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Rule of Law Symposium

A Minnesota Judge's Perspective on the Rule of Law in China and Kyrgyzstan

Justice Paul H. Anderson*

As an appellate judge, I must start by stating the issue: explain the rule of law. More particularly, I have been asked to discuss the rule of law in the context of my recent international experiences and to share perspectives I have gained as a state supreme court justice who has worked with judges, lawyers, and government officials from around the world. My presentation has two parts. First, I will discuss some basic principles that I believe are important when explaining the rule of law as it exists in the United States. Second, I will share some perspectives gained from recent international experiences. But before I do either, I will provide a brief summary of my recent international experience.

During my tenure on the Minnesota Supreme Court, I have been privileged to host several delegations from foreign countries. This past October, I hosted a week-long visit by four judges from Kyrgyzstan who wanted better insight into the rule of law, judicial independence, and jury trials. I have also participated in several international exchanges. In the 1990s, I made two trips to El Salvador that focused on reestablishing the rule of law following that country's civil war. I have also visited with judges in the Czech Republic, and, most recently, I did a lecture tour in China.

Before today's symposium, Judge Jack Tunheim and I

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discussed the work Minnesota judges have been doing in Kosovo and elsewhere in the Balkans. This is a project that has been shepherded by Judge Tunheim over the past ten years. Judge Tunheim remarked on how much Minnesota judges have done to promote the concept of the rule of law and an independent judiciary. During this discussion, we shared many general principles that we believe are important to this success. Our discussion prompted me to develop my own list of principles or guidelines.

An important starting point is to know something about the country that you are visiting or hosting. This may appear to be a simple and obvious point, but it is often overlooked and its importance to credibility can never be underestimated. I am fortunate in this regard; because of my background and natural inclinations, I have come to know something about several countries. This knowledge serves me well when meeting with foreign delegations. I recognize and appreciate the smiles, the nods of approval, and the sense of satisfaction that follows a comment noting something special about a visitor's country. Making this effort shows respect for your guests. So make an effort to know something about each country and its people. Doing so will lead to a more meaningful sharing of perspectives and ideas.

Avoid ignorance and arrogance. They are an especially lethal combination. On the other hand, humility will in most cases help you to establish credibility. Here I will give an example. The late Judge Learned Hand was frequently considered for appointment to the United States Supreme Court because he had such a good reputation as a judge. When knowledgeable observers were asked what made Judge Hand a good judge, the most common point of reference was that he approached issues with humility and self-doubt. He was known for approaching legal questions with modesty and without arrogance.

Judge Hand's humility also helped him to achieve the second attribute—self-doubt. Here I make an important distinction. There is a great difference between self-doubt and indecision. When discussing Judge Hand, I am not talking about indecision, rather, a willingness to keep an open mind, to always question and reexamine, and the ability to see the other side of any issue. When explaining our system of government to someone who has not experienced it firsthand, it is important to appreciate that while we may consider it to be a marvelous

system that has served us well for two-plus centuries, it is unique to us and it has some flaws. I recommend explaining our system with a sense of pride, but also with modesty and humility.

When explaining our system of government, particularly the judiciary and how it works, remember that our system could have developed differently. I often wonder what our government would have been like without Chief Justice John Marshall. What if his last-minute appointment by President John Adams had gone differently? Things surely would have been different for me as a justice. Marshall and President Thomas Jefferson had different views of the judiciary. Jefferson saw the judiciary as playing a limited role. Marshall, however, established our system of judicial review, which led to the judiciary being a separate, equal branch of government.

It is important to recognize that countries developing their own government systems, particularly judicial systems, develop in different ways, many of which, in their own way, ensure the rule of law. We can and should explain that our system has worked well for us and emphasize that there are several important fundamental principles that provide the foundation of our system. These principles include a commitment to the rule of law, judicial independence, and judicial review. But, it is a mistake to state that our system is the end-all and the be-all. The latter approach is like pounding a square peg into a round hole; it does not work well and it causes many splinters. Explain our system but provide enough latitude so that your listeners have an opportunity to learn about our system, evaluate it to see what may work well for their country, and then take our best and apply it in their country.

Be candid about our country's successes and failures. For example, it is nearly impossible to talk candidly to the Turks about their problems with the Kurds or the role of women in their judiciary without discussing our own historical problems with respect to race and gender. Visiting delegates are often both knowledgeable and curious about our history with respect to race relationships, gender equality, and our treatment of immigrants. When talking with delegates, be up-front, speak with candor, and explain our history and how we have evolved to where we are now on these important issues. This approach establishes a very good template of credibility on issues like the elimination of bias, bringing women into the legal and judicial system, and protecting human rights.

This leads me to another point—it is important to understand and appreciate the importance of history in these discussions. I admit that I have a strong bias here given that I am a history buff and value a historical perspective. As noted previously, it is difficult to talk to representatives from other countries about their need to improve human rights or get more women judges without acknowledging our own history. For example, when I was a law student at the University of Minnesota Law School in the late 1960s, we only had one female judge in Minnesota. In my class of over two hundred, there were only four women. When I visit with my female classmates today, they remind me how difficult it was for them to attend law school at that time. It was not unusual for professors to chastise women students on the ground that they had no business being there, that they were there only to get a husband, and that in the process they were taking the place of a male student who needed to attend law school so he would have a job in order to feed his family. We have come a long way in a few years, but we cannot forget the past.

Our system is still evolving and much of this evolution is recent. Understand and appreciate this recent history. Then explain, in a credible manner, how our system of government has flourished because of the presence of women judges and persons of color. It is important for me to have a colleague like Alan Page on the Supreme Court because his perspective is different than mine. I am a Norwegian and Scots-Irish kid who grew up milking cows on a dairy farm just west of the Twin Cities. Justice Page grew up in a metropolitan area—Akron, Ohio. He is African American. Our backgrounds and life experiences are very different, but our different perspectives serve our court and the people of Minnesota well. I often say that it is a good idea to have one Paul Anderson on our court, but it would be a bad idea to have seven Paul Andersons on the court. For the same reason, it is very important to have an Alan Page on our court. The point is, our legal system has been enhanced and has flourished because we have embraced different perspectives. Make it a goal to explain that for the rule of law to flourish, a government must reflect the citizens it serves.

It is also critical to explain our system of government and the rule of law in a way that is understandable. As a threshold point, appreciate that the explanation is often presented using translators. Appreciate the difference in languages. Develop

speaking styles and techniques that result in speech patterns that are easily translated simultaneously. Attempt to understand the target language as well as your own language. During the recent visit with Kyrgyzstani judges, my base language was English and the target language was Russian. It was important for me to understand that generally it takes about fifteen to twenty percent more words to say the same thing in Russian than it does in English. I needed to pace myself so that I could be easily translated.

Develop a method to explain things in easily understandable concepts. When talking about the United States' form of government, I refer to our Constitution as the American legacy. Our constitutional form of government is the most important legacy we have given to the world so we need to explain, in easily understandable terms, how our Constitution works. Most people understand what a contract is. So I note that in the late 18th century when our founders got rid of King George III and the English monarchy, they were faced with the challenge of developing an entirely new form of government. They started with certain basic principles such as the unalienable rights of life, liberty, property, and the pursuit of happiness. They knew that power corrupts and that absolute power can corrupt absolutely. Having risked their lives by participating in a revolution, they wanted a form of government based on the consent of the governed. What were they to do?

What our founders did was to draft a contract, between the people and those the people put in positions of having sovereign powers. It was a written contract. Moreover, it was a limited contract under which the powers of those vested with sovereign power were limited. Further, as a limit on those powers, the founders divided power between the executive, the legislative, and the judicial branches. Having just experienced a bloody revolution, they also wanted to preserve the ability of the people to revolt when necessary. They institutionalized a method of revolution—elections. Every two years we have the potential for a revolution. Did you notice that we had revolutions in 2006 and 2008?

There is an international hunger for knowledge about our American system of government. There is something about it that people from around the world admire. We are viewed as the land of opportunity. We have an obligation to feed this hunger for information about us and do so in a way that is easily understood and credible.

To be credible advocates for the rule of law, we need to make sure that our own house is in order. In recent years our international image has suffered greatly from controversy that has surrounded the War on Terror, officially sanctioned torture, Guantanamo, and the war in Iraq. If we do not keep our own house in order, our message is diminished and has a hollow ring to it. If we are going to remain a world power, we must keep our own system of laws and our economy in good shape. To continue to be a strong advocate for the basic principles we believe in, we must be vigilant to guard against actions that undermine those principles. We must pay attention to what is going on in our own backyard.

Finally, I want to highlight that there is a risk that arises from interacting with representatives of foreign countries and examining and explaining our system of government to them. The risk is that your own thinking will change. I believe that Justice Sandra Day O'Connor and Justice Anthony Kennedy have taken this risk and have changed as a result of their international work. Justice O'Connor has done extensive work in Eastern Europe. Justice Kennedy participates in an annual conference in Salzburg, Austria. Both have lectured in China and other countries. As a result of their international experience, their thinking has evolved on some key issues like the death penalty and human rights. Every time someone engages in a meaningful dialogue with persons from a different country, information grows and horizons expand. This growth is important to our own development as a country. Further, it helps us to achieve another objective—keeping things in shape in our own backyard.

Having outlined some of the principles I use when explaining the rule of law in the United States, I now turn to the second part of my presentation where I reflect on some of my international experiences. I was recently invited by a branch of the Chinese government to lecture in China on American federalism, the rule of law, and the importance of judicial independence. I had a twelve-day window in late May for travel and lecturing. I was able to present eight lectures at five of the top ten law schools, a police academy, a judges' training school and an undergraduate university. I also participated in sixteen meetings with justices of the supreme courts in Beijing, Shanghai, and Hangzhou, law school deans, police academy presidents, police officers, and several members of the legal community. It was an interesting and challenging educational

and cultural experience. It was all the more interesting because I was in China shortly after the major earthquake in Sichuan province.

There were times I thought I was in over my head. You undoubtedly have heard of Mark Twain's *A Connecticut Yankee in King Arthur's Court*. Well, for me it was a bit like that—A Minnesota Farm Boy in the Forbidden City. I was worried that the Chinese would discover that I was just that—a farm kid from Minnesota who did not have much to offer. I am sure some of you law school students experience the same feeling when you sit in class. I know I did. I felt that way sitting in Dean Stein's Real Property Class back in 1966. It should be both heartening and discomfoting to you to know that someone my age (sixty-five) who is a Supreme Court Justice can still harbor those same feelings.

My discussion about China begins with a warning not to trust anybody who pretends to tell you the truth about China. It is very difficult, if not impossible, to know the truth about China. But I can share with you some facts, some information, and some of my personal insights, observations, and perspectives about this emerging economic power. I begin by comparing our governments. In the United States, we have separation of powers, a system of checks and balances. China has central party rule with central authority. There are few, if any, checks and balances. We have an independent judiciary. An independent judiciary does not exist, nor is it presently desired, in China. We exist under the rule of law. China puts a premium on the rule by law. Many Chinese are very proud of their system of rule by law. There is a big difference between the rule of law and the rule by law.

In the United States, we have free speech guaranteed by the First Amendment. In China, the press and media are essentially the mouth and tongue of the party. There are severe restrictions on the free communication of ideas. I need go no further than to note the compromises on internet accessibility and information that China demands of companies such as Google. We have access to most public documents. In China, access is deemed a privilege, not a right. We have access to court records. Party government and the courts operate in secrecy in China. We have, for the most part, an open and transparent system of government. In China everything is run by the party from the top down and mostly in secret. An organizational chart of the Chinese government shows a

political and judicial committee of the communist party. The courts are subordinate to the party. The party controls the courts through its political and judicial committee. Thus, the judiciary is not free from the party's central political influence. This is rule by law not the rule of law.

Yet, I was invited to China to talk about our democratic society. So the question becomes, why? I believe it can be explained by acknowledging that some real change is occurring in China. I saw some of this change up close when observing how much more open the government was in dealing with events following the earthquake. The real question is how much change and how soon?

As mentioned earlier, I lectured at five of China's top ten law schools. My lectures were in English. The lectures lasted from between an hour and forty-five minutes to two hours and each session was followed by a meeting with several students. In some ways, lecturing at the law schools was a surreal experience. After these lectures, I felt like I could walk out of the building and find myself in the parking lot of any one of Minnesota's law schools. The experience was so similar. The Chinese law students were bright, articulate, and well-informed. They asked me questions about Minnesota, our court system, the U.S. Supreme Court, Justice Antonin Scalia, Seventh Circuit Judge Richard Posner, Oliver Wendell Holmes, and many other topics bearing on legal and judicial issues in the United States. Their questions prompted candid exchanges. Several students were surprised with my candid comments about Scalia, Posner, and my critique of Holmes and his belief in Social Darwinism. They were surprised by, but enjoyed, my candor and willingness to be forthright.

I was told that to gain permission to lecture at the law schools, it was necessary to go through four or five levels of approval. But once approval was obtained, I could for the most part talk about whatever I wanted. There were no restrictions other than some that were self-imposed. My discussions with the law schools deans, faculty, and legal community members were frank, candid, and open. One lunch in particular stands out. It was with a law school dean and faculty members in Shanghai. Some spoke English; some needed to communicate using translators. At the end of the session, the dean commented on how much he had learned from this lunch. He said the most important thing he learned was that it was not really possible to understand the American legal system just by

reading books. He said he now understood how important it is to experience American judges firsthand. He commented that he gained more insights from this lunch than from most of the books he had read. He remarked how valuable it was to meet face-to-face and to be able to ask questions and get candid answers.

Meetings with supreme court justices and intermediate court judges provided a particular challenge. It was a challenge to get through the meeting's formalities in order to talk about substantive issues. But in most cases, I was successful in doing just that. The Chinese treat you very well and often very formally. Most of the meetings, at least at the beginning, were diplomatic. They were scheduled to last forty-five minutes to an hour. They were designed for a formal exchange of greetings, green tea, and an explanation of their court system which was to be followed by an exchange of gifts. I soon learned that there were about fifteen minutes at the beginning of each meeting when there was an opportunity to steer the conversation toward a substantive discussion with a candid exchange of questions and answers. Accordingly, I entered each meeting with a strategy—make some candid comments and observations early and ask questions. I hoped that this approach would send the message that I wanted genuine dialogue with questions that I would attempt to answer candidly.

This strategy led to fascinating discussions. For example, in my meeting with justices in Hangzhou, we discussed the discovery process in the Minnesota tobacco case. The justices were fascinated with how discovery worked and how Minnesota tobacco litigants were able to obtain information that had an international impact. We also discussed community corrections. The justices are exploring alternatives to incarceration. Fortunately, in Minnesota, we have a long history with respect to community corrections and we were able to have a good exchange. My advice to anyone working on international exchanges is to develop a strategy to break through formalities. Otherwise, it is difficult to get to the heart of the topics you want to discuss. It takes both a strategy and tenacity, but when it works, the results are well worth the effort.

I believe that most of the current reforms in China stem from changes in Chinese culture that occurred between 1980 and 1989—before Tiananmen Square. The 1989 Tiananmen Square protest is a seminal event in China's history not unlike September 11 is for us. Following Tiananmen Square, there

was a significant clampdown in Chinese society which has led to a more nationalistic attitude and restrictions. But in the last few years, Chinese leaders appear to have realized that if China is going to move forward in the international economy, China must move beyond its post-Tiananmen Square attitudes. The big question is how it will do it. I believe China is exploring its alternatives, and there is a legitimate inquiry going on. In the end, I believe this is why I was invited to China. There is a genuine interest in what we Americans may be able to contribute to this process, particularly in the area of our perspectives on the law.

Judge Kevin Burke is correct in noting that economic forces are driving change in China. China's leaders know their country is now a world economic power and acknowledge that in the economic sphere China needs some semblance of the rule of law if it is going to thrive. But China is worried about the implications of such change, even if the change is controlled and modest. Students of Chinese history and its culture who are aware of the multi-faceted nature of the Chinese character know that these concerns are not unfounded. Those in power, if they want to retain power, have reason to be concerned about the genie getting out of the bottle, even with modest reforms. If the rule of law genie does get out of the bottle, even if it is limited to the economic sphere, it could easily become uncontrollable. The rule of law may spread to other areas of society such as political freedom and human rights, threatening the established power structure.

Nevertheless, as noted earlier, there is a hunger in China for Western ideas, especially American ideas. I can illustrate this point by telling a joke that I heard in China. The joke goes as follows: There are five people on the Titanic, the ship is sinking and the captain must convince all five to jump overboard. The five passengers are Russian, French, Japanese, American, and Chinese. The captain first approaches the Russian and tells him that the People's Party says it is his duty to jump. The Russian immediately jumps overboard. The captain next approaches the Frenchman and says, "Oh, you French dive with such grace and style. Would you be willing to show me your diving style and skill by diving off the side of the ship?" The Frenchman smiles, doffs his clothes, and dives off the ship. The captain says to the Japanese gentleman, "Japanese family tradition dictates that in these circumstances you must jump." The Japanese gentleman willingly jumps off

the ship. The captain now approaches the American and says, "Don't worry about jumping overboard, you're insured." The American jumps. Finally, the captain approaches the Chinese gentlemen and says, "See, the American jumped, you should also jump." The Chinese gentleman smiles and willingly follows the American overboard.

I believe that the Chinese are interested in any substantive ideas we are willing to share with them. They have an appreciation of what we have achieved as a society. But they are concerned about what change may bring. Thus, they are proceeding carefully, with deliberation, and in ways that are often difficult for us to understand. It is also apparent that whatever changes they will make, they intend to do them on their own terms.

We all know that we face significant competition from China, but I left China with an understanding about what gives us a competitive advantage—our freedom. Despite all the energy, intellectual engagement, and overwhelming manpower that I saw in China, I believe the United States can thrive in the face of this challenge. The reason is that the current government structure in China still requires most of the people to confine their thinking to specific and often isolated silos. Thinking still tends to remain too confined. China does not have the intellectual freedom and exchange that we have. If we maintain our freedom and ability to think outside the envelope and be innovative, we will do fine. Because of the freedoms we enjoy, we have the ability to periodically reinvent ourselves in order to meet changing circumstances. It is an advantage we must work to preserve.

Recently, I had an experience that demonstrated how change may occur as the unintended consequence of what appears to be a modest innovation. I have done considerable work in the area of privacy and access to court information. I recently helped to organize a conference on this topic in Williamsburg, Virginia. This is a biennial conference and was the sixth in a series. The most recent conference was the first time that we had a panel of foreign experts addressing us on the topic of privacy and access to documents. We had representatives from China, Spain, Russia, and Canada. The Russian panelist was the Court Administrator of the Russian Federation Highest Arbitrage Court. He appeared by interactive television. The court administrator was asked about public access to his court's documents. He smiled and said, "Let

me show you." He said that documents from his court are on the Internet, then he brought up his court's website. I was fascinated. The website looked very similar to many of the court websites we have in the United States. In fact, I would not be surprised if the format was borrowed from one of our systems.

The next question was whether this website was limited to the commercial court or available for courts of common jurisdiction. Did Russian criminal courts and the constitutional court provide similar access to court documents? The answer from the administrator was an emphatic no. But as I sat there I thought about the genie-getting-out-of-the-bottle analogy. How will it be in Russia once members of the legal community have become accustomed to such ready access to the law in the commercial area? Will they demand similar access in other areas of the law? Now, I am not so naïve as to believe that such access will develop soon. I never underestimate the ability of an autocratic mind to figure out how to keep things under control. But change can come as a collateral result of what I saw on that website. As I saw that website with its ready access to Russian commercial court cases, I wondered how long it would be before Russia's legal community would demand similar access in other areas of law.

Finally, I will touch on one facet of the recent visit to Minnesota by four Kyrgyzstani judges that I hosted last month. There is one particular panel presentation with which I am especially pleased. For me, it is important that government officials, including judges, understand and appreciate the role of a free press in supporting the rule of law. Therefore, I set up a panel of journalists, a media attorney, and a public official subject to press scrutiny.¹ The panel discussion was held at the Minnesota Judicial Center. I insisted that it be in the Judicial Center in order to send the message that in a free society, government officials are not afraid to invite the press into their own domain. I thought this would be a meaningful symbolic gesture.

The panel discussion was lively and candid. I was challenged by the panel on several points. A significant exchange occurred toward the end of the session. In addition to

1. The members of the panel were Elizabeth Stawicki of Minnesota Public Radio, Dane Smith of Growth & Justice and former capitol reporter for the Star Tribune, Mark Anfinson, an attorney for the Minnesota Newspaper Association, and Minnesota Secretary of State Mark Ritchie.

the panelists, I had invited a local columnist. I informed the columnist of the nature of the meeting and had given him some indication of my objective. After the panel discussion ended, I asked the columnist whether he had any comments to add. The columnist pulled out an article by an international group highly critical of the Kyrgyzstani judiciary system. The report concluded that the judiciary had failed to be a neutral arbitrator because of political influences. It went on to note that these political influences stemmed from the legacy of the Soviet autocratic rule that had dominated in Kyrgyzstan for so many years. The tension in the room was very evident, but the Kyrgyzstan judges to their credit, attempted to address the question. The result was a meaningful dialogue that ended amicably. Two days later there was a very thoughtful and well-written article in the newspaper in which the columnist reported on the meeting.² The article was translated for the Kyrgyzstani judges and they were pleased with the even-handed and fair manner in which the article was written.

Before the media session, I had two quotations translated into Russian. I thought the quotations would convey the point that I wanted to make. One was a quote from newspaperman William Allen White: “[Y]ou can have no wise laws nor free enforcement of wise laws unless there is free expression of the wisdom of the people—and alas, their folly with it. But if there is freedom, folly will die of its own poison, and wisdom will survive.”³ I told the Kyrgyzstani judges that to live in a society governed under the rule of law, there has to be free expression by the people. If there is free expression, foolish, unwise, and dangerous ideas will die of their own poison; but wise ideas will thrive.

The second quote was from Mark Twain. Twain wrote it in response to criticism from British poet and culture critic Matthew Arnold who, after visiting the United States in the 1880s, was sharply critical about the American people lacking the discipline of awe and respect, particularly for their betters. Arnold was particularly critical about the role of the “funnyman” in American society. He thought it was a national

2. The columnist was Rubén Rosario of the St. Paul Pioneer Press. See Rubén Rosario, *Kyrgyz Delegation Gets an Earful from Free Press*, ST. PAUL PIONEER PRESS, Oct. 24, 2008, at 1B.

3. William Allen White, *To an Anxious Friend*, EMPORIA GAZETTE (Kan.), July 27, 1922, reprinted in WILLIAM DAVID SLOAN & LAIRD B. ANDERSON, PULITZER PRIZE EDITORIALS 25 (2003).

misfortune. Arnold was referring to Twain, the newspaperman, social critic, and author, as being the premier funnyman who was a national misfortune. In response, Twain wrote the following: "A discriminating irreverence is the creator and protector of human liberty."⁴

I indicated to the Kyrgyzstani judges that the most important words in this quote were "discriminating irreverence," and that a discriminating irreverence is not cynicism but a healthy skepticism. If a free society is to survive and flourish, there must be a role for those who are skeptical, and as painful as it is for those who are in power to endure this discriminating irreverence, it is the creator and protector of human liberty. I think the judges from Kyrgyzstan learned something of real value from this experience. I am pleased to say that upon their departure, one of the leaders of the delegation was heard to say, "Their [Minnesota's] judiciary is truly independent."

I have attempted to provide some practical perspectives to use when explaining the rule of law. I am very fortunate to play a role in our government and hope I have provided some guidance on how to explain the essence of this marvelous system. I will finish with one final thought. We just went through another revolution—an election. In the next few months and years we will once again be attempting to reinvent ourselves. Opportunity is on the horizon. This time of change will give us a chance to further the principles that support the rule of law in our country and the world. We must prepare ourselves to seize this opportunity while it exists.

4. Richard Lacayo, *The Seriously Funny Man*, TIME MAG., July 23, 2008, at 47 (quoting Mark Twain).