

PANEL #5: THE REFORM OF RULE OF LAW, HUMAN RIGHTS, AND ECONOMIC DEVELOPMENT

In spite of the economic growth achieved in the region, the immense poverty and the extreme gap between rich and poor have prevented the proper development of Latin America. Reforms spurring growth and the rule of law have not been able to close this gap, and, in some instances, the rule of law seems to be rather indifferent to the causes of social justice. With disturbing frequency, reform initiatives that promote health, education, the environment, and the satisfaction of other basic human necessities have not been able to complement or further economic development. The goal of this panel was to explore and attack these indifferences and to foster a dialogue between those who promote the growth of economic development and those who defend human rights.

PANELISTS

Dr. Carlos Ponce Silén (Facilitator), Director, Consorcio Justicia Asociación Civil (Venezuela)

Dr. Daniel Funes de Rioja, Founding Partner, Funes de Rioja & Asociados (Argentina)

Dr. David Lovatón Palacios, Former Director, Instituto de Defensa Legal (IDL) (Perú)

Dr. Jaime Vintimilla Saldaña, Executive Director, Centro Sobre Derechos y Sociedad (CIDES) (Ecuador)

DRA. MACARENA TAMAYO-CALABRESE: Good morning and welcome once again to the second day of this Conference of Economic Development and Rule of Law in Latin America. The topic of the fifth panel is “The Reform of Rule of Law, Human Rights, and Economic Development.”

Our panel moderator will be Dr. Carlos Ponce Silén, who is Director of the “Civil Justice Association” consortium. Dr. Ponce has a Master of Arts Degree from Tufts University as well as a Masters in Environmental Law from the Vermont School of Law, graduating cum laude. He obtained his law degree from the Catholic University of

Andres Bello [Venezuela]. Dr. Ponce Silén has more than fifteen years of professional experience in political analysis involving environmental justice and Latin American economic, social, and sustainable development. He has conducted research and written extensively regarding Latin-American political and social behavior. He is a professor at the Central University of Venezuela.

Our panelists today are Dr. Daniel Funes de Rioja, founding partner of Funes de Rioja and Associates. As a lawyer, he specializes in labor law; as a consultant, he works for numerous companies. He is also the Head of the Social Policy Department of the Unión Industrial Argentina. Dr. Funes de Rioja is also the Director of the Center for Corporate Labor/Employment Studies, which has ties with various Argentine MBA schools.

We are also joined by Miguel David Lovatón Palacios, who is a former director of Perú's Instituto de Defensa Legal [Legal Defense Institute]. He obtained his law degree from the Pontificia Universidad Católica del Perú and has been a professor at this university since 1992. He is the Director of Projects and Executive Board Member for the Legal Defense Institute. He is also an author of various publications regarding judicial reform, justice access, human rights, and military justice.

Finally, we have Dr. Jaime Vintimilla Saldaña. Dr. Saldaña is a professor for the University of San Francisco in Quito, Ecuador. He is the Executive Director of Centro Sobre Derechos y Sociedad, CIDES (Center of Law and Society)¹, and the Executive Director of the International Center for Conflict Mediation for Ecuador and the Andes Region. Dr. Saldaña also received a diploma in Conflict Mediation from the University of Santa Maria in Chile.

DR. CARLOS PONCE SILÉN: First of all, I would like to thank LexisNexis for providing this invitation and for having the initiative to organize this conference, which involves topics that are often disregarded by lawyers when discussing economic development issues. These discussions often ignore human rights and democracy aspects, a tendency in our geographical region when trying to analyze the Latin America socio-political-economic reality.

I have an interesting role today, to advance and explain a number of concepts, to share my experiences with you, and to moderate this excellent panel of experts with good friends and distinguished colleagues who have been working for countless years within the area,

1. For further information, see <http://cides.org.ec/cides>.

sharing experiences, and working beyond the traditional exercise of the legal profession. These individuals have focused their professional careers towards “real justice,” towards the building of democracy, towards the strengthening of labor union sectors and union rights, in one hand, and in the other hand, towards the strengthening of judicial reforms and towards the utopia of democracies based on a foundation of human rights. Obviously, since this journey began a number of years ago, one gets excited when seeing good starts and continued progress.

Fifteen years ago, we were able to see that Latin America was transforming into a region rich in democracy, where dictatorships were losing their appeal and legitimacy. There came a moment when Cuba was the only authoritarian system in the region, and all the other countries were really heading towards an improvement in their democratic systems, towards a fundamental respect of human rights, and towards efforts to establish rules for democratic interplay in each country in the region. Positive examples could be seen in Chile, Brazil, Uruguay, Costa Rica, the Dominican Republic, El Salvador, México, and Argentina. Given the positive changes that were occurring, one felt that Democracy’s time had arrived to the region. Unfortunately, this enthusiasm was momentary and fleeting. Despite the number of different democracies that showed signs of democratic strength and improvement through time, as in the case of Uruguay and Chile and obviously, in the case of Costa Rica, we are concerned that, in other countries, the rule of law and the availability of liberties is limited or is being limited; a terrible black cloud looms over the region.

From these circumstances, the organization of which I am a member, the Development and Justice Consortium, has been trying to set up footholds for the education of democracy and to generate democratic participation and dialogue within our countries and within the other countries that have allowed us to enter. This has been a systematic endeavor that has had many ups and downs, but it is an effort and a path that we all need to follow.

With the ten minutes that I have, I want to bring about a sense of urgency and necessity to this conference given that the majority of the conference’s participants are lawyers from the different countries in the region. I want to talk a little about human rights, state reforms, and economic development based on the point of view of the administration of justice.

The rule of law forms part of the foundation, the base, the pillars of a country’s democracy. This means having a system of liberties and a system of efficient justice; an effective, accessible and independent institution that can act as the guarantor of checks and

balances to competing powers. This is a struggle that has taken centuries. It is a continuous struggle that each country has gone through in order to reach justice in a variety of scenarios, a struggle that is not really that easy to win. It is justice that requires the congruence of a variety of different factors in each of the countries, a congruence that has much to do with the existence of real democratic-minded individuals who are willing to submit to a system of controls. A democracy without human rights, without liberty, without the rule of law, is not really a democracy. The possibilities of economic development, without democracy, are at the mercy of the whims of the populist ruler, of the tyrant, who will highjack power, the state, the government, and ultimately, the nation. Unless there's a possibility of having a system of liberties, having the enforcement of human rights, and having a functioning judicial system, we leave the state at the mercy of these populists, who are, once again, looking to scavenge the entire region once again.

As we can observe within the Third Article of the Inter-American Democratic Charter, it is essential for a representative democracy to respect human rights as well as fundamental freedoms, to have a process to obtain and to exercise power within the norms of the Rule of Law. It is also essential that elections be conducted in a periodic, free, fair manner based on universal and secret voting, expressing the will of the people, the plural influence of political parties and organizations, and the separation of public powers. If we apply these criteria to these "badly labeled" democracies that were created due to of populism in the Andean Region and now in Central America, we know that they do not really fulfill any of the criteria but the one of carrying out periodic electoral elections. So those democracies are just machines that carry out elections, but those elections are not free, are not independent, and do not really usefully enhance economic development within those countries.

It is a perverse cycle of populism and personalism in the region, a region that has over 500 million people, where 100 million live on less than \$1 per day, where 230 million people live on less than \$2 per day. This region deserves the end of this kind of poverty, but this can only be achieved with real democracies that have systems for checks and balances, where each one of the components of democracy has a role without overreaching their exercise of power. In terms of human rights, we see that the region is full of inexplicable situations of violence, inequality among certain groups, inequality against women, violence against indigenous groups, violence against unions, against women, children, the young, the disabled, and people of diverse sexual orientation.

Latin America is still a region where we haven't really moved forward beyond the obsolete criteria of civil and political rights. We have not really reached the stage of recognizing universal human rights within our region such as universal economic guarantees, housing guarantees, the right to health, the right to safety, and the right to assemble. These rights have emerged and become established over the years and they are now are fundamental rights; one right being recognized without the others doesn't really make sense. Our region and its institutions are in crisis. Its institutions have lost their legitimacy both at a national and regional level. We are preoccupied with an OEA that is inflexible and incapable of bringing about a regional leadership that will avoid creating conflicts. We see how the Inter-American human rights infrastructure is systematically under pressure due to some leaders of the region who do not want to accept that they are living within a region where they do have collective responsibilities and where there exists a human rights charter that these leaders have to respect. We have vigorous and strong civil societies, but they are ones that are every day subject to greater pressures, such as the legislative actions in Perú and Venezuela, the executive actions in Colombia against organizations in civil society, and the actions by violent groups in Colombia that prevent groups in a civil society from taking and wielding power against abuses of power.

The concept of democracy seems easy to grasp, but in reality, the concept is diverse, complex, and very difficult to accomplish. It requires a systematic effort, systemic reinforcement, and time commitments of every single person, every single citizen, every single member of the Academy and labor union associations, and those who want to wield power in these countries. An interesting passage called my attention: "Democracy and justice are intimately intertwined." The fortune of one is the fortune of the other; justice is much more than a mere judicial concept, because it acquires political dimensions. The concept of justice expands in a political dimension, which is in contrast with its judicial formalization and its institutional structuring.

It is fundamental to come to think that the process that creates a functionally and economically independent judicial system, that places the judiciary in a position to control the abuses of the other branches of the state, that enables the judiciary to be regulated by these other branches, is a task requiring serious integration efforts and is not an effort to retrench judicial power or to establish judicial privileges. Rather, the process is an effort to strengthen justice, to come to the aid of those people that are left three, four, or five years without access to justice.

In the case of my country, Venezuela, freedoms are based on the ability or the will of the citizen or the private sector to submit, to surrender, to kneel to the established powers. In order to start out as a businessman within Venezuela, you have few opportunities. Similarly, as a lawyer, you submit or you are broken; there are no other opportunities. If you submit and accept the rules of the tyrant's game, you can function and practice comfortably. I base these observations from a study made by my good friend and member of the Consortium, Antonio Canovo. In many countries, the petitioner in administrative proceedings wins over the state in 50%, 60%, 70%, 80%, 90% of the time. Dr. Canovo examined 6,527 administrative proceedings in Venezuela and found that from those 6,527 cases, the petitioner only won once and the rest were won by the government; if you decide to practice law in Venezuela, you will lose against the state. And when a petitioner individual actually wins, the government will concede that it lost, but the victory will be moot because it will refuse to pay.

In another example of the legal conditions in Venezuela, in my case, a couple of years ago, I asked for a constitutional interpretation of a particular law at the Supreme Court of Venezuela. Rather than taking my petition as asking for an interpretation of the law, the justices took it as asking for a nullification of the law. The Supreme Court nullified the law by analyzing this particular law and interpreting other laws that the judges decided to interpret *sua sponte*. The Supreme Court in Venezuela is not supposed to examine the decisions by lower courts, as stated in the Venezuelan Constitution. But since everything is decided by one person, the Supreme Court of Venezuela was converted to a fourth level of appellate review. You, as lawyers, can win on first instance, win on appeal all the way to the Supreme Court, and when you think that you have won on the merits, the Supreme Court comes out and decides that they can review the case a fourth time because they have a self-imposed right to review anything because they are a constitutional court. However, that is not what the legislation states and that is not what the Venezuelan Constitution states, but this type of judicial review has been ongoing for the last five years.

This is how Venezuelan jurisprudence is conducted these days. One has to obtain divine inspiration to understand what's happening with our profession. No justices are insulated and protected from external influences, not even the magistrates. There was the case of Magistrate Velazquez Alvaray, who was a preeminent and well-respected magistrate aligned with the party in power, and who gave, in one instance, a decision counter to the President of the Venezuelan Republic. He is now living in Spain because he is afraid, he is frightened for his life because the parliament decided that, as a result of

his decision, he was to be removed from his position. When top-level magistrates do not have any job security in their positions, you can imagine the level of job security that the rest of Venezuelan judges might have. When you see this happening, you know that you are looking at a country devoid of the rule of law, where violence rules instead.

Recently, a friend of mine who is a priest from Apure called me and told me that seventeen young people were killed last week by governmental paramilitary groups, groups within the Venezuelan government. The Venezuelan government controls two types of violence: the official violence arising from the armed forces and the unofficial violence arising from these paramilitary groups who are making their own justice. Seventeen young men were killed last week and nobody became aware of these killings at the hands of these death squads.

Lists have been created that prevent members of the opposition from obtaining jobs and from obtaining access to facilities. There are no judges that will go against the creation and use of these lists. Furthermore, judges are subject to review proceedings by the government, when it is decided that these judges have not complied exactly with what the President of the Republic ordered.

There is also an issue of budgetary allocations by the government. In the past, we have had a budget allocation for the judicial system of 0.2% of the government budget, and for fifteen years we have professed that a budget allocation of at least 2% was needed to improve the situation in the judicial branch. After all this time advocating for these changes, we now can say that sometimes you need to be careful what you ask for because it just might be granted. The Judicial Branch presently receives 2.3% of the governmental budget along with additional set-asides, but justice these days in Venezuela is worse than forty years ago. We still have the same number of judges as forty years ago, and it is impossible for lawyers to freely practice their trade. A lawyer friend of mine told me that he had clients that remained loyal to him and continued to retain his services even though the clients knew that he was going to lose their case regardless.

We can see how democracy in Venezuela is shaped by external perceptions of what democracy should be and that these perceptions have helped change what the rule of law means in Venezuela. I'm very sorry for only being able to talk about Venezuela, but this is my country, and this is the country about which I have the most direct knowledge. I do not dare comment on any other manner about the rule of law in Venezuela, and that's why we have some other speakers who can share their experience from a different point of view.

When a study analyzed the rule of law and justice in Venezuela, the study indicated that the rule of law index dropped from 29.8 in 1998 to 9.2 at the present time. This score might be even lower if it were not for the benefit of the doubt assumption that Venezuela has a political process. We can see that there are no rules of play, and we have let who I call “the clowns” control the system. They are exerting their will in such a manner that everybody else is laughing at their bad clown act.

To overcome this state of governance, it will require a systematic effort coming from all civil society, from the unions, from the political and professional associations, from all the living forces in order to be able to stop what’s happening so that the example of Venezuela allows other countries to pay attention to their actions.

I am now going to show you a sequence of images to disprove the myth that all Venezuelans who are in opposition to the government come from the lower classes. My grandfather emigrated to Venezuela from Puerto Rico. He moved to Venezuela in order to work as a laborer within the oil industry. My other grandfather came from the Canary Islands to Venezuela and arrived at a port. He set out walking along the train tracks finding spot work until he found more permanent jobs. He started improving his life standard and now, we are educated sons and daughters of people who came from the lower classes. We are the middle class that has risen in Venezuela. Not everybody who opposes Chávez comes from the upper classes. Actually, there is a segment of the upper classes that supports President Chávez for economic expediency. You need to remember that Venezuela is an oil-producing country that extracts 2.3 million barrels daily at about eighty dollars per barrel.

I have so many images and I’m so sorry that I’m taking advantage of this event to talk to you about this. These terrible images are Venezuela’s potential contribution to all our surrounding Latin American countries that arises from the regime of President Chávez, and that’s why many countries have to pay attention because what is coming to them or what they are already experiencing is similar to the experience that we are now living through in Venezuela. Venezuela has about 24 billion dollars to give to other countries to further its own agenda. Venezuela’s ranking in the world in terms of freedom of speech is number seventy-two, only slightly above Cuba. This is what is happening everyday in Venezuela, and people do not even realize it. Members of unions are killed; seventeen young people killed; fifteen, sixteen thousand people killed due to violent activities; community leaders that show up dead in the morning, community leaders that did

not have any conflicts with anybody but show up dead in the morning. This is the real violence that Venezuela is going through every day.

Venezuela is also one of the most corrupt countries in the world, along with Ecuador. Unless we start working all together in Venezuela, we are going to reach the position of Zimbabwe. We are going through a deterioration process that will leave Venezuela to be a negative influence in the region, especially with those 4,000 AKs that were ordered and the general weapons build-up that Venezuela is creating. So, I'm sorry for having taken more time than I was allowed. I just wanted to give an overview of Venezuela's justice system and this country's treatment of human rights. And if you are interested in a more detailed analysis, you will have it within my presentation that will be distributed to you. There is an analysis of regional legislation regarding justice, human rights and an analysis of the cases coming from the Inter-American Court of Human Rights that relate to the subject of judicial independence. That's why I now pass the floor to Mr. Daniel Funes de Rioja.

DR. DANIEL FUNES DE RIOJA: Thank you very much for having inviting me, as I do really appreciate it.

Much like Emilio Cardenas, I work in the international arena. I'm the executive vice president of the International Organization of Employees and, due to this position, I am the vice-president of the Administrative Council of the International Labor Work Organization.

My presentation will not only have a judicial point of view, but also will have a business perspective in conjunction with the business realities that we live in. I fundamentally believe that the political framework, social context and economic development cannot be separated and isolated. In Latin American countries, we have seen that we can have economic rights without having political freedom, or that we can have political democracy, governability, and a market economy without social participation. These aspects are recurrent processes and themes in these countries. If politicians pay attention more to the third factor, their emphasis is not because they want to create jobs—real jobs and education—but rather, their motivation is partisan and self-serving. From the point of view of a businessman, he has expectations of rights such as property, but in some instances, these business rights and expectations are not maintained. If these social, political, and economic aspects are not addressed in a complete context, it is not going to work.

And I think that in the last twenty years of attempts towards political democracy within the Latin American region, just as

Licenciado Ponce has observed, unfortunately, there are experiences and signals that concern us. Many Latin American countries have not been able to capture and realize these three main factors at the same time. We have been moving towards these goals in the manner of a pendulum, only achieving one or two at any given time. This has permitted the rise of political parties without any kind of real popular representation, a market economy without a market or without transparent and clear rules. And society is always struggling with the fact that it is easier being guided by voter payoffs than by citizenship. And that's why I truly believe that this three-part premise is fundamental. From this perspective, that has ethical, political, and practical aspects, I am going to base my point of view and my experience in this moment. I'm not really going to focus on the issues that Mr. Ponce had already mentioned. However, I'm going to focus mainly on something that is not really original. Like Chesterton said, I have discovered something that others had discovered many years ago. Both at the United Nations Economic and Social Council (ECOSOC) and at the 2005 Summit of the Americas, I indicated that we should have a basic consensus on at least ten principles. Without a doubt, democratic governance belongs within these principles.

In my generation, we cannot avoid the fact that in many of our countries, mine included, we have failed because of a lack of a political party system that worked effectively and that would protect us from the Siren song of authoritarianism. And, fortunately, I am now able to say that although Argentina had three of these periods in its modern contemporary history, the Falkland Islands War put a halt to these authoritarian episodes. Any idea that a military government could be counted on to correct wrong actions and decisions was dispelled. The Argentinean society understood from this war that democracy, despite all its horrors and mistakes, needed to be sought after.

The second of our formative experiences was the hyperinflation of the late 1980s, which showed us the value of macroeconomic stability. Such stability was also beneficial to the poor people because an economic crisis brings about more grave consequences from the economic point of view of the poor. The third Argentinean experience I want to highlight is the 2001 social and economic hyper-crisis. This crisis was not created by chance but rather, we did not really have an answer to the question of the transformation of currency exchange regimes. After the Mexican "Tequila Crisis" and the Brazilian Crisis, it was obvious that we needed to come up with an Argentinean solution, but in reality, many decided not to do anything to prevent such a crisis. After the crisis, a workable solution was implemented, but one that created large levels of social

exclusion, which were inconsistent even with our type of country. No democratic governance should support such decisions, so that is why I think that this is a pretty important point that we have to consider. From this experience it is evident that the independence of judicial power needs to exist along with the recognition of the human rights of everybody without any conditions.

In terms of political parties, I believe that a successful modern country benefits from political party turnover. A mature democracy works because it has become efficient, and if societies are not efficient politically, they become marginalized, which is a good outcome because one of the basic assumptions of a political democracy is the possibility of marginalization. This is happening right now with “apparent” constitutional democracies that are creating weak, faulty constitutions. These actions are akin to digressions, digressions that Carl Lowenstein would consider pathological digressions. These digressions, unfortunately, have become experiences that remind you more of Caesar than a democracy, but with a democratic facade.

The second issue I’m going to point out is that of efficient public administration: the efficient state. I think that globalization generated new contexts. But within these new contexts, possibly, the business world of a market economy has not stated clearly with sufficient insistence that human rights be respected and that the right to property be upheld. In order to create a state, we need everybody to contribute. The state cannot be created in a vacuum, and the state cannot refuse to govern. The efficient state, one with normative rules and good regulation, will attempt to stop corruption. The judicial systems created in our region can be compared to the Tower of Babel if one examines these systems in a normative manner. For example, if you compare the level of difficulty to create and to successfully maintain a small corporation in this region with that of the Nordic or European countries, you will see that it takes two days in Europe and about one to two-hundred days in Argentina.

If you compare the international transparency indexes, it is not an accident that Argentina is lagging. A big and complex bureaucratic regulatory system leads to a higher level of corruption, and we are awash in such corruption. The current state of thinking in Argentina is that you steal, but you only steal enough to still manage. By tolerating this, we have created a state distorted and disrupted by corruption, where the laws we advocate in the market place, competition, productivity, and efficiency, end up being curtailed, derogated. Corruption destroys the market economy because market players attempt to seize the competitiveness of the other market players; these market players want monopolies. We all have a natural tendency to

want monopolies, to want to have competition eliminated from the market. In general, the individual might be trusted to do good and abide by the rules, but a better solution is to oversee and guard the institutions that force transparency in these market systems.

Economic development is the third aspect that describes the functioning of a governmental system. The market economy is the preferred economic system here in Latin America rather than the Cuban and Venezuelan systems, which are based on social capitalism, state capitalism. The socialist economic system has failed famously around the world, catalyzed by the fall of the Berlin Wall. But now, we Latin Americans, we are building twenty years later a social system that the rest of the world has abandoned. We are now arriving at fascism in many of our countries where it ended everywhere else with the end of the Second World War. We are currently building what Eastern Europe abandoned several years later, after the fall of the Wall. We are doing so for a simple reason and I would like to illustrate this with a story.

In 1976, I asked a member of the Argentinean military if the military was going to pull another coup d'état, because the conventional wisdom was that Argentina had a ten-year cycle of military intervention and the last intervention had been in 1966. I told him, "Well, the military is going to do the same thing that they did ten years ago; the military is going to commit the same mistakes." The military officer thought this was an absurd notion since they had other generals in place, and they felt they were immune to committing past errors because of these different generals. This same type of cycle is occurring at a national governmental level, and governments are repeating what was done between 1945 and 1955 and some years later. I am not referring just to the case of Venezuela, which is the instance that is most troubling, but also I am referring to Ecuador, Bolivia, and maybe some other countries that are going through more mitigated, subtle experiences that might come to light, depending on the discreteness of their plans to obtain governmental power.

Next week, I have a meeting with President Uribe of Colombia, which is a complex country that has tremendously serious problems. They are making a great effort, not just trying to create transparency in a system that has been disturbed politically, economically, and socially by drugs and the guerrillas. I read in the newspapers a phrase that worried me, but I do not know if it is true or not. The newspaper reported that President Uribe wanted to modify the Constitution so that he could continue to be reelected. I will tell him in my meeting that he should not do so because we cannot allow for the undermining of governmental institutions and systems just because we

like our current leaders. This would promote what we do not want, that is, institutional distortions. This philosophy should mirror that of the philosophy in the free market.

The market economy has rules, and there are incentives and policies created by governments targeted towards certain sectors so they do not break the rules of a market economy in their favor. This stance strengthens the attitude that once there is a commitment to a market economy, a market economy needs to be maintained. We need to ask for laws and to respect these laws and obviously this presupposes regulatory frameworks that are adequate, transparent, and stable. If we are to characterize Latin America, we like to change rules frequently; we do not give these changes the opportunity to affect the government. We do not allow the time for any of these medicines to be effective.

One of the mantras of the London School of Economics is that there are no good or bad economic models and that the important thing is to apply these models for the necessary number of years. This economic mantra does not coincide with the points of view of many others, but it is worth stating again that the main premise of the London School of Economics view is that regardless of the qualities of the chosen economic model, the important thing is to apply it and maintain applying it. Latin Americans have a tendency for trial and error with such velocity that we will not leave things to function in a normal manner. This wait-and-see attitude is also important because it signals stable investments. Otherwise, one is left with speculative investments in highly unstable markets that force investors to take gains very, very quickly too, because after two or three years, you have no certainty in your profits. Our countries promote not only speculative and unstable investment if we do not have important economic structures and frameworks.

At this point, I want to point out the fifth point of the ten previously mentioned premises, which is the respect of fundamental human rights, and in particular human rights in the workplace. And labor in particular, but why? Because, as you know, we have five principles that we established in 1998 through the International Organization of Labor. Among these are the freedom to organize and to associate—freedom to organize without state interference. I want to say that many of our organizations are situated in countries that have a fascist tradition. Many of our countries have a fascist tradition from the point of view of corporations, where we have union and entrepreneurial organizations which are not independent from the state, and it is important that they be independent. In Germany, the union officer who wants to be in politics enters the political realm and is replaced by another union officer who attends these union duties. In our country,

the union leaders try to be union leaders for life, if possible, and they usually succeed. Then they become congressmen, ambassadors, presidents of football clubs. With all these roles, they do not attend to any of them adequately. Businessmen also cross over to the political realm so they are no longer entrepreneurs anymore. In this society, so attuned to the media, there are many instances when we go to the media, we can say what we think, or we can start saying things that the newspapermen want to hear or what the people want to hear. In this context, it is easy for people to attempt to cross over to these other spheres of influence. Politicians want to be entrepreneurs, and entrepreneurs want to be politicians, union leaders want to be entrepreneurs or politicians, and even sometimes priests want to be politicians. In my opinion, each of these individuals has a specific function in the society and these functions are fundamental. The other day, José María Cuevas, the outgoing president of the Central Empresarial and the president of the Spanish Confederation of Entrepreneurial Organizations, told me, "Daniel, do not make this mistake. Do not go into politics, ever. You have to be an entrepreneur and maintain this role, because when you are seduced by the Siren song, and when you cross that line, what is being lost is the definition of clear societal roles." This also happens with judges, even to those that have distinguished judicial careers. We have media-conscious judges that dictate their sentences through TV, which I consider awful because these judges feel the pressure of the media, because they end up working for the media and not for their personal conscience. These influences are really important to highlight because we are in a very media-conscious society. We see through the media various things: the Pope's funeral, to the recent tsunami, to earthquakes, and even man landing on the moon, and we are very impacted by these images. And why is there such an impact? Because these actions were seen in real time. So that's why we must be careful from the point of view of the different aspects that form the rule of law and justice; the nexus between the media and the rule of law.

Many issues are left to be solved in Latin America: the freedom to negotiate, non-discrimination, the abolition of the forced labor that still remains, the use of cultural aspects and educational systems to create and maintain *de facto* forced labor conditions. I remember the instance when a country abolished slavery by publishing the fact in the "official newspaper," but nobody noticed because nobody reads the "official newspaper" and, moreover, the majority of the slaves were illiterate. Slavery continued *de facto* until it became an international incident, but the fact remains that the abolition was published in the "official Newspaper."

Another serious problem in Latin America that needs to be tackled is the elimination of the most abhorrent instances of child labor. We see this in Latin American streets every day. We see all these little kids working, but not only do we see these children working, we see these children being exploited in all kinds of methods and manners. This is our reality, and we cannot avoid it and forget it. These aforementioned political, societal, and economic principles must be applied to solve these kinds of injustices, and to the extent that we tolerate this exploitation, businessmen will not qualify to be businessmen or even to be citizens.

The protection of property rights and the creation of employment are also fundamental pillars. A society that has youth unemployment indexes two or three times that of normal unemployment and that does not have mechanisms for the creation of youth employment is condemned to have an endemic social illness giving rise to drug use and delinquency. I raise this as an urgent policy matter not because I feel responsible for drug use and delinquency, but because it is incumbent on me to help make the necessary efforts with others or to point the issue out to society for it to solve this problem. Because if we do not solve this problem, we will continue to encounter a “brain drain” by the disadvantaged poor similar to what is happening to the educated youth. We are paying for elementary schools, high schools, and universities that will be devoid of children that have fallen out of the educational system. These alienated children are the same people that arrive at the capital, workers that have very low employment qualification. These unskilled workers help Latin American countries remain condemned towards underdevelopment, rather than helping these countries towards a developed country status.

From the point of view of the labor employment system, the Organization of American States concentrates its efforts on maintaining formal labor systems, which these days have high levels of labor protections. However, the reality is that half of the labor force, but in practicality more than half of the labor force, is covered under the private employment laws rather than the formal public regulations. This part of the labor force lives in an absolute legal informality, without any labor rights or social rights. The formal labor insiders defend their own rights, which in some instances are actually more akin to privileges. The union protections have been extended to the point that some union members can arrange not to work at all, because there is no culture of work here. On the other hand, in the informal working sector, there is exploitation and irregularity. In comparison, the socialist leaning European countries have developed a model of flexible security, a labor system that reaches out and has social effects, by

having employment development, by having employment training systems, which is key. Their philosophy is to make people employable so that they can obtain employment.

There also exists an unemployment benefit system, which is highly accessible to the average worker. Yes, you might contend that Latin American countries cannot afford to pay for such systems, but I would contend that we spend much more in bribes, pay-offs, and employment fraud. This system could provide some type of compensation that could be very high, medium, or low. But a good, efficient, and honest social security and unemployment administration would avoid these large diversions of patronage monies that obviously the politicians need to use because patronage depends on these pay-offs. For this patronage to continue, these politicians would need to be elected on an ongoing basis. A professional unemployment system would do away with this patronage structure.

Education is the ninth pillar, but it is not ninth in importance. As we said before, the success of our nations is based on democratic governance, a market economy, and social inclusion. But the path toward these goals is education. I was born to a generation where the saying in the streets was “Yes to Shoes, No to Books,” indicating a disdain or at least an indifference towards education. However, I assert that the educational road that we have to travel will permit us to access technology, innovation and social dialogue.

I want to conclude with an observation. For the last forty years, I have been listening to union speeches and discussions, and the doctrine behind these discourses is based on class warfare and pure Marxist dialectics, still based on the model of the Industrial Revolution. The effectiveness of these doctrines has changed dramatically, as current labor organization systems reject these schemes of confrontation and embrace cooperation and collaboration. That is not to say that conflict is nonexistent; conflict is normal and expected, but the current emphasis is how to resolve conflict. However, our labor organizers, our union organizers still subscribe to a clearly confrontational agenda. The social dialogue between labor and capital needs to be efficient in Latin America in order to understand globalization, to understand the transformations that the world requires, and to understand the need to live together and resist segmentation, exclusion, and isolation. This dialogue can only be accomplished with respect and deference to the dignity of human beings and to peace.

PONCE SILÉN: Thank you very much, Dr. Funes. Now it is time for Dr. Lovatón Palacios to provide some words on democracy in Perú.

Before he does, I would like to preface his discussion by stating that democracy in Perú exists due to the efforts of a number of democracy-minded individuals who were members of various organizations from Peruvian civil society, such as the Instituto de Defensa Legal [Legal Defense Institute].² These individuals fought for democracy without regard to their lives, their personal freedoms, or their dignity. They were attacked by the government-backed press and by the Fujimori government, who launched a systematic attack against NGOs. These individuals worked together within the system, making positive proposals, and at the same time, confronting the government and being subject to these systematic abuses.

One of these individuals is my good friend, Miguel David Lovatón Palacios, who is not only a brilliant professor within the academy, but also a permanent fixture in the world of NGOs, promoting changes, promoting solutions along with changes. For example, he would criticize certain actions that weakened liberty rights within democratic processes and, at the same time, he would sit down with the judiciary to collaborate and provide his support for the strengthening of the judiciary and for the establishment of clear norms. He has been working on the rescue—the strengthening—of justice on Perú, trying to provide the judiciary with the necessary power so that it is not a third rate, diminished judiciary. He has been working in many of these activities through the Instituto de Defensa Legal. It is an honor for us to have David Lovatón Palacios with us.

DR. DAVID LOVATÓN PALACIOS: Thank you, Carlos. You have set the bar very high and I hope that my presentation will not disappoint, but I will try my best to reach that level. Good morning, everybody.

As Carlos was mentioning, I am a member and was a former director of the Instituto de Defensa Legal, an institution that during the last twenty-five years has been working for democracy, human rights, and Rule of Law in Perú. The Instituto has a consortium with the Pontific Catholic University of Perú called Justicia Viva [Justice Alive], whose task is to promote changes in the judicial system using civil society as the forum of change. I wanted to emphasize the importance of institutions like mine to be in front of you at this event organized by LexisNexis, talking about human rights. I was commenting to Carlos Ponce that this occurrence could not be imagined twenty years ago, that in front of lawyers and businessmen,

2. For further information, see <http://www.idl.org.pe>.

an organization that defends human rights would be talking in front of judges and other lawyers regarding human right topics. It is without doubt a step forward and it is sound judgment that LexisNexis would be concerned with the relation that that the Rule of Law has with the protection of human rights.

I believe that yesterday's speakers, along with Dr. Funes, have laid out and explained the intense linkage between democracy, the market economy, and human rights. I would like to start the discussion with a famous story from Perú. I don't know if it exists in Argentina or in other countries. A couple of businessmen assess the consequences of a recent coup d'état. One asks the other, "How is business?" The other replies, "Well, business is business as usual. I am now doing business with the new dictator." I believe that Latin American democratic thinking has undergone important advancements away from this kind of thinking, and the presentation by Dr. Funes clearly describes these new propositions. I am going to ask him to travel to Perú to educate business leaders and labor leaders about this new way of approaching democracy.

I also want to mention that just as the treatment of human rights has evolved, much in the same way do the organizations concerning and advocating human rights need to evolve. It is obvious that the Latin American human rights community needs to transform itself and evolve towards new human rights topics, and to not remain focused on history, on the terrible human rights violations carried out by the dictatorship and on the grave internal armed conflicts that our countries lived through. At this point in history, there are no internal armed conflicts in Central or South America, with Colombia being the unfortunate exception. In Perú, as many of you know, we had twenty years of violent armed internal conflict that according to the Truth Commission, killed 70,000 people. I propose that these armed conflicts are part of the past and now we are in the process of working these issues through the judicial process. We hope that the government of Chile will cooperate and extradite ex-President Alberto Fujimori back to Perú in due time.³ These extradition processes are part of the evolution that we have been talking about in this conference.

In the brief time that I have I would like to develop two ideas. First, what are the dangers and challenges that the human rights community believes exist in the topics of democracy, the rule of the law, and human rights in Latin American for the next few years?

3. *Editor's Note:* Alberto Fujimori was president of Perú from 1990 to 2000. He was extradited from Chile to Perú on September 22, 2007. He now faces a numerous charges.

Second, what specific measures or particular issues need to be addressed in relation to these challenges and dangers?

The first risk, which was addressed by Dr. Cardenas, so I will not delve into it much, is this new type of authoritarianism as exemplified by Uruguay's ex-President Batlle and Perú's ex-President Alejandro Toledo. Not really to the level of past authoritarian regimes, this semi-authoritarianism can really be described as authoritarian "temptations," the worst expression of these being the Cuba-Venezuela Axis. However, it is evident that this Cuban-Venezuelan influence does not end at their borders. It is a model that can be quickly exported, has large monetary resources, and has an easy selling point that exploits and capitalizes on the understandable frustrations of the citizenry that cannot obtain basic public services.

I will now develop further these points in the next few minutes. It is evident that this is a latent danger that can grow in Latin America. This is basically a type of authoritarianism that is clothed in a variety of different guises. I insist that the Chávez model is not its only manifestation, and more sophisticated neo-authoritarian models can be utilized, such as using a constitutional assembly to damage and unbalance the equilibrium of powers. Other models could enlist the support of the Armed Forces to resolve social upheaval or the growth of crime, or they could pass laws or administrative measures to restrict or prosecute NGOs that are critical of a regime. In sum, I believe that authoritarianism has developed sophistication here in Latin America. It is not dressed in olive green garbs and boots, but it evidently arrives via elections. It relies on popular mass support and it is imperative that civil society have in mind these new neo-authoritarian manifestations in order to prevent them.

The second factor to consider is the extreme poverty indexes found in Latin America. For example, in my own country, Perú, one of every two people currently live below the poverty line and around twenty percent of the population lives in extreme poverty. And this considers the fact that Perú has been growing in a sustainable manner at an average of six percent per year for the last six years. Even with this economic growth, we have not been able to significantly lower the poverty indexes, and the explanation for this is very simple: both the state and the civil society lack the institutionalization to permit the redistribution of wealth that is evidently being created and gathered in Perú. A contrary example that was named yesterday is Chile. Chile has a socialist government, but it has achieved a democratic regime and a reduction of its poverty by fifty percent, going from a forty percent poverty level ten or fifteen years ago to twenty percent. Nobody is happy that twenty percent of Chile population is poor, but this is,

without a doubt, a significant advancement relative to the overall problem in Latin America. The General Secretary of the Organization of American States, notwithstanding Carlos Ponce's displeasure with the Organization, talks about the concept of an incomplete democracy. Democracy needs to bring about the wellbeing of all the citizens of Latin America, and this is not occurring, as shown by these poverty numbers.

The second and third greatest dangers in Latin America are the increasing lack of security for the citizenry and the growth of organized crime within Latin America. Although my examples are based on South American city experiences, I am sure I do not have to explain them further to our friends attending here from Central America. There are significant problems in Colombia, Brazil, Venezuela, and Central America. These problems affect the citizenry in more than one manner; not only does crime violate citizens' human rights because they can not leave their homes to walk the streets, to go to school, to go to work safely, but it is also a violation of their personal liberty, their physical integrity, and their psychological integrity. These problems usually spur political rhetoric and heavy-handed policies that many times abandon important due process guarantees. And these experiences not only happen in Latin America, but also in the United States in its war against terrorism. It is evident that when any society within Latin America, the United States, or Sweden faces a collective dangerous security problem, this society will react in a very basic and elemental manner, much like what the Peruvians lived through when the government had to deal with terrorism: judges with hidden faces, military tribunals, indictments, and sentencing based on a single accusation of one person against another, grave violations of human rights, and indeterminate stays in detainment centers. These are examples of how society reacts, of the price that society needs to pay for security. But when it is you who need to pay the price, it now becomes an individual violation of human rights. Furthermore, organized crime, drugs, human trafficking, illegal forest cutting, contraband, information theft, prostitution, and child trafficking have all acquired global dimensions and now pose the greatest challenges and dangers to the democracies in Latin America in the next decade.

Other dangers that exist, which my institution and the human rights community are trying to address, are the growing frustrations of the citizenry regarding the breakdown of security services, police organizations, and judicial systems. This frustration has led to people taking justice into their own hands, leading to popular judgment, sentencing, and lynching. We are not talking about a type of valid communitarian or indigenous justice, but rather, we are talking about a

phenomenon of street justice, a collective sense of institutional impotency, where the citizenry believes it is useless to seek out the police, the laws, or the justice system, where the citizenry believes the criminals are set loose, and the police and the justice system have no responsibility and authority because that is how the legal system has been set up. These issues affect the justice systems and security institutions in Latin America and highlight the need for the strengthening of democratic institutions.

The last threat that I will talk about comes from a reaction against private investment, both national and international in character. This is a very recent experience, but in Perú it is emerging and worrisome, arising from an anti-establishment movement here in Perú that has nationalistic tendencies and is actualized by a nationalistic movement led by an ex-Army commander, Oyanta Humala, a friend of a friend of Carlos Ponce. This movement has anti-establishment elements and is likely to create a viable electoral option in the next elections, rising from this dissatisfaction that comes from looking at the wealth of the Peruvian nation and contrasting it to its great poverty. It is important to point out that there is a growing source of social conflict in our country that places the mining and petroleum investments in Perú against the communities surrounding these projects. The communities are mostly composed of native indigenous peoples, who had lived in these areas for a number of years prior to the investment projects. Although nobody is per se against private investment and mineral industry investment, which provide large revenue sources for the government in royalties and taxes, we believe that the government has overreached its position as protector of private investment. There is something wrong in the way the government has tried to stigmatize and demonize institutions such as NGOs, churches, and social leaders who suggest slowing down the process in order to negotiate, to talk, to create environmental impact assessments, and to highlight the fact that mineral exploration brings about risks, not only of environmental pollution but also of [excessive] water usage. Perú will be one of the water shortage "hot spots" in the next few years here in Latin America. The mineral industry uses an inordinate amount of water, and the debate is a fundamental one: what should the water be used for: human consumption, agriculture, or the mineral industry? This is evidently a debate, one that should be resolved by democratic means, and there should not be a stigmatization of social leaders. It is conceded that there will be some social leaders who will have anti-establishment tendencies, but it is also worth mentioning that on the other side, not only are there business leaders, but there are also deeply entrenched establishment power players. With all of these groups vying for their

own agenda when it comes to water apportionment, it is imperative that these various social sectors bring about and resolve these conflicts through democratic institutions in a democratic manner.

In the last few moments that I have with you today, I want to talk about some lessons learned, and some solutions that my institution has brought about. My institution not only investigates the government, judges, and government officials, but also formulates solutions and plans of action. It is not the first time, evidently, that the efficacy of the rule of law and citizen rights can be traced to the ability to provide security to citizens. There are various reform models for police forces such as community policing and local presence proximity policing that have been successful in developed countries and that have been implemented in local places or regions in some countries in Latin America.

As an aside, the Instituto de Defensa Legal has just recently published a regional study called "Police Reforms in Latin America,"⁴ by José Maria Rico and Laura Chinchilla, the actual Vice President of Costa Rica. Both of them are experts on these topics. From the report, it is evident that efficiency is needed in the fight against crime and delinquency, but such efficiency should not be based on heavy-handed measures, because from our perspective, they are extremely inefficient. I will provide an example. Heavy-handed measures are supposed to bring more criminals into jails. That is the assumption and goal of these measures—to place more criminals in jail—but nevertheless, no proposals for prison facility reform and construction have been brought forward. In Latin America, in 2004, the prison system had half a million prisoners over capacity, so the question remains for the proponents of heavy handed, tough-on-crime measures: Where do we put these criminals? One perspective that might be thought about, but is never mentioned, is to eliminate these prisoners so they do not have to be placed in jail, but this is merely a thought exercise and a position that is intolerable when set against human right standards. So if not that, then the onus has to be on police and penitentiary construction reforms. It is imperative, thus, that police reforms should be the focus, and, presently, there is a network of experts and academicians that are examining these topics, that is, the task of deeply reforming police groups and combating police corruption. It is evident that if the citizenry wants to trust and collaborate with its police body, the citizenry truly needs to be willing to trust the police. However, where

4. Jose Maria Rico & Laura Chinchilla, *Las Reformas Policiales en America Latina: Situacion, Problemas, y Perspectivas* (2006), available at <http://www.seguridadidl.org.pe/trabinvest.htm> (follow "Las Reformas Policiales en America Latina: Situacion, Problemas y Perspectivas" hyperlink).

there are high indexes of police corruption, such as is in my own country, in Buenos Aires, and in various Brazilian cities, what kind of citizen collaboration can there be? In Argentina, there is often talk that police internal affairs offices are part of the solution, but a case can be made that this office should be outside and independent of the police. It would also be an interesting measure to create police forces capable of dealing with complex global crimes, which necessitate the specialization of the police force and their officers, but with the understanding that sufficient resources need to be provided.

In terms of corruption, I listened with much attention to the excellent presentation by our colleague, Dr. Funes, and I do agree with him that an “efficient state” is the best means by which to avoid corruption. I would also add a few complementary corollaries to his ideas. We need a civil society that is on alert to acts of official corruption because governmental authorities by themselves do not really reform, and nor do police, unless they feel pressure from the mass media, business, NGOs, and unions—pressure that would demand changes in terms of administrative performance, and simplicity, in terms of transparency. And that’s why it is important that various independent and diverse institutions take on this role: businesses, unions, NGOs, churches. For example, the Catholic Church has stepped up in this struggle for democracy and the fight against violence in Argentina. Professional associations, as well as the mass media have become oversight agents, making sure that governmental monies are tallied up properly, that transparency exists in elections involving higher authorities, and that information related to legislative measure is accessible to others.

Another very important issue for us here in attendance, is the access to high court jurisprudence as Dr. Tabara, the President of the Peruvian Supreme Court, mentioned yesterday. He outlined the way the Peruvian Supreme Court has handled this issue of access to the high court legal system and how the Peruvian Constitutional Tribunal has really moved forward in this respect. I do believe that this is a very important measure when considering the factors of the rule of law.

When talking about the advancement of economic, social, and cultural rights, these attempts not only need to be progressive, but also need to be sustainable, and I want to share with you some insights regarding this. In the Free Trade Agreement negotiations between Perú and the United States, the U.S. negotiators were pressured by Congress, in general, and the Democratic Party, in particular, to add two different amendments related to labor rights and the environment. In particular, the U.S. wants to address the illegal cutting of mahogany wood, also known as “red gold,” because it is a very expensive and highly sought-

after wood; this has led to excessive cutting and deforestation in the Amazon rainforest. This is an example of how sustainable development requirements and market forces have pushed for the creation of better standards for labor rights, and environmental rights to protect our natural resources.

In my last three minutes, I will finish with two thoughts. When implementing justice and the rule of law within Latin America, the multicultural identity within our countries needs to be taken into account. This multicultural reality is an important component in countries like Guatemala, México, Perú, Bolivia, and Ecuador, where much of the population has descended from indigenous ancestry. A similar experience exists in countries with an African-descendant population such as Brazil, the Caribbean, Colombia, and Venezuela. In all of these countries, the administration of justice and other basic public services are unavailable to these groups. If we want democracy and a more inclusive state, with better economic development and lower poverty indexes, it is evident that we need to incorporate these marginalized populations in a progressive manner into the free market, the government, the justice system, community safety, and education.

The same issue occurs with women, as shown recently in an extraordinary study by the Inter-American Commission on Human Rights.⁵ Latin American women are subject to double victimization, as they are also victims of a number of types of violence, are not protected by the police force, and are not able to access the justice system. This is a report that should be understood by all of the countries in the region, laying out a series of benchmarks and reference criteria to be followed. It is imperative that countries follow the recommendations of the Inter-American Commission of Human Rights, and that they obey the decisions from the Inter-American Court regarding human rights. It is also important that lawyer bar associations, business organizations, and union organizations have come with their own views and action plans on the subject of basic human rights. In a case that is going to be decided soon, the Inter-American Court is going to resolve a very important lawsuit that is being brought against Surinam,⁶ involving precisely these indigenous communal rights over land with existing or potential mining or oil exploitation. For the first time, the court is

5. *See generally* *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II. doc. 68 (Jan. 20, 2007), available at <http://www.cidh.org/pdf%20files/Report%20Access%20to%20Justice%20Report%20English%20020507.pdf>.

6. *See generally* *Case of Saramaka People v. Suriname*, Judgment of Nov. 28, 2007, Inter-Amer. C.H.R., Report No. 76/07, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

going to have to involve itself with setting human rights standards when it comes to land exploitation and indigenous human rights.

In summary, a large segment of the Latin American population has no legal existence, that is, it has no access to or representation in the established legal system. My country, Perú, has twenty-eight million people, but there are one million Peruvians who do not have any kind of government identification, and therefore, they do not exist in the eyes of the law. They cannot access any governmental services and cannot carry out any legal transaction; legally, they do not exist. And I think this happens as a general rule through out Latin America, in Central America. This is a very prevalent occurrence in the Andean Region, where there is a high rate of people with a lack of government documents. The massive and aggressive campaigns to provide people with documents and legal status have not been effective enough for this population.

I finish off with this thought: The justice systems in Latin America have been historically criticized for their inefficiency. As a first step to combat this inefficiency, it might well be that it is an exercise in trying to figure out what subject matter should be handled by the system of justice and what should be handled by private entities and by administrative courts. And of those cases that are progressing in the justice courts, which ones should remain in the courts to be resolved and which ones should be thrown out. Tackling these two issues could become part of the overall strategy to increase the efficiency of the state, as our colleague, Dr. Funes, proposed in his presentation.

PONCE SILÉN: Thank you very much, David, for your excellent, detailed, and illustrative presentation, and the concrete recommendations that you provided. We have grown to expect this kind of excellence from you. And now, with us, we have a great friend, a great colleague and a brilliant academic, Jaime Vintimilla Saldana, the executive director of the Centro Sobre Derechos y Sociedad, CIDES. Thanks to Jaime Vintimilla Saldaña, the use of alternative dispute resolution has grown tremendously in Ecuador. Mediation and arbitration have been applied to all aspects of Ecuadoran life, implemented in rural areas, in the countryside, in indigenous areas, and even in the cities, thanks to people like Jaime. Through countless years, Jaime has carried the flag and led the fight for human rights, judicial reform, and the direct participation of civil society in the construction of democracy. So I pass the floor to Dr. Jaime Vintimilla Saldaña.

DR. JAIME VINTIMILLA SALDAÑA: Thank you, Carlos.

There are three main topics that I want to start addressing in my presentation. First of all, I want to comment on the threats to democracy that we are experiencing in my country, Ecuador. For the last ten years, we have been living through a rule of law that is deceptive and false. And for the last eight months,⁷ we have been living through semi-authoritarianism, which may be further enhanced on September 30, 2007, with the Ecuadoran Special Constituent Assembly elections, where 130 delegates will be elected to rewrite the Constitution.⁸

Second, Latin American society is vehemently demanding changes from within the State, but it seems that the State is just as vehemently refusing to pay any attention to these demands. On the other hand, the State is demanding changes from society and from the international community. I do believe that the State, the local society, and the international community need to complement each other in order to achieve real reforms within the rule of law, economic development, and the implementation and administration of human rights.

Third, the rule of law is changing around the world and in Latin America. We can observe, and my conference colleagues have said, if I can summarize their thinking, that we have passed the stage of having a monolith State institution that creates law, and moved to a system of legal pluralism, a convergence of diverse judicial systems and legal theories. We also have the possibility of drawing from different legal sources that were not available or were merely considered referential but that now are being used as precedent in specific cases. For example, I think that normative law in Latin America is disappearing little by little and being replaced by argument- and persuasion-based law, as a type of hybrid between common law and civil law: a Latin American system. To my comparative law students, I sometimes posit the idea that three legal systems exist, the

7. *Editor's Note*: On April 15, 2007, Ecuador's left-wing President Rafael Correa won 82% of the vote in a referendum to change the Constitution of Ecuador. Background Note: Ecuador, U.S. Department of State, <http://www.state.gov/r/pa/ei/bgn/35761.htm>

8. *Editor's Note*: On September 30, 2007, President Rafael Correa's party won control a majority of the seats for the special Constituent Assembly. See *President Rafael Correa of Ecuador claims victory in assembly election*, INT'L HERALD TRIBUNE, Sept. 30, 2007, available at http://www.iht.com/articles/ap/2007/10/01/america/LA-GEN-Ecuador-Constitutional-Assembly.php?WT.mc_id=rssamerica.

Latin American system being the third system. Within this Latin American system, there are at least three aspects that present complex issues to resolve, challenges rising from the relationships generated between the rule of state, human rights, and economic development.

The first challenge that we have to confront is the challenge of international policy. We have moved away from the nation-state concept to the idea of teams of nations, in various stages of integration. This means that we have moved from a legislative sovereignty that our semi-authoritarian leaders seem to prefer, to a regional sovereignty where rule of law is implemented at this regional level. It is a regional sovereign state that has imposed its rule of law upon a number of nation-state legal norms. What international private law labels as foreign law, ceases to be so, and becomes a local right that needs to be implemented throughout the local legislation. For example, the issue of human rights has brought about a consensus, a generalization of what human rights should look like. This leads to an international implementation of human right norms and then, through the regional sovereign state construct, to a national implementation.

Second, we have a scientific and technological challenge, as David [Lovatón Palacios] and Dr. Funes have already mentioned. Science and technology do stand for progress, but at the same time, they represent extreme risks, mainly for the environment, but also for the survival of mankind in this planet. The emphasis up to this point in Latin America has been economic development and that emphasis lacks an integrated view where ecology and the environment should have a place in the discussion. Presently, we do not legislate for the future but rather, we focus on the present looking back at the past; we should be applying the rule of law not just to the present, but towards the future.

The next challenge relates to the social and economic inequities that exist here in Latin America, and David and Dr. Funes have provided numbers that bear this out. But I will only focus on the Ecuador situation, where 40% of society is not only poor, but destitute, where we find social and economic inequity that is overwhelming. Yet, the global debate is not really about poverty and wealth. The current debate is about the inequitable distribution of resources, which everybody ideally should have access to in a proportional manner. This kind of equality has been accepted by first-world countries, but for those countries at the peripheries of wealth, this equality is a distant concept; a more realistic goal would be for these countries to merely satisfy basic needs. It is important to discuss what traditional economists have always been saying about growth and development, but what is really happening within our countries? The issue then becomes: How are we able to generate a balance between economic

development and the legal system? The legal structure of the Nineteenth Century spoke only about normative law, but nowadays, we have to pay attention to how the legal structure affects social and economic development in societies world-wide and in Latin America.

The next challenge that we encounter arises from the extraordinary and excessive increase in the number of laws, what Dr. Funes described as a legislative Tower of Babel. In Ecuador, since 1830, the legislature has enacted something like 130,000 laws. Currently, 70,000 of these laws are still in force. Despite sophisticated software, we can only keep track of 30,000 or 40,000 of these laws at a time in the computer, but at the same time, we are observing the effects of diminishing force of law. What's happening in reality? Do we really have a more effective rule of law? Without generalizing the situation excessively, the only thing that these extra laws are creating is more injustice; it is a very complex paradox.

The next challenge is that of education. Unless we educate citizens, not only to be lawyers, but to be responsible citizens, our reality will become much worse than what it is presently. In sum, Latin America faces a multitude of human rights challenges and paradoxes that need to be resolved to move forward: the internalization of human rights, the possibility that human rights cease to be the criteria for the protection of the most vulnerable, the incorporation of human rights into legal frameworks in transnational, national, and local judicial systems, and the possibility that these human rights can be claimed by Latin American persons as any other law or norm. Hopefully, these ideas can be helpful because time is of the essence and it is crucial that these three concepts can be complementary, can be constructive, and can make democracy a reality.

But what really is this democracy we are trying to reach? Democracy stands for various mechanisms that provide the possibility for the development of its citizens. If citizens are not allowed to develop politically, we will have a democracy driven by political parties and partisan considerations. We are going to have an indirect democracy; we are never going to have a democracy that helps a human being to find himself. That's why these political prestidigitators, these semi-authoritarian leaders, these semi-disguised authoritarian political actors, take advantage by subterfuge, take advantage of misery, disenchantment, poverty, citizenry low self-esteem, and targeted subsidies that generate a "golden state" in a matter of seconds. This is the danger that we see within our countries. What can we do?

I believe that changes need to occur to the socio-political-legal schemes that we have been talking about. The first change needs to

come from law; law cannot be treated in its pure form. Law needs to be transformed, shaped by the context it finds itself in. I liked the Mexican view of law as presented in one of the previous panels: law becomes part of an inter-disciplinary science where we were able to observe how the rest of the disciplines interact and are affected by law. It is fundamental to understand that because law is continuously encroaching into these areas, we, as a society, are becoming more vulnerable to the manipulation of law. That is why, as law practitioners, we need to expand and coordinate our knowledge into other subject areas. It is fundamental that we do not get stuck in the formalities of law and that we begin to ask whether the purposes and goals of laws are being achieved. If there is poverty and injustice within a society, something is happening with the rule of law, and we need to examine it further. These laws should also be measured and examined through statistics. How is it possible that in a State, which supposedly has the most comprehensive legal protections for society, there are more than a million cases of repressed causes of action? How is it possible that we will have within ten years, three Supreme Courts? How is it possible that in three years, we have had three Constitutional Tribunals? How is it possible that the Consejo Nacional de la Adjudicatura (National Adjudication Council) doesn't really help or foster administrative law, but rather focuses on pushing and pulling levers? How is it possible that 54% of the Ecuadorian population doesn't really have access to the administration of justice? If the rule of law does not address these issues, this legal system concentrates only on the formalities of law rather than a legal system that gives us the possibility of growth. I believe that the rule of law is not simply the application of law, but also has to include the understanding that the rule of law is a broader concept, which might encompass the transformation of law into a constitutional right or the awareness of the different sources of law that comprise the power of the State.

Borrowing Dr. Funes' virtuous circle concept, I have my own circle of eleven points, and I will describe them briefly. First, rules need to be sanctioned by legitimately elected authorities. Our country, Ecuador, is going through a very serious problem of legitimacy. The Constituent Assembly will construct—dictate—a political code that will require a referendum. However, the Assembly wants to set up a legislative branch and a legislative commission prior to the referendum, which is terrible. How can there be legislative action if the Constituent Assembly's work product has not been approved by the people? By the sovereign? By a referendum approval? We do not know where this is going, but this is a fundamental point. This is the point where citizenry and citizens need be recognized by political parties, bar

associations, and universities. If you ask somebody in Ecuador, “For whom are you going to vote?” he will show you 3,300 candidates, and 130 assembly members; we are going to utilize a paper ballot that is about one meter long. The paper ballot looks like bed sheet, a bed sheet that will permit us to sleep during the elections while the uncertainty lasts. This Constituent Assembly is the mother of all the uncertainties, if not the mother of all the battles. We must definitely fight for institutionalism, and I agree with what my friend, Emilio, stated about the four factors that can serve to prevent the undermining of institutions.

I will add a fifth one. First, the prevention of abusive use—the perverse and grotesque use—of the economy and national resources to curry political favor with the population in election campaigns in order to advance political agenda. Second, effective means to check and balance the control of power, something that we do not have here in Ecuador. Third, a means of free communication that is transparent and informative, without which society is in danger: society is in danger that these communication means are mere presidential mouthpieces. Fourth, a pluralist environment, respectful of dialogue and tolerance, without social class-based differences. In Ecuador, our leaders have confused the concept of majority rule with that of pluralistic consensus and the rule of law. These ideals can sound like utopian goals, but if societies do not head toward consensus, majorities can acquire anarchic tendencies, become intolerant, and generate terrible dictatorships. Fifth, the adequate decentralization of the State. Sixth, a change to the mission statement of the Armed Forces so that it encourages democracy. In Ecuador, the Armed Forces have been the arbiter-umpire for all the political conflicts during the last ten years, for better or worse. However, this arbiter role has been transformed in the hands of the President because the Armed Forces have become the road builders, the “builders of the Citizen Revolution.” Seventh, the establishment a culture of jurisprudence. If the rules of the game are not understood by the players, groups can start making the rules as they go along or claim that their rules are the valid ones. If there is no process to understand and explain these rules, then the rule of law is useless when a group wants to intervene against a government’s interpretation of the law. Law will be simply a procedural device, devoid of thinking, understanding, proportionality, reason, or rationality. Eighth, the promotion of a culture of political ethics. Unfortunately, this is another change that the rule of law has to make. It is not true that law is diverse and separate from ethics and morality. In fact, they are always present in law in some amount. But ethics and morality are like air: we do not see them, we do not understand the

concepts until they are not present, and when ethics and morality are not present, we start to asphyxiate. In Ecuador, there exists an unprecedented ethical crisis and this crisis is not solved with the rules of law.

The rule of law needs complementary norms such as ethical principles. When I talk about political ethics, I refer to the various ways in which to understand ethics. It should not be based on utilitarian ethics but rather on teleological ethics with a clear purpose and a doxological ethics that searches for clear functions to obtain the optimal wellbeing. Ninth, the establishment of human rights as a means of efficient international and national safeguards. In what sense? Human rights are not an obstacle for investors; nor are they the little pebble in the shoe of the governing authorities. Human rights convert themselves into criteria for the legitimization of political power. President Toledo already said it. If there is no respect for human rights, where one of the fundamental rights is to have clear and concise rights, then human rights do not exist; this is fundamental. And tenth, we should strive towards an alliance among the State, civil society, and the free market; these entities are not fundamentally incompatible. Why can they not coordinate and implement among themselves something harmonious? I think that I need to finish this presentation. As they say, time is a tyrant. I will finish with this thought: Where is the rule of law heading? Where are human rights heading? Where is economic development heading? What is the law doing? Maybe merging the philosophy of the 17th, 18th, 19th centuries, and possibly the Greek and Roman philosophies, we could declare: *veritas, non auctoritas facit legem*. This means that truth and authority will make a law, and not only the law itself. Thank you very much for your attention.

PONCE SILÉN: Thank you very much for these excellent presentations by Dr. Daniel Funes de Rioja, Dr. David Lovatón, and Dr. Jaime Vintimilla. Unfortunately, time is always a tyrant against the moderator in a panel discussion.

