

RULE OF LAW STATUS IN LATIN AMERICA
SIL- HOUSTON, TEXAS CONFERENCE
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I. INTRODUCTION

Opening

Outside the community specialized in the field, the overall concept of international development assistance and collaboration has been rather narrow in its focus. The focus tends to over emphasize economic, and/or political needs in developing nations without giving sufficient attention to the intricate relationship between the political and economical well being of a nation and the rule of law.

- For example, there is a great deal of discussion on ways to eradicate poverty in Latin America and the Caribbean by opening the market place through foreign investment and the Free Trade Agreement (FTA). While these initiatives are certainly valuable, they are inherently interconnected to another pillar of development assistance that is something of the “step child” to international development initiatives—the rule of law.

Opening the market place and promoting jobs are important endeavors but none of it will function in the long run without laws to regulate procedures in contract disputes, working conditions, fair wages, restrictions on child labor, a company’s ability to rent or buy land or even, incorporate as a legal entity in the country. Moreover, once adequate laws have been put in place, the legal profession must enforce them and give them practical application.

Though the role of the rule of law in the reform process has seen growth in the last decade or so, much more needs to be done. In spite of the growing consensus in policy circles that the rule of law is a prerequisite to economic and political stability, and a prerequisite to a sound investment climate and genuine democratic development, little attention is paid to rule of law issues in relation to the investments made.

Why is the rule of law important?

The rule of law is the single best guarantor of economic prosperity, good governance and respect for human rights. Conversely, the absence of the rule of law is directly linked to

- Unfulfilled economic potential that translates into unemployment and an unattractive foreign investment climate.
- Corruption that negatively affects all aspects of public and private life and destroys the lifeline of a country.
- Human rights abuses, particularly along religious, political and racial lines
- Armed conflict resulting in civil wars and terrorism.

To put it in its simplest terms, the rule of law is the surest guarantor of a nation's stability and prosperity, and its respect for the dignity and well being of all citizens. The rule of law establishes the baseline from which other initiatives can take root and prosper.

Lawyers' role and responsibility

With few exceptions whether practical or theoretical, Latin America is a continent of growing, and at times, fragile democracies. Countries such as Mexico and Chile are leading the effort.

As expressed by ABA President Robert Grey in the lead article of the August issue of the US State Department's E-Journal, *Issues of Democracy*, "[i]n a democratic society where the governed relinquish a portion of their autonomy, the **legal system** and all those that make up the legal system—lawyers, judges, notarios etc.—are the guardian against abuses by those in positions of power. Citizens agree to limitations on their freedom in exchange for peaceful coexistence, but expect that when conflict between citizens or between citizens and the State arise there is a place that is trustworthy, independent of undue influence and authority over all the parties to solve the disputes...the courts. The courts are the guardians of the rights of the people and the legal profession and the organized bar are the foot soldiers."

Good laws may be passed but without real enforcement, practical application and continued vigilance, they do not serve their purpose.

II. THE ABA'S COMMITMENT TO THE RULE OF LAW

The American Bar Association recognizes the value of the rule of law within its national borders and abroad. With this in mind, the Association established 11 “Goals.” The most pertinent of these for our purposes here today are Goals II, VIII, X and XI .

Goal II is:

“to promote meaningful access to legal representation and the [U.S.] system of justice for all persons regardless of their economic and social condition.” This goal is directly tied to access to justice.”

Goal VIII is:

“to promote the rule of law in the world.” Goal 8 is the driving force behind the Latin America and Caribbean Law Initiative Council, which I chaired until recently, and the other ABA Global Rule of Law Councils.

Goal X is:

“to preserve and enhance the ideals of the legal profession as a common calling and its dedication to public service.”

Goal XI is:

To preserve the independence of the legal profession and the judiciary as fundamental to a free society.”

On the national front, the ABA has devoted more than 100 years in defense of the legal process. Recently, it submitted an amicus brief in the Supreme Court case *Tennessee v. Lane*, which dealt with access by the disabled to the courts in the United States of North America. Thirty years before, the ABA was also present in another significant event in our country, Watergate. It was ABA President, Chesterfield Smith who first expressed in a press release that “no man is above the law.” That quote later appeared in all major newspapers in this country. That same year, the ABA House of Delegates—composed of 474 legal representatives from all fifty states and U.S territories—voted without debate unanimously against granting legal immunity to President Nixon. Today, I have the honor and privilege to Chair the ABA House of Delegates.

The ABA’s efforts to strengthen the rule of law do not end at its national borders. As a matter of fact, the ABA’s Latin America and Caribbean Law Initiative’s slogan is “justice has no boundaries.” Through its international rule of law programs, including those of the Section of International Law,

the ABA engages in a myriad of project that support efforts abroad to strengthen the rule of law. Four core values govern the ABA's global technical assistance and collaboration efforts:

- Projects must be responsive to the needs of the host country;
- Provide a comparative approach and neutral advice;
- Provide expertise on a *pro bono* basis whenever possible, and
- Abide by and enforce strict conflict of interest guidelines.

With relatively modest funding, the ABA has collaborated in constitutional reforms, established anti-corruption task forces, judicial and lawyer training to combat human rights abuses, assisted in documenting war crimes, aided in drafting important criminal, civil and commercial legislation in dozens of countries around the world, and has provided some of leading experts through the Section of International Law's UNDP Project.

In focusing its efforts abroad the ABA has developed seven focal areas:

- 1) judicial reform; 2) anti-corruption/transparency; 3) legal profession reform; 4) legal education reform; 5) gender issues; 6) conflict mitigation, and 7) criminal law reform/anti-trafficking.

Above all, the ABA sponsored projects are always conducted in consultation with local experts in the country or region and with the outmost respect for the legal traditions of the host country. The ABA initiates projects at the invitation of the country. Invitations may come from the governments themselves or through respected local NGOs.

III. HOW ABA/LALIC WORK RELATES TO THIS EFFORT

ABA—Latin America and Caribbean or ABA/LALIC, as it's known, is a public service project of the ABA and falls within Goals VIII and X of the Association. Its primary mission is to join its Latin American and Caribbean colleagues in the law in the effort to strengthen justice and trust in the legal system.

Allow me to now turn to the current efforts of ABA/LALIC in relation to the seven focal areas previously mentioned:

Judicial Reform

Judicial reform is one of the highest priorities for the Association as a whole and for ABA/LALIC in particular. Among the council's most successful

project is a court-annexed mediation project in Mexico to promote access to justice. Mexico has been at the forefront of efforts in Latin America to provide alternative dispute resolution mechanisms for over-burdened courts, as well as providing greater access to justice to everyday citizens. Though the initial proposal called for participation by four states, the interest by other states to participate required the Project to expand threefold and continues to grow even today. Currently, there are 19 states as formal participants and another 4 requesting formal participation. The Project has provided numerous documents that are now being used throughout Mexico including the “Principios de Mediacion”—used widely in drafting legislation, mediation training manuals, center design training manuals, a newsletter and website and internet driven live conferences between center directors and mediators. More recently, it has developed a statistical analysis tool that will be used by all participating states to measure and analyze data. The Project has trained over 200 mediators and 12 Mexican mediation trainers. It has contributed to the drafting of 12 mediation law proposals and has seen the opening of 15 mediation centers in 19 states. According to our colleagues in Mexico, conflicts brought to a mediation center are resolved in an average of 9 days. Similar cases have taken as long as ten years to resolve in the traditional courts.

It is also worthwhile to mention and publicly thank our friends for the Barra Mexicana Colegio de Abogados, who have been supportive of this Project since its inception and the state judiciaries through out Mexico who have been most kind to us.

Anti-corruption and Transparency

Corruption and the lack of transparency are among the biggest concerns and obstacles to strengthening the rule of law. John Zemko, Senior Program Officer for Latin America at the Center for International Private Enterprise, was quoted as saying, “...[that] it is safe to say that corruption affects [private enterprise] pretty significantly and is probably one of the largest issues on the plate in terms of making markets work better.” Some foreign investors have stated that they chose one country over another when deciding location of a new major plant, partly as a result of the level of corruption. There is a lack of regulatory or legislative oversight of public entities; worse yet, the biggest problem is the lack of efficient punishment. Many countries have existing laws that penalize corruptive practices, but the enforcement of those laws falls through. While the number of public

officials charged with corruption has gone up, few are actually prosecuted and fewer yet end up in jail.

In the area of transparency, ABA/LALIC is working with two Costa Rican ministries to enhance internal auditing procedures to limit institutional corruption. While Costa Rica scores higher on international corruption standards, such as those produced by Transparency International, in recent years, official corruption has become a topic of much debate and a source of civil strife. The ministries interested in this effort are looking for ways to establish controls and procedures to bring cases against corrupt officials. The Project seeks to harness the political will for change.

Legal Profession Reform

With respect to ABA/LALIC's work in strengthening of the legal profession, it is working in partnership with the Barra Mexicana, who is very devoted to the institutionalization and further development of continuing legal education.

Conflict Mitigation

In the area of Conflict Mitigation, ABA/LALIC has submitted a project for consideration for the implementation of restorative justice initiatives to curve youth violence in Colombia—a backlash of the government's conflict with the guerrilla.

Legal Education Reform

Likewise, ABA/LALIC has joined the effort in Mexico to reform important aspects of legal education including, curriculum reform, law school accreditation and student/faculty ratios. For this project, the ABA Section of Legal Education, with more than 120 years of existence and experience, has donated dozens of books and manuals. Also, ABA members who are national experts on accreditation of law schools have participated in bi-lateral seminars on this issue.

Gender Issues

ABA/LALIC has been active in gender issues, as well. For example, ABA Board of Governor member, Bernice Donald, traveled to Brazil at the request of Brazilian NGOs in order to share information and experiences related to domestic violence and gender discrimination, in addition to civil rights.

Criminal Law Reform/Anti-Trafficking

Increasingly, many nations in Latin America are revisiting their criminal justice systems and instituting reforms. The success rates differ from country to country, but important headway is being made on this front.

The Association, through ABA/LALIC is collaborating with the reform efforts in Ecuador. For example, it is developing a mock trial conference with Ecuadorian officials and reformers to generate better understanding of the application of the new criminal justice procedure code, which is based on the common law tradition and the use of oral advocacy. The mock trial will involve bi-national teams of defense lawyers, prosecutors and judges. Additionally, ABA/LALIC was awarded a grant for a multi-year trafficking in persons project in Ecuador. The project will work in prevention, prosecution and protection.

Association-wide front

Finally, on an Association wide front, the ABA has two important initiatives:

- **Rule of Law Symposium:** The ABA is planning to hold a Rule of Law Symposium in June 2005 with the hope of broadening the constituency of policy-makers and donors prioritizing international rule of law development assistance. The Symposium seeks to: a) mobilize this constituency to enhance support; b) develop an international network of stakeholders for information sharing and advocacy; and c) to improve the quality of technical legal collaboration.
- **Congressional Support:** Additionally, the ABA, through its President, Robert Grey, continues to inform and impress upon the U.S. Congress the importance that it continue to provide robust support and funding for programs that promote the rule of law and democracy in Latin America.

Hopefully, this gives you a panoramic view of the work of this Council with respect to the region it serves.

IV. WHAT THE ABA SHOULD BE DOING IN THE REGION

With the time remaining, I will focus on the last portion the topic I've been asked to speak about... *What should the ABA be doing in the region?*

As is true in most everything in life, there is a great deal left to be done and tremendous room for growth. However, there are three areas I would mention:

- **Staying the course and expanding current programs:** In the short life of the Council, approximately four years, it has provided significant contributions to the efforts of our neighbors to the South. So, it must stay the course, expand and improve its programs, contacts and efforts, while remaining vigilant in being respectful of differing legal traditions.
- **Contributing to the Free Trade Effort:** There has been tremendous growth in multi-lateral trade in the Americas over the past decade, particularly with the inception of NAFTA and more recently the progress made on the Chilean front. The FTA or ALCA holds enormous promise for the Americas and the ABA through its various entities, such as the Section of International Law, Business Law, the Latin America and Caribbean Council and others can make important contributions in this regard.
- **Bar Strengthening:** Both supporters and critics of the ABA recognize the importance of a strong bar in the development of the rule of law. A strong bar serves as a watchdog, civil society mobilizing force, deterrence against political tyranny and aids to foster public confidence in the justice system and the law. The organized bar must come to the defense of unjust criticism of the judiciary, as much as expose corrupt judges and lawyers and set standards for minimum competence, professionalism and civility in the profession.

The Association has more than 120 years of experience in this area and can serve a critical role. Unfortunately, the greatest challenge in this area is funding.

V. *CONCLUSION*

I hope this overview has given you an accurate perspective of the Association's deep commitment and current efforts to the region.

I'd like to finish by expressing our most sincere appreciation to our friends and colleagues in the countries where we are currently working for the opportunity to join them in an effort to improve justice and ensure liberty for its citizens.

Finally, I also thank the Section of International Law and its leadership for the opportunity to participate and share with all of you the work of ABA/LALIC in legal reform, and, of course, to you in the audience for your time and attention. THANK YOU.