

2006

Session Four; Development and the Judicial Process

Dale B. Furnish

Recommended Citation

Dale B. Furnish, *Session Four; Development and the Judicial Process*, 12 LAW & BUS. REV. AM. 483 (2006)
<https://scholar.smu.edu/lbra/vol12/iss4/8>

This Symposium Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SESSION FOUR: DEVELOPMENT AND THE JUDICIAL PROCESS

PROFESSOR DALE B. FURNISH

I think it is important to remember that in trade and in law, as in life, the only constants are growth and change. So for those of you who are students here, bless your hearts, you are entering a professional lifetime in which 20 or 30 years from now things will not be as they are today. They will be different and hopefully they will be better. But, also, I think it is very important to remember, as we see difficulties with these things, that the closer people get together, our nations get together, the more friction there will be. I have lived long enough to be wrong a lot of the time. I remember when Canada and the United States, in 1988, put together a free trade agreement and one of the first comments that was made by President Ronald Reagan was, in response to some reporter's question, "Well, so relations will be better, they will be smoother between the U.S. and Canada?" And he responded, "Absolutely not, we are closer but there will be a little more friction. There will be a forum for a lot of political problems and discussion." I think he has been absolutely right.

I see these free trade agreements and the integration of systems as a marriage. In a marriage, you say, "Well who have you got problems with?" Your wife and children. Right, and if you just have a friend, you have a possibility [of friction]. That has been history, first with Canada and now with NAFTA—with Canada, the United States, and Mexico. The frictions, disputes, and controversies have gone up exponentially. I would also give perhaps a look at what might or might not help. I am complying with this industry. I am always trying to say, "Look at the United States as a common market and look at the procedure that this couple of centuries took to get there and some of the strife and the controversy that we had to work out. Look at the European Union." It has been a curse within my lifetime. It has not been smooth and it is still not smooth. But look at the progress from the coal and steel community to the European Union of today. It has certainly changed. It has certainly grown and it will continue to change and grow.

Now, in terms of trying to tie what I want to talk about to what other people have talked about today, I really want to talk about folks and how they make decisions. The way they resolve disputes and controversies and the way they benchmark that with published opinion. Again, I have been around long enough to have gotten some impressions that may or may not be right but they are strongly held opinions. One opinion is that countries can change habits when habits become painful enough and as-

sociated with enough trauma that there is some sort of break and they move on. Now, I have been wrong again. For example, I thought Chili would never change. I spent a year in Chili and I became familiar with Chili's socialist laws. I think that given enough trauma, Chili has changed. Another country that I cite in this regard is El Salvador which had a terrible civil war. I had to actually negotiate an interim peace support in 1994. At least as I travel through Central America, many people may think Costa Rica to be the most advanced society. I think El Salvador is. I attribute some of that to coming out of the Civil War. It was so traumatic. It really opened the country up to change.

I want to focus here on Mexico this afternoon very briefly, but I would at least propose the possibility to you that Mexico has had a terrible time. The 1990s in Mexico were a time of economic disaster. You live close to the border in Texas, but at least what I found in Arizona was that a lot of people are not aware of what is going on in Mexico. I continually tell them that it is the 1930s. This is a terrible economic time. The Mexican society is really decimated by what is going on economically. I think that was true in that it was a time of an assassination of a presidential candidate in Mexico. There was a time when there was sea change in the political system. A true democracy began to open up. It was a time when NAFTA came in. So it was a time of tremendous trauma in the national life of Mexico in the 1990s, and yet I am very optimistic about the changes that are going on in Mexico right now. I think free trade is part of that, and I will just very quickly try to point out some specifics. There are several general examples and a specific example with the courts. You, and particularly the young students in the room, will live to see me proven right or wrong. But I truly do believe there is much going on under the radar in Mexico.

There are changes taking place in the roots of the system that have not produced flowers above ground yet but they will. They are taking root and they will have long term effect. I can mention 1,000 but let me mention just one or two or three or four or five. Mexico has a new bankruptcy law. This is interesting because in the 1990s they had no bankruptcy law. It was frustrating among other things because of the little group called *Batisone*. It consisted of citizens that would go to courts and as all courts dealt with bankruptcy, they would visit a judge. They would say, "We are having foreclosure on Roberto MacLean's house. Roberto is a good guy. He has got a nice family. We do not want you to take his house. Why do not you just not do that?" And the judges would not do that. Now I do not know if that was an oral threat or what went on, but that was the bankruptcy law in the time of great economic distress in Mexico and they were able to frustrate it through the *Batisone*. Now they have reconstituted the bankruptcy law. They put it into the federal court. There is an incipient bankruptcy law growing in the federal district where many of the major companies are incorporated. So you are beginning to get a Chapter 11-like reorganization practiced in each federal dis-

trict. It is really changing, but it is just incipient. Look back in twenty years. But remember the history of American bankruptcy law coming out of WWII. It has really changed.

Competition policy—it is an institution-building proposition. Before NAFTA there was no competition policy. There was a law but it was not enforced. Neither did the Federal Competition Commission in Mexico, and it is beginning to take off. I think if you ask most people in Mexico about the Federal Competition Commission you would get a blank stare. But is it beginning to start? Sure. It is beginning to take effect and it will continue.

The court in Mexico really changed when Ernesto Zedillo, elected President in 1994, set out to change the courts and he did. I will give you one example that I observed. The judiciary in the federal district I think was shameful. There were some world class lawyers—a lot of world class lawyers, but the courts were crummy. The explanation is pretty simple.

The economy has changed that and I think twelve years later, if you spend time in the federal district in Mexico City with the federal district judiciary, you will be impressed. Those are good, good lawyers. A lot of it is simple economics. They are finally paying a living wage. The good lawyers are dedicated. A lot of the corruption is going away and they have had a real effect, but they will have a larger effect as the years go by.

Just really quickly I want to talk about one example. Again, out of the 1990s there was a procedure under Section 341 of the Commercial Code which allowed summary debt collection in Mexico. It was a three-day procedure. A creditor could go to the debtor and say, “You owe me money and you have not paid it. I am going to foreclose on my guarantee and all the response you can have is to prove you paid the debt or ante up the money that you owe on the debt.” Otherwise you foreclose. That procedure had been held unconstitutional on two occasions before 1990, but it takes five consecutive decisions in Mexico to create what is called jurisprudence or a rule of law. As the 1990s started, and people used the Section 341 procedure, twice more it was taken to the Mexican Supreme Court and they decided it was unconstitutional. So on the very doorstep of creating five consecutive decisions and creating jurisprudencia, a binding rule in Mexico, they ran into a mere judicial system. One of the interesting things about the first decisions is they were textually the same. But after the first decision, the next three decisions simply copied virtually word for word the first decision.

PROFESSOR ALEJANDRO GARRO

There are very well-defined driving forces for judicial reform efforts. One is strengthening the process of transition to democracy and democratic consolidations either in countries of the former Soviet Union or in countries of Latin America, Asia, or Africa which struggle with problems of underdevelopment. In that sense, much of the driving force of law reform has been either sometimes in constitution making, sometimes in

trying to find effective enforcement of a bill of rights, more effective mechanisms to judicial review, and then also widespread going into areas of electoral systems, party systems, development of society groups, etc. Then in addition to that driving force, there is a need to actually strengthen the sense of security and productability, for that is something without which no market economy can be built. And in that sense the focus has been in areas such as torts, contracts, property, and dispute resolution—without which it is impossible to have a reliable system of solving disputes. Finally, I think another connected driving force in law reform efforts is the significance of trade and foreign investment, because the driving force is actually behind much of the forces behind organization and unification of commercial law. Now with the idea that if we are going to be doing business globally, you need to understand what the recipient host country is about. And for that it is a good idea that someone would make a law that everybody can understand and probably publish and understand in more than one language.

I think that there are quite a number of important reasons for actually being engaged in law reform efforts. I think that law reform efforts, looking backwards, that started in the early 1990s have been quite disappointing in many ways. Of course, there are many reasons why law reform is worthwhile, possible, and worth undertaking. But there are not so many success stories. In fact, many comments have been written in a prolific number of papers in academia that have been very critical about this rule of law promotion programs, finding them of questionable value and finding that they had little lasting impact in the societies where they were to be done.

I was wondering if we look back, where we realize that these changes are promoted by the international financial institutions, by the United States government, Canadian government, and German government, they actually are changes that are going to take generations to take it through. However, it is important, at this time, to reflect upon what are the barriers for a more successful law reform or judicial reform effort. I think that legal culture is one significant element to take into account. Something that, actually, I learned for the first time again in reflecting upon legal culture in an essay written by Professor MacLean, dated 1996, in Washington where he proposed what he called a culture of service as opposed to a culture of authorities, speaking of the administration of justice. I think that article made an impression on me because, even though written by someone who has experience as a judge, a public servant, and at the time a legal advisor of the World Bank, it is something that he was able to bring out from inside someone who actually knew very well more than one legal culture. I understand that the word culture may raise some concerns because somehow it has become very easy to fall into stereotypes, ridicule, and things of that nature. But I think that there is a bottom line well-taken in different legal cultures in the world. And we should take them seriously because no legal norm operates in a vacuum,

but against a background of that legal culture. And in the same way that we can say that there is Asian legal culture that is more prone to conciliation and mediation rather than litigation, or there is an American legal culture that could maybe be more pragmatic than other legal cultures, even though there may be only half truth and maybe much is stereotype, on that there is a part of truth. I think that is something significant in the process of law. We need to take that into account, realizing that that would be a poor legal cultural working definition and an impressionistic view of legal culture that actually fits every aspect of the law-shaping, law-applying, law-interpreting, and law-enforcing.

If you think about areas of law shaping the law, the adoptions of law for all the world is a history of borrowings from legal rule of law that worked relatively well in one country, that is actually looked upon by other countries as a Latino rule of law. And therefore the shaping of the law is very much influenced by legal culture, because whatever that rule of law says is actually what the legal culture in that recipient country would want that rule to say.

Then there is the question of interpretation of the law. In that article, Professor MacLean also confronted the different approaches of the judge to be more formalistic, tied up to the language of the law that looks at the meaning of every word of the statute, as opposed to those judges who, within the parameters of the law, make use of some leeway of discretion, being able to reach what is a sensible solution. And that legal culture plays a role because there are legal traditions brought up in the idea of judges are the masters of the law, as opposed to legal systems where the judges are given much more wide discretion, expressly so.

In the area of enforcement of the law, that is where law makers probably see that there are actual differences between the law reform that is taught, and what the actual practice is. You see the same law in the books, in the same constitution, and in the same statutes applied so differently according to the legal culture of that country. Therefore, I think there is something to be said in favor of that legal culture in the five minutes that I have remaining.

I will simply differentiate between the impact of that legal culture in the administration of justice, which I would say judicial reform efforts, as opposed to the legal cultures impact or influence in law reform efforts. I do not think we should differentiate between the two because law reform agents are actually devoting their efforts not only in the enactment of laws that probably are going to be working well, but they also realize they need to have good administrators of the law. And then the division of justice issue obviously involves and implicates various different types of issues, but I think that what is interesting to see is that unless that law is administered, interpreted, and enforced in the way that the lawmaker wanted, then we see that the system adopts its own reaction and adopts its own system.

With the help of all the lawyers, I started to look at what the informal system does in fact. I realized for the first time that the official judges and lawyers are in one side of country, but much of the marginal population has its own system of dispute settling. That is when I realized that obviously it is true that the judiciary does not have the monopoly of settling disputes, but there are so many other different ways of settling disputes, and that if the formal legal system does not provide a suitable system to settle disputes, there are going to be other new ones developing on their own. An international litigation and dispute resolution office is a very good example. Did you realize in the basic areas of the law such as contracts, torts, and property, you find that probably only in the area of real estate property do local courts have the final say about who owns Blackacre and what type of secured interest is there? But in the rest of the areas of the law, let us say a case of contracts, it is international commercial arbitration that actually is taking over for the most significant contracts. International bilateral agreements already promote exit arbitration as a proven system of dispute resolution. As you move from contract to areas of tort you will find an arbitration is obviously not a system of resolution. You have litigation, yet most plaintiffs harmed in developing countries by multinational corporations generally will seek to file suit before the court with jurisdiction over the place where the defendant is headquartered, which happens to be the United States. Therefore, you have a lot of international public litigation moving from the places where the wrongful act took place to the places where the defendant has its home base, which of course gives jurisdiction to the courts of that place. Yet, it is a doctrine of Scottish origin which is very much used, and perhaps abused, by United States courts, by which the former *conveniens* defends will tend to dismiss those cases and move them back to the country where the death or the loss of limb of the worker may be worth \$200-\$300 or \$1,000, rather than having it in Texas for thousands of dollars. Therefore, you find also that international litigation moves from one area of the country to another area. Why? Because the dispute resolution mechanism in the country did not provide the type of redress that the plaintiffs are seeking.

Finally, of course, not to speak about international criminal cases or where we need to have a court now that if the country does not move in actually prosecuting certain extremely serious crimes, there is a court now established that will take care of those issues. Fine, but what if the defendant happens to be not an international criminal but a state that has violated the dignity of human beings both in Strasburg and in Costa Rica? You also have international tribunals that will take over the job that the domestic courts do not. Therefore, what I see is a phenomenon of displacing the dispute from the places where the wrongs take place to some other tribunals, if they are in a foreign country or international tribunal because the domestic courts are not doing their job. Therefore, the significant consideration is to actually improve the systems of the penal solution, taking into account obviously those legal transplants.

I just wanted to bring up a few reflections on this phenomenon of law reform trying to do what seems so extremely difficult to do at the local front. The first place is that I think we need to realize and recognize that every law reform effort has a political agenda. And we need to recognize that there are no innocent, naive rules of law, and we need to decode what are the values that we are trying to establish. And then that being the first step, we need to really talk about the values. If it is creditor protection, because of the bankruptcy system that we are doing, we need to talk about that openly. And if the act or values that we are seeking to obtain are just speedy informers of debt money, debts, or whatever, we really need to do that very clearly. The second step, and I think that it is important and extremely challenging, is that in many developing countries the settlement of the dispute is not done through law. So one of the more basic and challenging efforts of law reformers is to realize that if we want that law to stick, we have to make sure that in that country people actually take the law seriously; otherwise it will not work. That is an extremely difficult issue connected with a legal culture. And finally, I think that then we can talk about the contents of the law, and after we are done discussing the contents of the law, we can spend a lot of time doing research activities, training people who are going to be using that law, and actually we can probably start that in law school.

DR. DIEGO CESAR BUNGE

I work in that area from the private sector standpoint, and if you look at the normal evaluations of political risk existing in any developing country, you will not see a factor of the predictability of the actual judicial system. That is because those measurements of political risk are mostly addressed at the degree of probability of repaying in due time and manner the sovereign debt of that given country. But if you look at the same political risk formulas, but for instance transparency international, you will find a completely different perspective. Definitely a rational investor or trader that has to make the decision to do business on a long-term basis in any given jurisdiction will evaluate the level of predictability, the level of professional response of judiciary of that country.

Getting a little beyond the surface, you have to look at certain organizational factors in order to evaluate the service of justice. First the institutional set-up of that given jurisdiction and by talking about jurisdiction I am talking about any sovereign state. I am an Argentine lawyer. I practice in Argentina where I do a lot of cross border transactions. But my country is a federal country also, and the levels of predictability of the official or formal court system from the different provincial jurisdictions and municipal jurisdictions are very different. The level of risk is quite different, and that impacts on its decisions. But also, you have to look upon how the institutional and legal framework influences the set up of the jurisdiction. Argentina, for instance, is a hybrid legal system in the sense that it has numerous constitutions after the constitution. Most con-

stitutional cases cite U.S. precedent, a similar country which has superimposed many other sorts of regulatory and basic legal legislation that come from different sources that necessarily creates transaction costs. But also you have to look at the human resources, not only judges, but also the members of the judiciary. How are they trained, selected, and paid? How are they removed? Finally, the court and case docket management issues: We can see that in the Argentine experience that has been analyzed, in that when you look at justice as a service then dubitable logistical implications stand. You have to measure the judicial productivity as an outcome that derives from inputs, and then you have to analyze the role of statistics of that productivity, how reliable those statistics are, the official ones or if you have to conduct your own field work in order to have reliable statistics. Then that relates to the analysis of the real workload of the judicial system. And then you can look into the rate of resolution of the cases, the rate of delay, the rate of quo congestion, and the rate of pending cases. This has been done in Argentina through many NGOs, and the results are available to the domestic and to the international community to work. Many of these NGOs are working hand in hand with the government, and, at least politically, have recognized the need for judicial reform. Now these NGOs are also ranking the level of productivity on the performance of the courts. Ranking means giving awards, and there are some courts that are not given those awards. That means reactions, some reactions similar to the ones Roberto faced in Peru. Many of these NGOs are not welcome to several sectors of the judiciary.

Two important points. These studies look at the court centenary unit with a responsibility to manage the process. And you have to analyze this similar unit and see the efficiency in that unit in order to see if different processes have to be adopted or not. Another new development in the studies conducted in Argentina is that they may very well be adapted in the handling of the cases and the dockets simply by adopting the new tools of the information society. All reforms in all developing nations have mostly touched tangentially the judicial process, as such, incorporating IT developments, but leaving the main raw material as it was at the beginning of the twentieth century. That can be transformed very easily, and has happened in other services, telecommunications, broadcasting, and most services. There could be leap frog advantages by adopting these developments.

The processes of selection, monitoring incurring of judges and judiciary personnel is crucial, and in this regard the importance of having a school official, a school of the judiciary, work where pledges are formed and judicial personnel are formed is also crucial in order to make more professional the rendering of the servant.

Another angle to this, in order to finish is that you not only have to measure in a quantitative manner, but also evening a qualitative manner the process of a judicial service. You have to measure the quality of the

law being actually rendered. That relates to the predictability of the system.

The last item is the very immediate access to transparent reliable case reporting systems. Argentina started at the end of the nineteenth century adopting a very reliable case reporting system through private companies, that actually exported service as a very profitable business to Spain, and they are doing much better in Spain than in Argentina right now. But this has to do with the quality of legal education, particularly what is something that is assumed to be a given here in the United States. Legal research and writing and advanced legal research and writing. That is crucial for having good legal analysis and good quality of decisions.

Finally, the role of precedent. I have to disagree with the fact that you cannot desire principles from continental civil law systems. Actually, even statistically, that is something to be looked upon in order to see what to expect from that system. In today's mobilized world it omits most sovereign nations, I stress the notion of sovereign nations that have incorporated international human rights treaties into the domestic legal system. Necessarily the judges have to apply international law in which the handling of cases and the handling of precedent is vital. The lack of a system of sterile devices or equivalent is something that does not do much good to predictability and to the rule of law.

PROFESSOR JENIA TURNER

It is a real honor to be part of this colloquium among so many people who have thought in great depth about the relationship between the role of law and economic development and the relationship between the role of law and human rights and economic development. With that being said, that relationship raises various broad and complex issues. Today, I would like to focus on one particular aspect of it, and that is the perceived tension between, on the one hand, post-conflict justice, prosecutions of human rights abuses committed during conflict, and, on the other hand, economic redevelopment post-conflict.

With the end of the cold war, the international community has become much more willing to intervene in post-conflict situations, to help restore political stability and help with economic reconstruction and with legal reform as part of that. In particular, after the intervention in 1995 in Bosnia and Herzegovina, even international financial institutions like the World Bank became much more involved in post-conflict situations—not just the U.N., as had been the case before. The reason that was the case is because, as you can imagine—the World Bank and the International Monetary Fund (IMF), their main mandate is economic issues—there was a perceived problem with going beyond the competence or the mandate of the World Bank. I will touch on that again at the end of my talk.

You can imagine that there is an enormous challenge in how to conduct post-conflict reconstruction because the legal infrastructure is in shambles, yet the economic situation is dire, and we are talking about basic

infrastructure being completely destroyed. The main challenge is that the conflict may resume. There have actually been studies that there is about a 44 percent chance that, within five years of the onset of peace, conflict will resume. So, that is what we are dealing with in post-conflict reconstruction.

For that reason, post-conflict reconstruction demands extraordinary measures that go well beyond what we have seen in normal redevelopment aid. It requires things like demobilizing and reintegrating combatants. It requires reform of the armed services and police forces—again, reconstruction of basic infrastructure—and what I am going to touch on today, some form of legal reckoning with past abuses. I will talk about why that is important.

So the demands on reconstruction aid are overwhelming, as you can tell, and it is not surprising that some perceive a tension there between the different goals—for example, between demobilization and disarmament of combatants and economic need. To continue on with a specific example, in Sierra Leone, the World Bank has actually been active in helping with a project that helps demobilize and reintegrate former combatants, doing things like giving reinsertion benefits and helping provide training. There has been a study showing that there is a growing resentment among many Sierra Leonians because they think that combatants are receiving these reinsertion benefits of \$150 and are getting additional training, while the victims of the conflict—victims of sexual violence, mutilation, and internal displacement—say that they have not received sufficient support. They have received some support, but they say that instead of giving this money to the combatants, it should go either to economic development more generally or to the victims. So there is this tension there, and a similar tension is often perceived between prosecutions of international crimes on the one hand, which are very complex and require a lot of resources and, on the other hand, basic economic needs—economic development—and this has been reported in many post-conflict situations—Bosnia, Rwanda, East Timor, Sierra Leone.

I would like to talk about how we can address that tension, and I would say two things are important. One is to think about how to design post-conflict justice in a way that puts the least possible strain or less of a strain on economic development. The other is that we need to understand and promote the ways in which post-conflict justice can have long-term benefits in terms of promoting legal reform or how it fits with more general legal reform measures and then, in turn, how legal reform can help economic development.

First, let me talk about the concern by many local populations that post-conflict justice may be in tension with economic development or basic economic needs. As I already said, prosecutions of international crimes, human rights abuses committed during the conflict or during a dictatorship, are quite complex and require a lot of resources. Often the international community actually insists that they be done according to

certain human rights standards, and often they are high human rights standards. So if you look at the paradigm of international prosecutions that have occurred in the Yugoslavian and Rwandan tribunals, these are incredibly expensive and also very slow processes.

Just to give you an example, the ICTR budget is \$250 million for 2004-2005, and it has, since 2003, delivered five judgments and convicted five people—incredibly expensive. Post-conflict countries simply cannot afford that kind of process, and just to give you an example, in Rwanda, only about 20 percent of the judiciary survived the genocide, so we are talking about a serious lack of qualified lawyers and qualified judges. And yet, at the same time, they had hundreds of thousands of suspects in detention and awaiting trial. So this is what they are dealing with. It is understandable that ordinary Rwandan trials will cut down on procedural protections, so they employ plea-bargaining a lot more, they rely on hearsay evidence a lot more, they do not provide defense attorneys for indigent defendants, they do not provide as much judicial review over investigations, and so on and so forth. But they are much quicker—they last about a day as opposed to months and years at the ICTR.

Rwanda has also turned to informal substitutes for the legal process, so they have started the Gacaca courts, which are relying on traditional mechanisms of resolving disputes where the community is very involved—local elders are the judges. Now these Gacaca courts have been criticized by human rights NGOs (Non-governmental Organizations) as not providing sufficient procedural protections. For example, the defendant is not allowed to have a defense attorney present in these Gacaca proceedings. But I think we should look at them as useful complements to regular rule of law measures. For one, they are cheaper, and also, as Professor Garro was mentioning, they may be more consistent with the local culture.

If we want something that will be longer lasting, we may have to think about complements between informal traditional mechanisms and more formal rule of law mechanisms and how to combine these. I do not think that is giving up on the rule of law project or human rights. It is just a recognition that implementation may take a long time—implementation for formal rule of law. It is also recognition, again, of the importance of culture in the process, and also that we may require some economic development to take hold before we can continue with full implementation of rule of law measures.

My next point is whether post-conflict justice actually has longer-term benefits, which would make it worthwhile pursuing despite some of its short-term tensions with economic needs and economic development. The first such long-term benefit is political stability—that post-conflict trials of human rights abuses actually promote political stability. That is because they replace private vengeance with trials, and, in that way, they end a vicious cycle of violence and revenge, and, instead, we have a more formal political mechanism of resolving disputes. And this is something

that is actually believed by people in post-conflict situations. They do believe that this is going to occur. There was a recent poll of Afghans, and about 76 percent of them believe that bringing war criminals to justice will increase stability and bring security.

Now, as we know, political stability is a pre-condition for economic development, so you can see how that has long-term benefits. I would suggest there is an even tighter link between post-conflict trials and economic development because putting on trial people in positions of privilege who abused that privilege to terrorize and control the population also helps establish the rule of law, and it has an important symbolic significance in that way—that people who ruled with impunity and were thought to be above the law are now subject to the law just like everyone else. So it does have that important message about the meaning of what is the rule of law—very clear message about what it means—about what equality in a court of law means. So I would say, at a bare minimum, post-conflict prosecutions help us restore the rule of law, and I want to explain that.

Rule of law means very different things to different people. I want to say that in post-conflict situations, it is better to think of a thin version of the rule of law, which is mostly focusing on process—on predictability, stability, equality before the law, consistent application, and impartial application—as opposed to a more substantive conception—a thicker conception of the rule of law, which may incorporate a certain conception of human rights or liberal democracy. I think it is important to focus on the thin conception of the rule of law because, at least for now, we do not really have good evidence. There is evidence that rule of law promotes economic development, but it seems that that is the thin conception of the rule of law—predictability, stability, and impartial application. It is not clear that we need to have a particular version of democracy, or a particular liberal democracy, or a particular level of human rights in order to promote economic development. On the other hand, there is evidence that wealth and economic development do generate a demand for the rule of law and a demand for higher protection of rights. So, you have to think about it in a sequence that maybe we would start with a lower level of rule of law, then we get some more development, and then that produces a greater demand for the rule of law and human rights.

Another way to promote the link between the rule of law and post-conflict prosecutions is something that is becoming only recently better recognized by people who are involved in these efforts in the field. So in the past, we had people, NGOs, government donors, who would be helping with prosecutions, on the one hand, of human rights abuses, and then there would be people who would be helping with legal reforms. The two were not necessarily talking with each other even though the scholarship recognized the link between the two. The two were not really talking to each other within the field, but there are actual signs that this is changing, and I think that is a good thing. There is greater recognition of the link

between post-conflict justice and the rule of law and economic development, and there is greater communication between these two groups. For example, war crimes tribunals like the special courts of Sierra Leone are becoming more involved with outreach efforts to the general population, involving the local legal community a lot more in their work, and, to the extent that they have resources, also are somewhat involved in legal education and legal reform measures. Also, despite the fact that we now have the International Criminal Court, donor governments and NGOs are recognizing that the International Criminal Court will not have that transformative effect on local systems in terms of promoting the rule of law and also will not be able to handle all the cases that are going to arise. So they sponsor things like the joint rapid response initiative that aims to provide short-term assistance on short notice—technical assistance to countries that are not quite able to prosecute and investigate war crimes and human rights cases on their own. But, at the same time, we do not want them to resort to the ICC as long as we can help those countries to do it on their own. So there has been a lot more emphasis on, again, helping domestic systems through these types of initiatives to jump start the process and then to connect it to other long-term reform measures of the kind that are supported by the World Bank. The World Bank has been more and more involved in rule of law efforts—legal reform efforts. I think that is a great development—as long as there is a greater integration with post-conflict justice measures, over the long run, post-conflict justice need not be inconsistent with economic development.

Now, even though we have these long-term benefits, short-term tensions are likely to persist, and what I would like to suggest, as I said earlier, is that the way to address those short-term tensions is, on the one hand, through creative and cost effective methods like the Gacaca tribunals that perhaps rely on less formal methods of dispute settlement. And on the other hand, again, to involve the local community and make clear what the longer term benefits of post-conflict justice may be. But it is important to have that local ownership to insure that these measures are sustainable.

