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SPEECH

THE CREATIVE ROLE OF THE LAWYER—EXAMPLE: THE OFFICE OF THE WORLD BANK'S GENERAL COUNSEL*

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A. Introduction

Attempting to identify the law that applies to, and definitively resolves, a certain case is perhaps the most basic question in the study and practice of law. Sometimes, it is a simple question; more often it is perplexing. If the answer were always clear-cut and readily predictable, there would be little need for all these law schools and attorneys around the world. Judges would simply be the mouth that pronounces the law, as Baron de Montesquieu thought they were two centuries and a half ago.[1] Yet, there is a presumption that for every case the law not only exists, but is known to all. Legal advice is often requested before a dispute arises, and when it does arise, a certain law must be found to apply. The question is always addressed to counsel and judge alike. While the former may explain that the law is not clear on the point, the judge must reach a decision.

In common law countries, it takes thorough research to find out which precedents apply to the case at hand and which should be differentiated from it. The law governing the case will, however, be known for certain when the court reaches a decision, and even that may be reversed on appeal. In civil law countries, written legislation cannot possibly have an answer to every question that may arise, but the court must reach a decision nonetheless (principle of *non liquet*). A written text of the law could also be subject to different applications and interpretations by law en-

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1. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, L'ESPRIT DES LOIS [THE SPIRIT OF LAWS], Liv. XI, ch. VI (1749). De Montesquieu even referred to the role of the judge as pronouncing "les paroles de la loi." *Id.*

forcement agencies, courts, and legal scholars.

Legal systems normally recognize these dilemmas by giving courts a measure of latitude, especially when written law is silent on the issue and no binding custom can be relied upon. Some systems refer the judge in such cases to subsidiary principles which are vague enough to allow discretion (e.g., the "principles of natural law," "the principles of justice and equity," or "general principles of morality"). Some, like the Swiss Civil Code, call the spade a spade, by stating, that in the absence of legislation or custom, "the judge shall decide . . . according to the rules which he would lay down if he had himself to act as legislator."[2] The judge is to be guided in this exercise by scholarly writings and jurisprudence. The late Justice Cardozo of the United States Supreme Court expressed a similar thought when he suggested that the judge "legislates only between gaps. He fills the open spaces in the law."[3] Interestingly, a similar concept exists in Islamic jurisprudence.[4]

This does not mean that the judge "would innovate at pleasure." As Justice Cardozo eloquently put it, the judge could "draw his inspiration from consecrated principles . . . . He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in 'the social life.'"[5]

Some European scholars, like the late Professor Kelsen, assume, however, that as a necessity of logical and social order, a legal system must be deemed to be complete and, therefore, a gap in the law is a fiction, which enables judges to innovate new solutions when existing ones lead to inequitable results.[6] In either case, a creative role is recognized for the judge. No one would openly suggest, however, that the judge has the right to amend the law, by ignoring its provisions and substituting for them his personal views. Although in this country, where any view can always find a measure of support, some writings come close to that.

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2. THE SWISS CIVIL CODE art. 1(2) (Siegfried Wyler & Barbara Wyler, trans., ReMaK Verlag Zurich 1987).

3. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921).

4. *See* Ibrahim F.I. Shihata, *On the Judge's Creative Role - A Comparative Analysis*, 2 REVUE DES SCIENCES JURIDIQUES ET ECONOMIQUES 415-31 (Cairo 1962) (in Arabic).

5. CARDOZO, *supra* note 3, at 141 (footnote omitted) (quoting 2 GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF § 176, at 180 (1919)); *see also* FRANCIS R. EVERSHED, THE PRACTICAL AND ACADEMIC CHARACTERISTICS OF ENGLISH LAW 30 (1956) (discussing arguments for and against the application of the rule of precedent).

6. *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 146-49 (Anders Wedberg, trans., Harvard Univ. Press 1949).

There are also reports that in some places the jurors do just that.

The situation becomes more complex with the increased globalization of investment and trade where bilateral treaties, multilateral conventions, and a host of national laws may be relevant to a particular case. For international financial institutions, like the International Bank for Reconstruction and Development (IBRD or Bank), whose basic law (i.e., its constituent instrument known as the *Articles of Agreement*[7]) was written more than a half century ago, the complexity of the situation was recognized from the beginning. On the one hand, the Bank is expected at all times to adapt itself to the changing needs of the world, if only to ensure its continued relevance. On the other hand, it is extremely difficult to introduce changes through amendment of the *Articles of Agreement.* After approval by the Bank's highest organ, the Board of Governors, approval by at least 60% of Bank member countries which have at least 85% of the total voting power is also required. Amendment of some *Articles* even needs unanimous approval. With more than 180 members, one of which, the United States, having some 17% of the voting power, the practical difficulty of amendment is compounded. How then can a counsel of that institution answer constant questions about the law governing Bank policies and operations which are, of course, subject to its *Articles of Agreement*? How does he or she identify the rules applicable to the Bank's varying transactions, which may be derived from international law or such domestic law as may be applicable, and cannot be inconsistent with the provisions of the *Articles*? This is perhaps the most challenging task performed by the office of the Bank's General Counsel (GC).

Let me thus address in some detail certain aspects of the role of that office, an office which I had the opportunity to occupy for over fifteen years, as an example of the creative role of the lawyer and the difficult dilemma he faces in the application of an old text to the ever changing realities of the world. This role is not limited to the internal law of the Bank, but extends to its relationships with its creditors, borrowers, contractors, and personnel as well as with the many domestic and international organizations with which the Bank deals as a partner or a source of assistance (e.g., co-financier, co-executing agency, etc.). This role also includes assisting the legal and judicial reform efforts of the Bank's borrowing countries when such assistance is required. Before doing so,

7. *Articles of Agreement: International Bank for Reconstruction & Development*, (as amended effective Feb. 16, 1989) (visited June 26, 1999) <http:www.worldbank.org/html/extdr/backgrd/ibrd/arttoc.htm> [hereinafter *Articles* or *Articles of Agreement*].

however, it would be useful to briefly explain what the World Bank Group (WBG) is about.

B. The World Bank Group

When I speak of the World Bank, you probably have in mind one large international institution which provides loans for the reconstruction and development of its members in need. In fact, the WBG consists of five institutions with a broad and varying range of activities. First, in 1944, in anticipation of the new world that would follow World War II, the International Bank for Reconstruction and Development (IBRD) was created. At the same time, the International Monetary Fund (IMF) was established as a separate organization with what was meant to be a clearly different mandate. Over the years, the IBRD developed from an institution of thirty-eight members, mainly European and American, and a capital of $10 billion of a certain gold value, into a universal organization of 181 members and a capital in excess of $90 billion at present. It has extended to over 140 countries loans and guarantees cumulatively exceeding $324 billion in nominal value.[8] And it relies mainly for its financing on borrowing from the market. (Only 6% of its capital is paid-in, and not always in usable currencies). Meanwhile, the IBRD has become the largest source of research and knowledge on economic development worldwide.

Because the IBRD provides financial assistance only to a member state, or with the guarantee of such a member, it was felt important from the beginning that another institution was needed to finance private enterprises, through loans, guarantees, and equity investment, without any state guarantee. Thus, in 1956, within ten years from the start of IBRD operations, the International Finance Corporation (IFC) was established for that purpose. And because IBRD lends only to countries deemed to be creditworthy or at least considered prospectively able to service the loans, the need emerged for establishing a lending institution that would provide long-term, concessional loans to the poorest countries. Thus, the International Development Association (IDA) was established in 1960, as a "soft arm" for the IBRD. It now provides some $5 billion of interest-free loans every year.

In 1965, the Bank prepared another convention and opened it for signature by Bank members. The convention was to establish an institution

8. The figure in the text does not take into account the rise in the real value of older loans and includes all approved commitments, before cancellations.

of a different type, the International Centre for Settlement of Investment Disputes (ICSID). As its name suggests, this is not a financial institution, but a center for resolving disputes between foreign investors and their host-governments (if both the government of the investor and the government party to the dispute are members of the Centre). The role of this Centre, which was meant to encourage the flow of foreign investment, has since expanded greatly with the spread of bilateral and multilateral investment treaties referring disputes to the ICSID or to the ICSID Additional Facility.[9] For instance, while Canada and Mexico are not yet members of ICSID, as parties to the North American Free Trade Agreement (NAFTA), they have accepted that investment disputes arising under NAFTA could be settled through the rules of ICSID's Additional Facility, and claims are being brought against them before ICSID arbitral tribunals by investors from the United States. Conversely, in another Additional Facility case, the claim has been brought against the United States by Canadian investors.

Finally, in 1985, an agreement was prepared by the Bank to establish the Multilateral Investment Guarantee Agency (MIGA). The purpose of MIGA is also to encourage the flow of foreign investment, especially by offering guarantees or insurance against non-commercial risks facing foreign investors in developing and transition member countries.

The four institutions created after IBRD are not subsidiaries of the latter. IBRD neither owns, nor controls these institutions. Membership in them is open to members of the IBRD and, in the case of ICSID, to some other countries as well. But the President of IBRD is *ex officio* the President of IDA and of ICSID's Administrative Council. In practice, he is also the President of IFC and MIGA. IBRD and IDA, commonly referred to as the World Bank, have the same staff. Thus, the GC of the IBRD is the GC of IDA. Also, the Bank's GC has traditionally been elected Secretary-General of ICSID. The Boards of Directors of IBRD, IFC, and IDA, though legally separate organs of separate organizations, are required to consist of the same persons. The five institutions are referred to as the World Bank Group and the operational linkage between them is increasing. The Bank's GC is directly involved in three of the

9. *See* Ibrahim Shihata, *Recent Developments in ICSID*, 13 ICSID REVIEW – FOREIGN INVESTMENT L.J. 10 (1998). The *ICSID Convention* and *Additional Facility Rules* are available in, respectively, *ICSID Basic Documents*, ICSID Doc. 15 (1965) and *ICSID Additional Facility*, ICSID Doc. 11 (1979). Both documents are available on the internet at <http:www.worldbank.org/icsid/index.html>. The Additional Facility was established in 1978 by ICSID to enable parties to investment disputes that do not fall within ICSID's jurisdiction to benefit from ICSID's facilities.

five institutions, IBRD, IDA, and ICSID. As *ad hoc* assignments, during my work as GC, I was responsible for the initiative of establishing and launching MIGA (December 1983 to April 1988) and chaired the group which produced the *World Bank Guidelines on the Treatment of Foreign Investment* (1991-92).

C. Evolution of the Role of the General Counsel and of World Bank Lawyers

The GC of the World Bank (IBRD and IDA) has varied functions, among which the following may be the most obvious:

- Management of the Bank's Legal Department.
- Preparing draft resolutions of the Bank's Board of Governors and Board of Executive Directors (EDs).
- Assisting the Bank's EDs in the application and interpretation of the Bank's *Articles of Agreement* and advising them on all legal issues.
- Providing advice to the Bank's senior management (the President, the Managing Directors, and the Vice Presidents) on matters of law and policy, to the Bank's Inspection Panel (with respect to the Bank's rights and obligations), as well as to the Chief Executive Officer of the Global Environment Facility (GEF).
- Defending the World Bank Group (the five institutions) before the Bank Group's Administrative Tribunal, and arranging for their defense before national courts (in all matters for IBRD and IDA, and in personnel matters for other Group institutions).
- Certifying to the Bank's underwriters, external auditors, and other relevant parties that the Bank's activities are consistent with its *Articles of Agreement* and other applicable rules and advising them of any material effect of such activities on the Bank's position.

In addition, the GC, as already mentioned, has traditionally been elected Secretary-General of ICSID and, in this capacity, is responsible for the management of the ICSID Secretariat. Other special assignments and miscellaneous activities have also been performed by the GC on an *ad hoc* basis.

The role of the GC, and that of Bank lawyers generally, has evolved with the evolution of the role of the Bank itself. When I first joined the Bank as its GC in 1983, the Bank was providing financial assistance to borrowing countries in the form of investment loans and occasionally adjustment loans (the latter accounting respectively for 14.1% of total commitments and 12.2% of total disbursement in FY1983 for IBRD and

IDA combined). The Bank had not at the time provided any loan guarantees. It had not made any loan for debt and/or debt service reduction. Nor had it provided any free standing or primarily environmental loans, or any loan for the financing of legal, judicial, or civil service reform. Its operations were not based on pre-established country assistance strategies, which cover three years each. It did not address any of the issues which later came to be known as governance issues. Furthermore, the Bank's relationship with non-governmental organizations (NGOs) was in its infancy and it did not have an Inspection Panel to review complaints from parties adversely affected by its operations. Nor was the Bank involved in the administration of hundreds of trust funds financed by other donors. The MIGA had not been created and the GEF did not exist either.[10]

Since that time, however, the Bank's operations have expanded to cover all the above-mentioned areas under continually updated country assistance strategies for each borrowing country. Adjustment lending accounted on average for over 21.5% of annual commitments, and 27% of annual disbursement (in the last five fiscal years before FY98 for the IBRD and IDA combined). In the exceptional FY98, about 47% of IBRD loans alone took the form of quick disbursing non-project lending. In this form of lending, the Bank has moved from addressing only macroeconomic policy issues into tackling details of microeconomic and institutional reforms in various sectors. Investment operations have included, since 1984, guarantees of private loans and, since 1989, debt and debt-service reduction loans. Primarily environmental loans worth more than $12 billion have already been concluded. Furthermore, Bank-funded projects often include at present environmental components and technical assistance components in areas such as legal reform and judicial reform. Some loans are provided exclusively for the purposes of the latter reforms, including loans to large borrowers such as China and Russia. More recently, the Bank has declared its readiness to assist borrowing countries in their effort to combat corruption within the ranks of their civil service and public sector enterprises. The Bank's Legal Department played an instrumental role in the creation and launching of the MIGA and the GEF. It now provides legal services to the GEF Secretariat and

10. The GEF is not a separate international organization with a separate juridical personality. Yet, it is not part of the World Bank or its affiliates. It has a structure similar to that of international financial institutions, especially IDA, but the World Bank acts as the trustee of its fund and, along with UNEP and UNDP, as an executing agency of its projects.

the Inspection Panel.

The road for the expansion of Bank operations in all the new areas I have enumerated was paved by enabling legal opinions submitted by the GC and endorsed by the EDs. Through these legal opinions, the conditions of relating these new types of operations to the Bank's purposes were clarified, along with any specific measures needed to meet the *Articles'* requirements. Thus, debt reduction operations were deemed possible only to the extent they would have a material effect on the country's development prospects (and not simply as refinancing of commercial debt). Legal and judicial reform loans were related to improving the country's institutional framework and investment climate. More generally, governance issues would be tackled by the Bank to the extent they help the country in the efficient management of its resources, through appropriate rules and institutions, and do not entangle the Bank in the country's partisan politics. Through such legal opinions, the Bank's *Articles*, inspired by considerations of the 1940s, have been and continue to be adapted to the ever changing needs of the contemporary world.

D. The General Counsel's Legal Opinions

1. Advising the Board

Under the Bank's *Articles of Agreement*, the Board of Executive Directors has, among its powers, the power to interpret these *Articles*, subject only to possible review by the Board of Governors upon the request of a Bank member. This power includes resolving any dispute between the Bank and a member country or among Bank members with respect to the meaning or implications of the *Articles of Agreement*. In the first year of the IBRD's practice, interpretation of the *Articles* was made by the EDs upon the recommendation of a then standing Board Committee. The Board Committee on Interpretation consulted the General Counsel before it prepared its report to the full Board. Later interpretations were issued by the EDs directly with the benefit of the GC's advice. Since July 30, 1964, however, no formal decision on the interpretation of the *Articles* has been taken by the EDs, with one exception in 1986 (which, in fact, filled the gap resulting from the demise of the gold dollar). Instead, whenever clarification of the *Articles'* requirements was needed, the EDs discussed it in light of a legal opinion by the GC. Such an opinion, it should be noted, does not in itself amount to an authoritative interpretation of the *Articles*; the power to make such an interpretation is vested in the EDs. However, the EDs's endorsement of, or concurrence with, the

GC opinions gives them the authority which allows for their incorporation in the Bank's subsequent practice. The practice under the IDA *Articles of Agreement* has followed the latter course from the inception of IDA. While this informal approach maintains a large measure of flexibility for the Board, it also enhances the value of the GC's legal opinions as a source of the Bank's law. At least since 1983, there has been no case where the Board disagreed with the conclusions of these opinions.

In issuing his legal opinions, the GC takes into account the fact that the EDs do not constitute a court of law. While they expect from the General Counsel legally sound analysis and advice, they are primarily interested in developing solutions which best serve the purposes and interests of the Bank and its members as a whole. It is not enough, therefore, for the GC's advice to be legally correct; it is also expected to be such as to enable the EDs to perform their responsibilities in a manner which best suits the requirements of the Bank's business. This has proved at times to be a particularly difficult task, especially as the amendment of the *Articles* is generally found to be an impractical method for introducing innovations.

The GC's clarifications of the meaning and implications of the *Articles* have carefully studied the *travaux préparatoires* of the *Articles* in an attempt to identify the intended meaning. But they have accorded great attention to the ultimate objective of the *Articles* and the overall mandate of the Bank as a financier of investment for productive purposes in the reconstruction or development efforts of its members and as a facilitator of international investment and trade. A purposive (or teleological) interpretation has indeed been recommended in scholarly writings for charters of international organizations in general. By the nature of their respective mandates, these organizations must be able to respond to the world's changing needs. What is important here, as the 1969 *Vienna Convention on the Law of Treaties* suggests, is that this teleological approach should not conflict with the ordinary meaning of the words as used in their context (unless it is clear that a special meaning was intended or that the ordinary meaning leads to absurd or contradictory results).[11] Flexibility in the interpretation process cannot, however, reasonably substitute this process for the amendment of the *Articles*, which goes beyond the powers of the EDs or, for that matter, the Board of Governors. As mentioned earlier, only a high majority of member countries having an even higher majority of votes can approve the *Articles'*

11. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force on January 27, 1980).

amendment.

In addition to the legal opinions the GC issues to the Board of Directors during its meetings and in writing, he responds to queries made by individual Executive Directors, in which case his opinions are circulated to all Board members and may lead to a Board discussion of the issues involved.

2. Advising Senior Management

Although the GC is independent in his legal work, he reports to the Bank's President and is a member of the Bank's senior management committees. In these various fora and in response to individual queries by the Bank's President and other members of senior management, the GC provides advice on a regular basis on current issues. Such advice ranges from oral counsel to detailed written opinions and memoranda, some of which eventually find their way to the EDs, typically as an annex to a management paper on the relevant subject. This regular work, along with the review of loan/guarantee proposals and policy papers before they are submitted to the EDs, constitutes the routine function of the GC. In this function, the GC acts as the spokesman of the Legal Department, benefiting from the research and analysis made by its members and his deliberations with them.

In this, as in his role as adviser to the EDs, the challenge normally lies in finding solutions which are, at the same time, firmly based on defensible legal grounds and yet helpful to the institution from a practical viewpoint. The task becomes particularly difficult when the issue is entangled with political considerations of significant interest to Bank members or with ideological preferences prevalent among Bank staff.

Under the Bank's *Articles*, the Bank and its officers and staff are not to interfere in the political affairs of Bank members, or to be influenced by the political character of these members. Moreover, the *Articles* provide that "[o]nly economic considerations shall be relevant to their decisions."[12] Many sources, both internal and external, do not always find such injunctions to be feasible or, at times, even desirable. However, the GC has always maintained that the *Articles'* requirements must be observed by all organs of the Bank and by all its members, as long as they have not been amended through the appropriate procedure. Interpretation by the EDs cannot turn an Article's explicit prohibition into a permission of the prohibited action. But there is room for defensible flexi-

12. *Articles of Agreement*, *supra* note 7, art. IV, § 10.

bility. Economic considerations can always be taken into account even when they originate in political factors or are clearly associated with such factors, as long as the Bank's concern is for the economic aspects. The Bank's adjustment operations and its current practice of preparing a Country Assistance Strategy for each active borrowing member also require the Bank to be cognizant of the political and social environment in which it operates. My views on the extent of possible Bank involvement in certain governance issues of its members paved the way for the Bank's involvement in legal, judicial, and civil service reforms, but excluded direct involvement in political reform. These views provide an example of the drawing of a line that can be defended on legal grounds and is also helpful from the viewpoint of the Bank and its members.[13] These views have, however, been criticized by some writers who wanted the Bank to be directly involved in the political reform of its borrowing countries. Their commitment to certain ideals and their wish to use the Bank's clout to advance these ideas seem to be the motivation. In the process, they also seem to downplay the importance of ensuring the highest degree of credibility for the GC's legal opinions. Without such credibility, the role of the Bank and of the GC himself would always be questioned, to the detriment of the Bank and its members, and even to the detriment of the ideals so dear to those critics.

The GC's elaborate legal opinions on the different issues facing the Bank in its borrowing and lending operations, and in its dealings with its member countries and other parties, have had, in certain cases, an impact outside the Bank and have inspired similar analyses in other international development finance institutions. To that extent, the office of the Bank's GC may be contributing in a modest way to the progressive development of international law and, where relevant, the reform of domestic law.

E. Bank's Support of Legal and Judicial Reform in Borrowing Countries

When the Bank finances legal and/or judicial reform programs, the task is often managed by a member of the Legal Department. The role of the Bank's lawyer is changed in this respect from the typical legal advisor role to that of a hands-on project manager. The Legal Department had to be restructured to play that role effectively. The role of Bank lawyers in this regard is to assist the borrowing country in the design of the

13. These views, originally expressed in a December 21, 1990 legal opinion, are published as Chapter 2 of IBRAHIM SHIHATA, THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS, 53-96 (Franziska Tschofen & Antonio R. Parra eds., 1991).

reform program to be financed by the Bank, and to supervise its implementation as agreed with the borrower. The project is otherwise "owned" and implemented by the borrowing country, often with the assistance of its own consultants, local or foreign, funded in whole or in part by the Bank's loan.

It is important to recall here that a sound legal framework, in my view, must be defined in terms of a comprehensive system based on three essential elements, which I would like to briefly explain as they often guide the World Bank's support of legal reform.

The first element represents, of course, the legally *binding norms and rules*. Such rules, whether they are legislative or administrative in character, are meant to apply equally to all those addressed by them. They should not be intended to benefit or hurt a specific person or persons through an abuse of the legislative power. Their content should respond to genuine social needs and, where appropriate, reflect a pre-existing or emerging public opinion. They should be based on adequate data and analysis. They must also be subject to possible modification pursuant to previously known procedures, and they should complement each other in a harmonious way. Harmonization and approximation of law to international standards in certain areas such as the international sale of goods, intellectual property, commercial arbitration, insurance, and banking greatly facilitate future transactions and reduce the need for future amendments. Both the business community and the public at large should have access to adequate information about applicable laws and regulations.

The second element consists of the *appropriate processes* through which such rules are made and enforced in practice (or are deviated from when necessary). The appropriateness of such processes of rule-making, rule-enforcing, and rule-changing obviously differs according to the culture, political system, and other circumstances of each country. Experience shows, however, that legal processes will normally succeed to the extent that they are not complex or arbitrary, are based on a system of consultation with the people affected by them, and are realistic in their reliance on existing institutions. Simplicity of procedures, transparency of legal processes, participation of the affected people, and accountability of the public officials involved in these processes (elements of what is now typically referred to as "good governance") add to the legitimacy of the rules and contribute to the public's confidence in the legal framework as a whole.

The third element of the desired legal framework consists of *well-functioning public institutions* which are staffed by trained individuals, are

transparent and accountable to citizens, are bound by and adhere to regulations, and apply such regulations without arbitrariness or corruption. An efficient and honest civil service, along with regulatory bodies for the financial sector and public utilities in particular, ensures the appropriate application of legal rules, especially when their decisions are subject to judicial review. An independent and fair judicial system represents the institution which acts as the final arbiter of a functioning legal system. Without efficient and honest institutions for the enforcement of rules and the resolution of conflicts, the previous elements of "rules" and "processes" would fail to provide a sound legal framework.

For this three-elements system to work, efforts must be constantly made to increase the public's awareness of the role of law in society and to instill the conviction that no one is or should be above the law. With this, I would conclude this presentation and look forward to answering your questions.