? John Dryden’s cumbersome translation of Plutarch’s Solon – itself a translation? The best may be the most concise: Hegel said in his Lectures on the History of Philosophy (in German) that Diogenes’s

You may well wonder if I am throwing stones from a glass house; that is indeed so. Having lived in France for three decades, I can say that it is no source of pride in Paris that although France views itself as being the birthplace of human rights, it has the next highest rate of adverse judgments from the ECHR on account of judicial delay. According to a study conducted by the Institute for Research on Public Administration, it may now take 15 years for disputes as to the quality of workmanship in home building to be decided, 18 years for the judicial winding-up of small businesses (e.g. restaurants) to be concluded, 10 years for the pension rights of an incapacitated workman to be established. The billionaire investor, George Soros, said last June that he was considering petitioning the European Court after the highest court of France upheld his conviction for insider trading in 1988; the trial took place in 2004, and Mr Soros apparently had some difficulty reconstituting the evidence – or indeed finding witnesses with relevant recollections nearly two decades after the event. (Two other defendants, Frenchmen well-known for their political connections, had long since been acquitted.)

But as I said, France is only second worst. In Italy, the slothfulness of court proceedings might be a theme for comic opera if the subject were not so serious. Before the year 2000, the old ECHR condemned Italian denials of justice in over 1,400 reports; and the ECHR handed down 65 judgments against Italy. In the year 2000, Italy was condemned in more judgments than all the contracting states combined. Commercial lawyers practising in Europe know all about the Italian torpedo. That is the device used by a party which has agreed to another forum for the resolution of a contractual dispute (such choices are in principle respected under European law) but now wishes to escape its obligations. So it rushes into an Italian court, arguing that agreement to a different forum is invalid. That debate may take a decade while one exhausts available appeals, and even if Italian courts ultimately uphold the plain-as-day forum clause, justice is effectively denied, thanks to the politically correct but vastly counterproductive European notion that whatever legal system is first seized has priority before any other court – notwithstanding its greater connection with the case – can do a thing.

rendition of Solon's aphorism was this: "Laws are like spiders' web; the small are caught, the great tear it up."

As a guest here today, I will say nothing about the United States, and, in any event, this audience has its own better-informed views.

My litany of provocative criticisms reflects no feat of scholarship on my part. If any of you sat at my desk and pored over these tall stacks of reports and studies, you could outdo me in no time at all. It's as easy as shooting fish in a barrel. And that, of course, is my sad point. The evidence is everywhere. In fact, if you look at the latest issue of the very attractive magazine published by this law school, of which we received a copy in our conference dossier, you will see an interesting article about a resourceful recent graduate, an American, who found herself in Egypt and decided to set up her own little law firm to assist expatriates in Cairo. This activity leads her to try to help clients who have problems in the local courts. This is what she writes:

“The Egyptian judicial system is male-dominated and closed to foreigners. Their concept of justice is one that revolves around the theory of *wastah* or personal influence. If you are willing to pay the right person the right amount of money, your legal troubles disappear. If your opponent is willing to pay more, there will be no end to your legal woes”.⁶

Given this bleak picture, it would be preposterous to imagine that even half of the world's population lives in countries that provide decent justice. Whatever the technological innovations of the human race, whatever the astonishing comforts of its richest strata, this is surely a damning indictment: how can it be said that we live in a civilized world?

So what are we to do? Is there room for optimism?

I think the answer is affirmative, as long as we expose the Fraudulent Consensus. Our concept of decent justice is not to be compromised by meretricious concessions to cultural relativism. Such concessions do no more than to make us complicit with dictators, fanatics, and thugs. The rule of law is pure illusion for most of our fellow travellers on this planet, and things will not get better unless we stop

⁶ Laura E. Pinnow Sheehan, “Hanging a Shingle in Cairo”, 19 Richmond Law 20 (2007).

tinkering with texts and start dealing with contexts. Now, dealing with reality is, I fear, an insurmountable task if we set out to establish effective justice comprehensively. The least we can hope for, as the international law scholar Julius Stone put it in the 1950s, are *enclaves of justice*. But whereas for Stone that phrase was the lament of an almost inexpressible pessimism, I believe we can turn it around, and ask ourselves whether we cannot consciously create enclaves of justice, and hope that in so doing we prime a million pumps.

This is, it seems to me, fertile ground for a multitude of realistic projects – and I expect, indeed sincerely hope, that it includes a universe of ideas beyond my own present imagination.

Many enclaves of justice are doubtless possible within the framework of existing institutions, whether national or international. On the national level, for example, one might look to Singapore – which I remind you has lifted itself from poverty in half a century – to understand how a society might enhance the status, recruitment and incorruptibility of the judiciary. In far too many poor countries, the pinnacle of the legal profession as perceived by society is the influential lawyer who can fix everything from the back seat of his limousine, while magistrates are nobodies – and paid like nobodies. The Singapore answer is simply to recruit judges on merit and to pay them good salaries, as befits the importance of the role they are intended to play. Over time, it seems, this has had a beneficial effect. Singaporean judges have status, they have material security, and they *do not* have their hand out.

What I am suggesting is the contrary of paralysis and defeatism. What is most often pointless is to arrive in a country with a blueprint for comprehensive reform. The task is too great, the defective system too entrenched, the well-meaning architects of the blueprint too ignorant of local conditions and attitudes. What I believe is to focus pragmatically on the incremental. It can work; it can lead to quick, yet lasting results; and, yes, incrementalism can be exhilarating. At yesterday evening's banquet, you heard about judicial reforms in Mongolia. There was mention of a modest feature which just might have escaped your attention: the notion of maintaining an accurate and transparent docket, available to the public on a website. This might not seem like much, but let me convince you otherwise. There are many countries – far richer than

Mongolia, far more implicated in international exchanges – where it is impossible to ascertain the status of a case filed in the most important of courts. The first a party might know of the disposition of a case is when its property is actually seized in execution of an unfavourable judgment. Only then does it become clear that a number of things happened without its knowing: the court decided that it was possible to issue a judgment on the written pleadings without a hearing, deliberations were concluded on the basis of an incomplete record, the time for appeal was lost, an execution order issued. And if the devastated loser asks where one might find the rules that govern issues such as giving notice, or dispensing with hearings, the answer seems to be a black hole: these things are made up by judges and officials as they go along, the wheels of “justice” suitably greased by folded emollients. Whether the Mongolian plan to go from nothing to a website is realistic, I cannot say, but if the idea goes no further than to a properly maintained notice board available for public scrutiny, that would, in itself, put Mongolia far ahead of many jurisdictions.

Moving to the level of international institutions: the fact is that Russia does pay attention to the ECHR. The Russian government has a good record of paying the damages awarded (modest though they may be by American standards); it is consistently reported that Russian officials are wary of exposing themselves to the ECHR’s censure; and the very vehemence of Russian fulminations about ECHR judgments tells us that in some way, the Court is achieving a measure of justice which in time may achieve what academics call “compliance pull”.

In this respect, it should be clear that texts do have value, notwithstanding my strong words about the fraud that consists in presenting them as evidence of a consensus. The fact that governments subscribe to international norms, however hypocritically, nevertheless creates obligations in principle which may one day serve to legitimate and enliven international or external pressures to conform to them.

But such pressures must find traction in the concrete world; only then do enclaves of justice appear.

If we look at informal structures, a salient example is arbitration. It is hardly something new. In the wake of the American Revolution, neither loyalists to the

Crown having been dispossessed in America (where they were viewed as traitors to be tarred and feathered), nor American revolutionists seeking to assert property rights in captured vessels and cargo, had much faith in the enemy courts. And so arbitration was instituted under the Jay Treaties.⁷ This ancient mechanism is prevalent today. One manifestation of it, namely arbitration pursuant to bilateral treaties for the protection of foreign investment, has engendered much recent debate where I find that legal academic commentary misses the point. For one thing, writers in search of an audience excitedly point to esoteric inconsistencies in the reasoning of such tribunals as evidence of a “legitimacy crisis” in international arbitration. Given the horrific failings of much of what passes for a judiciary around the world, such complaints strike me as worse than trivial, like telling passengers in the freezing water that they should not enter the lifeboats because the seats have not been equipped with regulation cushions.

Others write that such treaties are false promises because it is not demonstrable that they actually lead to more foreign investment. But what if they “merely” lead to better justice – say in Mexico, where in the wake of NAFTA, we are told that officials have developed the salutary instinct of avoiding conduct which might be criticized in an international forum: a direct case of *compliance pull* to the benefit not only of foreigners, but – perhaps far more importantly – also to the benefit of local citizens. I confess to impatience with some writers – apparently chained to their desks – who criticize arbitration because, they posit, the availability of decent justice in international arbitration stunts the development of good practices in national courts! This may be the centrepiece of my brief: let us build our enclaves of justice where we can.

Finally, I would suggest that wholly informal enclaves of justice may emerge as concomitants to globalisation – irrespective of national laws or international treaties. Today, a Mexican football team which has paid a signing bonus of one million dollars to a player who took the money and went to Brazil without fulfilling his contract does not necessarily have to worry about the courts of Brazil or even finding assets of the player. Because there are borderless rules for sports played on

⁷ 19 November 1794. 8 *Stat.* 116.

the international level which have the import that the Brazilian team must accept joint liability for the player's debt, as established under a hierarchical order of national federations subsumed under an international federation – or else face exclusion from major league competition. Indeed, in the unimaginable event that the team were to accept relegation, the entire Brazilian federation would face exclusion from *international* competition. Needless to say, compliance is swift. Now this *looks* like law – contracts, statutes, lawyers in courtrooms, tribunals applying norms in reasoned judgments after having heard evidence and argument – but it is neither national or international law; there are no public authorities in sight; and yet this is law in action.

A famous head of State once said this to leaders of his nation:

“... you have yourselves formed this very State, to a large extent through political and quasi-political structures under your control, so perhaps what one should do least of all is blame the mirror.”⁸

That was said in the year 2000. That State was Russia, ladies and gentlemen; that head of state was Vladimir Putin, and his audience was a gathering of querulous Russian business executives.

Isn't the world our mirror?

⁸ Daniel Kaufmann, “Misuse of Law,” World Bank draft publication, July 2001, p. 2.