

December 4, 2002
Ko-Yung Tung

The Rule of Law

Speech to the Federal Judicial Council of Argentina
Palacio de Justicia, Buenos Aires

Mr. Vice President and Members of the Judicial Council:

I am truly honored to be invited to exchange ideas with you here in your beautiful city. Its beauty leaves me speechless-- as Jorge Luis Borges said, the beauty of Buenos Aires “ inhabits me like a poem that I haven’t yet managed to put down in words.”

Although this is my first visit to Argentina, I have been interested in Argentina my entire life. As a child growing up in Japan, I was fascinated by a far away country across the Pacific Ocean – Argentina is so rich in history, so varied in culture, and so blessed in its resources – the indigenous peoples, the Spanish conquistadors, the missionaries, the gauchos in the pampas, the wave of Italian immigration, Juan and Eva Peron, the Guerra Sucia, the triumph of democracy, the economic miracle, and its current financial crisis. A fictional novel could not have depicted a more fascinating and promising locale.

As I congratulate each of you on your appointment to the Consejo de la Magistratura (Judicial Council), I want to remind you of what you already know. That is, you have been charged with a weighty responsibility – indeed, while you cannot change Argentina’s history, you can change the future.

Today, I would like to share with you my thoughts about the Rule of Law. My views on the Rule of Law are very much shaped by my personal history. I was born in Northern China, when that country was being torn apart by a vicious civil war between

the Nationalist Party backed by the United States and the Communist Party backed by the Soviet Union. As a member of a racial minority in China, my family was stripped of its property and assets. As innocent victims of this conflict, my mother with her three infant sons (I was then six months old) fled China in disguise under the cover of night to Japan, the only country that would take us. There we suffered not only poverty in the devastated post-war Japan, but also discrimination as foreigners. Fortunately, on a scholarship, I was able to go to the United States for education. First I studied physics at Harvard University, thinking that with science I would be able to improve the lives of men, women, and children around the world so that they would not suffer what I had suffered. When I realized that I was not smart enough to be an Einstein, I decided that LAW would be a better route for me to achieve the same end, so I entered Harvard Law School.

Since then, LAW has been central to my professional life. As a Wall Street lawyer, I was a *practitioner of the law* representing multinational corporations operating in all corners of the world. There I learned that without the rule of law, businesses could not be conducted, investments would not be made, economies could not grow, and therefore, the living standards of ordinary people could not be lifted. As a professor at New York University School of Law, I was a *teacher of law*. There I taught that specific laws differed from country to country. As Vice President and General Counsel of the World Bank, I am now a *promoter of law*. For the past three years, I have spent a great deal of time reflecting on the *role of the law* in strengthening the World Bank's ability to carry out its central mission to promote economic development and reduce poverty. *For this reason, it is particularly appropriate that I am able to address this new Judicial Council as it begins its new, and perhaps, historical mission to strengthen the rule of law in Argentina.*

There are many definitions of the "Rule of Law". The rule of law may be like "pornography"—the United States Supreme Court Justice Byron White said that he could not define "pornography" but he "knew it when he saw it". I have often said that the rule of law is like air – you cannot see it, but it is essential to life: it is visible only indirectly

as when a bamboo tree bows with the wind. Thus, I do not attempt to define the rule of law, but I know when the rule of law prevails. It prevails when:

- The government itself is bound by the law.
- Every person in society is treated equally under the law.
- The human dignity of each individual is recognized and protected by law.
- Justice is accessible to all.

These manifestations of the rule of law stem from a very simple but fundamental premise – that each human individual is inherently vested with the right to dignity. It is the role of law to give recognition to, and the judiciary to enforce, that right.

The first element of the rule of law is that the government is *under* the law. When I attended Harvard Law School, each day I went into Langdell Hall where it was prominently etched: “*Non sub homine, sed sub lege et deo*”. The government does not give rights *ex gratia*; it is obligated to recognize rights, making explicit in Constitutions and laws what is implicit in human dignity. As people and governments are, alas, fallible, many countries, including Argentina, have erected structures to protect them from themselves with the separation of powers among the three branches of government—the Executive, the Legislative, and the Judiciary. With each checking the others, a delicate balance is struck.

Paradoxically, the judiciary is *potentially* the most powerful branch of government, yet so often it is the weakest. It can nullify *actions* of the Executive and it can declare unconstitutional *laws* passed by the Legislature. Yet, it is also possibly the weakest branch of government because it requires support from both the Executive and Legislative Branch because it cannot *act*, it can only issue words. As United States Supreme Court Justice Frankfurter noted, “the Court’s authority is possessed of neither the purse nor the sword but ultimately rests on substantial public confidence in moral sanctions”. While the judiciary cannot do it alone, it holds the key to its own success. It must *earn* the public confidence, public respect, and public support. Your Judicial

Council plays a key role in assuring that there is public confidence through its responsibility to recruit competent, independent, and honest judges, and promote efficient and effective management of the courts. In this way, the Judicial Council promotes the independence of the Judiciary so that this first element of the rule of law is realized.

Second, equality before the law. This element recognizes that no individual is worth more than another and that the law must assure this. Whether the person is black or white, woman or man, rich or poor, the law must be applied equally. That is why the statue of Lady Justice is blindfolded – she is not blind to justice, but she is blind to prejudices. Your *Judicial Council* too must be blind to undue pressures, but be vigilant to equity.

Third, law must protect the vulnerable. The powerful in society often do not need protection. In fact, in some societies the powerful either act lawlessly or preempt the law for themselves. Law must not only be an equalizer; it must also be a protector. In the entrance of this Gran Palacio de Justicia, there is a statue of Lady of Mercy, who extends her hands to help the helpless. Your Judicial Council must also extend its hands likewise. Those that enter these courts of justice should have confidence that they will be treated with respect and dignity.

Fourth, justice must be accessible to all. In fact, if justice is accessible only to a few, then it is not justice. Your Judicial Council must exert every effort that the fora of justice is accessible and that those fora actually deliver justice regardless of ones income, race, religion, physical handicap, etc. The World Bank financed Model Court Development Project is critically important to support this aspect of the Rule of Law.

Since its enabling statute in 1997, and its formal establishment in 1998, Argentina's Federal Judicial Council faces many challenges. The current economic situation and the political context add severe pressures and constraints on the Council and the Judiciary as a whole. This Council will be tested now. My uncle was a judge in wartime China; he resisted the pressure from the occupying Japanese authorities and was assassinated.

While no member of this Council will suffer such a fate, each of you will be tested. I am confident that each of you will pass the test as each of you is committed to laying the solid foundation for the rule of law in Argentina for yourselves, your children, and their children.

But, in this endeavor, you should know that you are not alone. The World Bank has been actively assisting in the promotion of the rule of law through its legal and judicial reform activities, including the Model Court Development Project that the Council is managing. We all appreciate that reform is a complex and long-term endeavor. The Legal and Judicial Sector Assessment of Argentina that the World Bank completed last year provides valuable baseline information of the country's laws, legal system, and institutions. It thus gives the basis for broad participatory dialogue in shaping the legal and judicial agenda for the future. The Model Court Development Project was identified as a critical pilot initiative to improve the efficiency and effectiveness of courts and its administration of justice. As a pilot project involving twelve courts, it will test various ways to see what works and what does not. For this reason, the Council should not be stymied in trying to devise the "perfect" court. As the saying goes, the best is the enemy of the good. While the best courts are the ultimate objectives, pilots are to introduce innovation, most tried in other countries, and customize them to the particular country and courts. Just as car makers develop and test a new proto-type, the project allows the Argentinean judiciary to test new processes and procedures developed through the careful research and study of many experts and legal scholars before spending valuable national resource on an untested model. Your model court judges and court staff will be the pioneers exploring the new possibilities and frontiers.

Later the pilots can be adjusted if necessary and scaled up in other courts. Thus, it is important for this Council to take some well-informed initiatives in testing new ways and processes to ascertain how they increase judicial efficiency and effectiveness, as well as accessibility, and thus, ultimately promote the rule of law in Argentina. It is time to act – justice delayed is justice denied.

Conclusion:

If we accept the premise that we can preserve, protect, and promote dignity through the Rule of Law, then we should also accept no less of the institutions established and mandated to fulfill our aspirations. I believe in the dignity of each individual, and I also believe that strengthening the Rule of Law is one of the best ways to preserve and strengthen the dignity of individuals, communities and, ultimately, the community of nations. During my tenure at the World Bank, I am proud to say that we have made tremendous strides understanding the positive role that legal and judicial reform can play to strengthen the Rule of Law and we have taken the steps to ensure that our legal and judicial reform projects reflect our goals. In Argentina, the establishment and development of an independent and strong Judicial Council has played and will continue to play a critical role in the legal and judicial reform process. In the years to come, I hope that many of you will continue working to ensure that the Rule of Law is used to continue the fight against poverty and to support economic development for future generations. I am grateful for your invitation and to have been a witness to such a gathering of national talent. I wish you all the best and wish to reassure you that we will accompany you on this most important journey.

Muchas gracias.