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ACCESS TO JUSTICE AND INDEPENDENCE OF THE JUDICIARY IN THE AMERICAS

by Laurie Cole

SUMMIT FOCUS
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FOCAL



**THE SUMMIT OF THE AMERICAS
FOLLOW-UP SERIES**



**ACCESS TO JUSTICE AND INDEPENDENCE
OF THE JUDICIARY IN THE AMERICAS**

by Laurie Cole

The Canadian Foundation for the Americas (FOCAL) is an independent, non-governmental organization that fosters informed and timely debate and dialogue on issues of importance to decision makers and opinion leaders in Canada and throughout the Western Hemisphere. Established in 1990, FOCAL's mission is to develop a greater understanding of important hemispheric issues and help to build a stronger community of the Americas.

FOCAL's main Program Areas include: poverty and inequality, economic development and trade integration, governance and democratic development, inter-American relations, North American integration and the Research Forum on Cuba (www.cubasource.org).

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EXECUTIVE SUMMARY

This is the first in a series of issue updates in which FOCAL examines how governments across the hemisphere have fared in upholding the commitments made at past Summits of the Americas. This first report focuses specifically on reforms relating to the independence of the judiciary, including measures to improve transparent judicial selection, guarantee secure tenure and support appropriate standards of conduct and increased accountability. Reforms aimed at providing prompt, equal and universal access to justice are also examined. Consulting the most recent data and information available we consider the progress made in this area since Quebec City and over the course of the last decade.

The report's findings are mixed. The success of reforms and their outcomes have been uneven between and within countries. In the area of independence of the judiciary, judicial councils and changes in the length and security of judges' tenure have laid the foundations for more autonomous judiciaries. However, problems of corruption, executive control and unlawful dismissal continue to plague courts throughout the hemisphere. It is argued that measures aimed at ensuring independence from other branches of government must be accompanied by a judicial code of ethics and standards of accountability that guarantee the professionalism of judges and court officials.

In terms of access to justice, research shows that while public defenders — state bodies that provide free legal council to low-income individuals — exist in countries across the hemisphere, they are in general understaffed, under-funded and have failed to evolve with the increase in demand for their services. The establishment of human rights ombudsmen (*defensorías del pueblo*) is highlighted as a bright spot in efforts to guarantee citizens' access to mechanisms of justice. However, to significantly and permanently improve equal access governments must work to eradicate discrimination and prejudice and improve information and public education about citizens' legal and social rights.

RÉSUMÉ

Voici la première édition d'une série de publications dont l'intention de FOCAL est d'examiner la manière dont les gouvernements, d'un bout à l'autre de l'hémisphère, ont donné suite à leurs engagements lors des derniers Sommets des Amériques. Ce premier compte rendu aborde les réformes inhérentes à l'indépendance du pouvoir judiciaire, en incluant les mesures visant à améliorer la transparence et assurer la permanence des fonctions légales, tout en supportant le renforcement des responsabilités et des règles de conduite appropriées. Les réformes visant à accroître l'accès rapide, l'impartialité et l'universalité de la justice sont également l'objet de cette étude. Après avoir consulté les plus récentes informations disponibles, nous considérons les progrès réalisés en cette matière depuis le Sommet de Québec et tout au cours de la dernière décennie.

Les conclusions de ce compte rendu sont variées. Le succès de ces réformes est, et a été, inégal entre les pays de la région et à l'intérieur de ceux-ci. En ce qui a trait à l'indépendance du pouvoir judiciaire, les conseils judiciaires et les modifications apportées afin d'assurer la permanence et la sécurité des fonctions légales constituent une fondation ayant contribué à l'autonomie des tribunaux. Toutefois, les problèmes afférents à la corruption, au pouvoir de l'exécutif et au renvoi illégal (des décisions) continuent de s'attaquer aux tribunaux à travers l'hémisphère. On allègue que les dispositions assurant l'indépendance des autres instances gouvernementales doivent être accompagnées d'un code d'éthique judiciaire et de normes de responsabilité qui garantiront le professionnalisme des juges et du personnel rattaché aux tribunaux.

Quant à l'accessibilité à la justice, des études démontrent que les avocats de la défense — entités étatiques qui fournissent gratuitement leurs services professionnels aux gens à faible revenu (aide juridique) — pratiquant dans des pays de l'hémisphère, sont, de façon générale, sous représentés, peu rémunérés, et ne peuvent suffire à la demande croissante de leurs services. La mise en place d'ombudsman en matière de droits de la personne (*defensorías del pueblo*) garantit l'accès des citoyens aux mécanismes de la justice. Cependant, afin de favoriser, de façon significative et permanente, un accès équitable, les gouvernements se doivent de faire disparaître la discrimination et les préjugés, et améliorer l'information et l'éducation destinées au public, en ce qui a trait aux droits légaux et sociaux des populations.

RESUMEN

El presente trabajo es el primero de una serie que FOCAL dedica a examinar el desempeño de los gobiernos del hemisferio en cuanto a los compromisos contraídos en las cumbres de las Américas. Este primer número trata específicamente el tema de las reformas en el campo de la independencia del sistema judicial, incluyendo las medidas adoptadas para hacer más transparente la selección de los jueces, seguridad de permanencia en sus cargos, normas de conducta apropiadas y mayor responsabilidad pública. Asimismo, se analizan las reformas realizadas en favor del acceso oportuno, equitativo y universal a la justicia. A partir de los datos más recientes e informaciones disponibles hemos realizado un análisis de los avances alcanzados desde la Cumbre de Québec y durante la década pasada.

Este estudio arroja conclusiones diversas. El éxito de las reformas y sus resultados han sido desiguales tanto entre los distintos países como dentro de ellos. En el área de la independencia del poder judicial, los consejos judiciales y las reformas en la duración y protección de los cargos de los jueces han posibilitado el surgimiento de sistemas judiciales más autónomos. Sin embargo, la corrupción, el control del ejecutivo y la destitución indebida de los jueces son problemas que aún persisten en los sistemas judiciales del hemisferio. Las medidas para lograr la independencia del sistema judicial con respecto a los otros poderes de gobierno deben ir acompañadas de un código de ética judicial y normas para la responsabilidad pública que garanticen el profesionalismo de los jueces y de los funcionarios de los juzgados.

En cuanto al acceso a la justicia, las investigaciones arrojan que a pesar de la existencia de defensorías públicas (entidades estatales que brindan asesoramiento legal gratuito a los individuos de bajos ingresos) en distintos países del hemisferio, por lo general están carentes de personal y de fondos suficientes, y no han sido capaces de adaptarse a las necesidades crecientes de sus servicios. La creación de las defensorías del pueblo constituye un hecho halagüeño por garantizar el acceso de los ciudadanos a los mecanismos de justicia. No obstante, en aras de perfeccionar el acceso equitativo a la justicia de forma importante y definitiva, los gobiernos deben eliminar la discriminación y los prejuicios así como ofrecer mayor información y educación pública acerca de los derechos legales y sociales de los ciudadanos.

FOCAL AND THE SUMMIT OF THE AMERICAS

The Canadian Foundation for the Americas (FOCAL) has been involved in the Summit of the Americas process since the Santiago Summit of 1998. Throughout this period, FOCAL has advocated increased inclusion of civil society actors in the Summit process and provided policy advice for the preparation of civil society's contribution to the Summit agenda. FOCAL was instrumental in keeping government officials, policy makers and experts informed about the Quebec City Summit via the regular production of a summit newsletter series in conjunction with Florida International University. With this report we continue to demonstrate our interest in the Summit process and underscore our belief in the benefits that concerted multilateral action — like Summits — can have in countries across the hemisphere.

This publication marks the first in a series of issue updates to be prepared by FOCAL. These updates evaluate how governments and multilateral bodies have fared in keeping the promises they made in the Plans of Action signed in Miami in 1994, Santiago in 1998 and in Quebec City in April 2001. We have undertaken this project because FOCAL believes that while civil society participation in the design and content of hemispheric initiatives is crucial for their success and legitimacy, it is also imperative that civil society become active in monitoring and promoting the implementation of agreements reached at the various Summits of the Americas.

In its first report FOCAL examines judicial reform efforts across the region and considers the progress made since Quebec City and over the course of the last decade. The report focuses specifically on attempts to improve access to justice and independence of the judiciary, action items contained under the *Justice, Rule of Law and Security of The Individual* of the Quebec City Plan of Action document.

THE SUMMIT AND JUSTICE

An independent and accessible justice system is one of the fundamental pillars of democratic society. Justice and the rule of law underpin human rights and personal security. They are essential for a well functioning democracy and facilitate economic growth, institutional development and improved productivity. They are necessary to the functioning of day-to-day civic engagements by individuals and by groups. During the 1990s,

multilateral bodies, civil society and the national leaders of the 34 countries involved in the Summit process pledged to build strong justice systems as a necessary foundation for other summit commitments.

As a result, justice and legal issues have been accorded greater prominence in more recent Summit Plans of Action — mentioned only in passing in the Miami document, they occupy a separate section in the Santiago and Quebec City Plans of Action. In both documents, countries of the hemisphere pledged to improve access to justice and independence of the judiciary. In Quebec City national leaders agreed to:

Access to Justice

Support public and private initiatives and programs to educate people about their rights relating to access to justice, and promote measures that ensure prompt, equal and universal access to justice;

Independence of the Judiciary

Encourage measures to strengthen the independence of the judiciary, including transparent judicial selection, secure tenure on the bench, appropriate standards of conduct and systems of accountability.

Reform of any national judicial system is a complex and on-going process that involves coordinated actions from diverse stakeholders. To be successful, it requires both sustained financial backing for reforms, as well as political support from key stakeholders. The signing of the Summit Plans of Action in Santiago and Quebec City signaled to citizens of the hemisphere that their countries' leaders were lending the political support required to undertake much needed changes. In the following sections we shall see if this commitment has translated into action: do citizens of the hemisphere have better access to more independent justice systems?

EVALUATING JUDICIAL REFORM

Judicial reforms are not only challenging to implement successfully, but they are also difficult to evaluate for three basic reasons. Primarily, justice systems throughout the hemisphere have been founded on varying combinations of Western legal traditions. Diverse political, cultural and historical circumstances have resulted in systems that function with

distinct administrative, organizational and philosophical underpinnings. Each country will require that different reforms be implemented by distinct bodies in varying sequences. As such there is not a sole model that can be singled out as the best way to ensure a well-functioning judiciary.

Secondly, reforms do not occur in a vacuum. It is possible that once implemented, a reform will fail to produce the desired outcome because its effect is moderated or countered by other dynamics: a country may have a good judicial selection system, but a very hierarchical or corrupt promotion /disciplinary system; a superior training program may be instituted, but the bureaucratic court administration that causes backlogs and slow case processing remains intact; legal aid may be available to marginalized populations, but may function in the context of a system that has traditionally been discriminatory and based on unequal social precepts.

Thirdly, uniform, time-series data is not available for many countries or themes due to a lack of accessible material that measures key judicial reforms and their outcomes. Nonetheless, reviewing the data and information that is available about recent reforms indicates successes and highlights areas that require further support and attention. While not a definitive measure, these findings do provide a gauge of the status of the Summit-related judicial reform initiatives.

This report outlines the issues raised in the areas of independence of the judiciary and access to justice, providing a look at some of the initiatives that governments have implemented in an effort to incorporate the promises made at Santiago and Quebec City.

1. INDEPENDENCE OF THE JUDICIARY

An independent judiciary is a cornerstone of successful reform and a prerequisite for an impartial, efficient and reliable justice system. An independent judiciary makes binding rulings on how the law applies to the state and the citizenry in cases presented to it. Without it, the rule of law, which assures citizens access to conflict-resolution mechanisms, protects constitutional rights and guarantees state accountability to laws, does not function (Unger, pp. 119).

Recent literature on the independence of judiciaries stresses that reforms must take into consideration both external and internal independence.

External independence is the reduction of judiciaries' vulnerability to pressure from other branches of government, the military and influential private forces. A lack of external independence is demonstrated in examples of outside powers rigging appointments, removing or impeaching judges, ignoring judgments or shutting down courts altogether. Internal independence is equally as important for the fair and efficient functioning of the justice system. It refers to the self-regulation of judges and the court system. Once the judiciary gains independence from the outside influences via legislative and administrative guarantees, it is necessary that judges themselves have the capacities that are required to do their jobs fairly and effectively (Mendez, pp. 1-2).

In many cases "independence reforms" focus on the external aspects of the problem, as they are possibly the most visible and easy to deal with via legislation, the formation of councils and official procedure. To be effective, however, reforms must include elements that address both.

Judicial Independence: The Current Situation

Judiciaries throughout the Americas continue to face regular challenges to their independence. Judges are limited in their ability to make decisions and rulings based on fair and informed interpretation of the law, uninhibited by political and economic pressure. Often they lack jurisdiction over other branches of government. Court systems do not maintain budgetary discretion or are perhaps dealing with antiquated judicial administration and case management systems. Judges are often susceptible to intimidation and threats, do not enjoy job stability and can suffer repercussions of job loss or discipline for handing down "incorrect" or unfavorable decisions (Popkin, p. 103).

In the past decade, governments, as well as regional and international organizations, have become more active in confronting these challenges by focusing on measures which aim to fortify judicial independence. To date there has been some progress in planning and implementing reforms. While this is a positive step, reforms — and their outcomes — have been less than successful at delivering positive and sustainable results, and in many cases impunity and corruption continue. Preliminary evaluations of the effectiveness of programs in affecting change, as well as the level and scope of commitment of national governments and judicial leaders to follow through with much needed reforms, have been mixed. The following section examines specific reform attempts in more detail.

Independence of the Judiciary — The Findings

The Quebec City Summit Plan of Action lays out four areas of reforms that are intended to make judicial independence a reality throughout the Americas:

- Transparent judicial selection;
- Secure tenure;
- Appropriate standards of conduct; and
- Accountability.

Transparent Judicial Selection

The process of judicial selection (of both supreme court and lower court judges) is fundamental to how independently they will behave once on the bench. Currently, judicial selection across much of the hemisphere is non-transparent, with insufficient importance placed on the merit of candidates and too much control exerted by powerful interest groups.

To ensure independence, it is imperative that the selection methods be transparent, based upon objective political and professional criteria, and that they be publicly debated. Qualified judges who are appointed based on test scores, elected by their peers or chosen by the executive in a merit-based process are generally less vulnerable to outside pressure, as they are often not “paying back” for their appointments. In addition, judges chosen in these manners are more likely to be confident in their jobs and have the necessary qualifications to carry out their tasks.

One of the primary strategies introduced to improve the selection of judges across the hemisphere has been through the formation of **judicial councils**. These bodies vary in composition and mandate from country to country, and are chosen in varying combinations by the executive, legislative and judicial branches of government. Their responsibilities can include recruiting, nominating and selecting judicial candidates, as well as looking after discipline, finance and policy-making within the judiciary. The rationale behind their establishment is that an independent judicial council should help to broaden input into the selection process, and ensure that professional considerations are taken into account (Popkin, p. 104).

Since the early 1980s, twelve countries in Latin America have set up some form of judicial council. In many cases this is a step in the right direction and experience has proven that these councils have indeed expanded the

Table 1 – Judicial Councils

Country	Formation Date	Status (functioning, major issues and challenges)
Argentina	1998	<ul style="list-style-type: none"> • Composition and decisions heavily influenced by party politics/executive pressure. • Faces competition with Supreme Court.
Bolivia	1998	<ul style="list-style-type: none"> • Clashes with the Supreme Court. • Power struggles with other agencies for jurisdiction, portrayed as bloated and inefficient.
Brazil	1979	N/A
Colombia	1991	<ul style="list-style-type: none"> • Proposals have been made to break up the council.
Costa Rica	1993	<ul style="list-style-type: none"> • Acts only as an administrative accessory to the Supreme Court.
Dominican Republic	1994	<ul style="list-style-type: none"> • Highly politicized composition.
Ecuador	1998	<ul style="list-style-type: none"> • Proposals have been made to break up the council.
El Salvador	1989	<ul style="list-style-type: none"> • Recently gained more independence from the Supreme Court, attempting to increase transparency and increase technical capacity.
Guatemala	1999	<ul style="list-style-type: none"> • Limited to administrative accessory to the Supreme Court.
Mexico	1994	<ul style="list-style-type: none"> • The judicial council is highly influenced by the Supreme Court and other branches of government.
Panama	1987*	<ul style="list-style-type: none"> • *The formation of a judicial council was included in the new 1987 Judicial Code, but one has yet to be formed.
Paraguay	1992	<ul style="list-style-type: none"> • Restricted mandate, limited to proposing list of candidates to Supreme Court and lower court — but it is deemed a positive step.
Peru	1981	<ul style="list-style-type: none"> • The council has been effectively hobbled by executive power.
Uruguay	1981	N/A
Venezuela	1969	<ul style="list-style-type: none"> • Eliminated in 1999.

Sources: Popkin, pp. 105-6; Unger, Chapter 5; Cumaraswamy, p. 6.

range of actors who participate in judicial selection. Unfortunately, judicial councils have not always generated the expected results. In most countries, the selection of judges remains politicized and problematic and the councils have been ineffective at controlling executive power and judicial disorder. In some instances they fall victim to the very troubles they were instituted to combat (Unger, pp.169-71). Frequent problems include executive interference, party politics and a lack of clear guidelines and jurisdiction. Many councils are selected along partisan lines and face deadlock and mistrust when carrying out their duties (see Table 1).

While this is a slow process, and arbitrary and politically motivated judicial selection procedures remain a barrier to an independent judiciary, the formation of judicial councils is laying necessary groundwork for future improvements. In the recent past several countries have undertaken legislative and organizational changes aimed at making the judicial selection process more transparent. In a study undertaken in 2001 by the Washington D.C. based Due Process of Law Foundation, it was determined that the majority of the countries that participated in their study had developed new systems for choosing supreme and/or lower court judges, and there has been discernible improvements across the region in recent years (Popkin, p.104).

Secure Tenure

Like transparent judicial selection, both the length and security of a judge's term is critical to his/her ability to judge impartially — and crucial for independence. In many countries, Supreme Court judges have held short appointments that coincided with presidential terms. In addition, judges are regularly dismissed or replaced before the completion of their terms for political or personal reasons. Security of tenure ensures that judges cannot be removed from office before their term has ended without good reason and according to formal, predetermined proceedings.

In an effort to ensure sufficient and secure tenures, several countries have modified the **length of judges' tenure**. Appointments have also been arranged so as not to coincide with presidential elections. In many countries judges sit for at least 5 years. Several countries' constitutions provide guaranteed tenure until a set retirement age of 75. Extended terms means that judges are less vulnerable to political pressure, having less

likely been appointed by the politicians currently in power. It also provides them with the space and protection to make impartial decisions based on the facts of the case.

Table 2 – Supreme Court Judges’ Tenure

Country	Length of Tenure for Supreme Court Judges
Argentina	Permanent tenure until age 75.
Bolivia	10-year terms.
Canada	Permanent tenure with mandatory retirement at age 75.
Chile	Permanent tenure until age 75.
Costa Rica	Judges re-elected to 8-year terms.
Dominican Republic	Permanent tenure with mandatory retirement at age 75.
El Salvador	Staggered 9-year terms.
Guatemala	5-year terms.
Honduras	No predetermined time limit — determined by the President of the Supreme Court.
Mexico	15 years, with no re-appointment (reduced from life).
Panama	10-year terms, but not enforced.
Paraguay	Permanent tenure until age 75.
Peru	7-year terms, with subsequent terms based on ratification every 7 years.
Uruguay	10-year terms, with mandatory five-year waiting period until re-appointment.
Venezuela	12-year term with no re-appointment.

Sources: Unger, p. 140; Due Process of Law Foundation (DPLF) Country Reports (Peru, El Salvador, Panama, Paraguay, Bolivia, Dominican Republic).

There are critics who point out that longer terms — specifically life terms — can be problematic, as they foster complacency, secure sub-standard judges and guarantee judicial impunity. This point once again highlights the interrelatedness of reforms. To ensure that tenure changes bolster judicial independence they must be preceded by a fair and transparent judicial selection process, and be coupled with procedures that monitor the performance of judges and address misconduct. The existence of

appropriate evaluation and disciplinary procedures, adjudicated by an independent body, are necessary safeguards that protect a judge from unlawful and random dismissal. They also guarantee to the public that judges are carrying out their duties in a proper manner.

To date in the Americas, governments have been more successful at crafting legislation to protect judges' tenure than actually respecting judges' appointments. Disciplinary procedures are often complicated and inefficient, and allow impunity as well as arbitrary suspension to continue. Recent examples from the hemisphere confirm this. In Guatemala the Supreme Judicial Council, charged with punishing, suspending and removing judges, has illegitimately suspended judges without salaries and indiscriminately fired judges before their term is up (DPLF country report — Guatemala, p. 4). In Argentina during 1999, a number of federal judges were suspended from their posts on charges of misconduct. Most removals were legitimate, but there remain some cases of arbitrary dismissal caused by political retaliation against a judge for their previous rulings. (International Commission of Jurists, p. 6)

Appropriate Standards of Conduct

The Quebec City Summit Plan of Action also refers to the need for appropriate standards of conduct. Despite constitutional and legislative guarantees of independence, often judges themselves lack “the intellectual and moral attitude of independence and loyalty to their tasks that is required of them” (Mendez, p. 2). Protection from external pressure will not successfully lead to an independent and trusted judiciary unless it is accompanied by an internal judicial structure characterized by high standards, integrity and accountability. Judges themselves must be well trained, adhere to an agreed upon set of regulations and be armed with internal anti-corruption mechanisms to limit misuse of their judicial position.

One method of assuring certain standards of conduct could include the creation and implementation of a code of ethics that define required and acceptable behavior for judges on and off the bench. A review of the existence of judicial code of ethics reveals that of the eleven countries for which data is available, only two — Panama and Honduras — have instituted

a code of ethics.¹ In both cases attempts to invoke the codes have been ineffective at modifying judicial behaviour. Chile recently set up a Judiciary Ethics Committee, that as of yet is not armed with a code of ethics, but is charged with trying and disciplining judges accused of corruption. Due to its relatively short period in operation analysts cannot say whether the Commission will be successful at sanctioning corrupt judges (DPLF country reports, Cumaraswamy, p. 6).

What is important is that standards of conduct within the judiciary have entered the public and reform discourse, and that many countries are currently considering a code of ethics. The Quebec City Summit underscores the need for such a code as a positive step towards greater independence.

Systems of Accountability

Intimately connected to standards of conduct and internal independence is judicial accountability, which requires “that a more or less independent body explains and justifies its actions, preferably in terms of widely accepted and pre-established rules or criteria” (Hammergren, p. 151). Historically judiciaries throughout the region have not been transparent in their behaviour or the rulings they hand down. Currently, within the hemisphere there are great differences in the level of accountability that is demanded of the judiciary (Hammergren, p. 157).

Accountability requires that two related conditions be present: That the judiciary be required to make public and explain its decisions, based on pre-determined standards; and secondly, that a failure to make information public, or the discovery of corruption or inappropriate behaviour, result in a swift, impartial and enforceable response.

Transparent public access to information about the functioning and outputs of the justice system must be available. This includes information on procedural issues such as judicial budgets and monitoring of judges’ salaries and assets. Jurisdictional aspects must also be examined, including reports on court proceedings, judges’ decisions and resulting sentences. These measures are facilitated by increased media reporting, increased

¹ The countries for which data are available are: Argentina, Bolivia, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Panama, Paraguay, Peru.

participation of civil society organizations, as well as government education campaigns and regular reporting mechanisms. This access to information must be accompanied by measures that allow complaints and investigatory claims to be made against the system or individuals. These claims must be addressed and punishment administered in a systematic way, and the resulting judgments adhered to.

Table 3 – Access to Information on the Internet in Selected Countries

Country	Judicial Budgets	Court Expenditures	Judges' Salaries	Judges' Rulings	Grievances
Argentina	✓	✓		✓	
Bolivia					
Brazil	✓	✓	✓	✓	✓
Chile		✓		✓	✓
Colombia					✓
Costa Rica	✓		✓	✓	
Ecuador				✓	
El Salvador					
Guatemala					✓
Jamaica				✓	
Mexico					
Nicaragua					
Panama	✓		✓	✓	✓
Paraguay					
Peru					
Uruguay	✓	✓	✓	✓	✓
Venezuela					✓

Source: Official country websites.

One way to evaluate the accessibility of information is via its availability on official government web sites, which is an indication of the level of openness and willingness to share and publish information.² A review of the existing web-based information pertaining to judicial budgets, court expenditures, space for lodging grievances, as well as data on judges' salaries and previous rulings indicates that at present countries of the region are not making available much of the basic information that the public needs in order to inform themselves about the operations and functioning of the judiciary, thus ensuring accountability. Table 3 demonstrates that of the seventeen countries reviewed, only two — Brazil and Uruguay — have posted all five pieces of information on their sites, while six countries provide none at all. Supreme Court judges' rulings and a space to lodge grievances against judges were the two areas for which most countries supplied information. Unfortunately, in these areas it is still less than fifty percent of countries that provide this type of information.

Access to information is a necessary, but not sufficient condition for assuring accountability. It is only once citizens are armed with an understanding and details of the issues that they can begin to evaluate whether systems are working in an acceptable manner. Judicial systems across the region must do more to provide their citizens with this pertinent information.

Judicial Independence: Challenges for the Future

Reforms discussed above have helped to secure both internal and external independence of the judiciary, but in many cases they represent the first steps in a complex and multi-layered process. The efforts to date have been reassuring:

- The fact that this issue has been included in the Summits Plans of Action places it in the spotlight and on the agenda of governments and multilateral agencies;
- Formation of judicial councils, while they do face some problems, are an important movement towards a more transparent judicial selection process;

² This medium obviously has its problems. Information posted in this manner may not be accessible to large portions of the population, as Internet access across the region is uneven and underdeveloped in some areas. In addition, the lack of information contained on some government sites may be indicative of the relatively recent introduction of the Internet and of technological issues, rather than problems of transparency and accountability. Although it is worth noting that many of the countries sampled maintain visually impressive and well-developed websites, suggesting that the lack of information is not due to technological limitations.

- There is a growing awareness of the need for internal, in addition to external, evaluation systems and mechanisms; and
- There has been an increase in reporting on tenure violation — public discussion of these actions makes citizens more aware of the issue and its importance.

Yet, there remains much work to be done:

- In many cases, the main opponents of judicial reform are the Supreme Court judges, political parties and the powerful private interests who gain from the system as it exists, and are used to — and benefit from — operating above or outside the law.
- Changing these aspects and patterns requires much more than reforming legislation or legal codes, but necessitates more deep-seated and fundamental changes in what is deemed acceptable behaviour, how judges see their roles and duties, and what the public requires and demands of them.

2. ACCESS TO JUSTICE

Access to prompt, equal and universal justice is a second issue included in the Summit of the Americas' Plan of Action. Access to justice refers to individuals' ability to make use of mechanisms that allow them to mediate, and seek a remedy for, their disputes. According to recent statistics more than 80% of Latin Americans are confronted with obstacles that limit their access to a justice system that efficiently resolves their conflicts (Unger, p. 187).

The process of bringing a grievance to officials for mediation involves several distinct steps, and necessitates the participation of several different bodies. Initially, citizens need access to the instruments required to make use of a justice system, including: fair treatment by police, timely information about the infraction committed, knowledge about their rights and duties as a citizen, and access to lawyers or informed advisors. Once inside the legal system, citizens must be able to expect structurally sound court procedures that can provide efficient, fair and enforceable rulings.

Access To Justice: The Current Situation

Despite reforms aimed at increasing accessibility, many of the substantive problems are not being dealt with sufficiently, and there remain several ways that access to justice can be blocked and fail. At the initial access level, justice seekers suffer from a shortage of or poor information, physical

barriers to service and a lack of affordable representation. On the structural level, numerous problems can impede access, including lack of qualified judges, insufficient infrastructure, as well as heavy bureaucratic requirements and poor management systems. There are additional and perhaps less apparent circumstances that can limit a citizen’s ability to resolve conflicts through official channels. Among these are various forms of discrimination, corruption, a deeply engrained societal mistrust of the justice system, and legal formalism — where judges adhere to the “letter” of the law without taking into consideration the context of the situation or the “spirit” of the law.

Many countries have begun to make adjustments to improve access to justice. Some of the efforts include guaranteed federal judicial budgets, attempts to improve the legal defense of those involved in criminal cases by strengthening public defenders offices, adopting oral over written procedures and the establishment of human rights ombudsmen (*Defensorías del Pueblo*). Despite these efforts, there remain substantial backlogs in the court system. For example, in Venezuela and Argentina the average wait time for a criminal trial is 4.5 years. An overwhelming number of people are currently being held in prisons across the Americas without having had their guilt or innocence determined by a court of law. Data from the Andean countries in 2000 demonstrate that between 43 and 72 percent of those held in prisons have not yet been formally sentenced. These figures underscore the staggering difficulties that both the accused and the victimized face while attempting to utilize the mechanisms meant to apportion justice. These problems continue to limit citizen’s confidence in the justice system throughout the region, as the reforms proposed to date have not managed to significantly increase access to justice.

Table 4 – Individuals Held in Prisons Awaiting Sentencing

Country	Total prisoners	% not yet sentenced
Bolivia	8,123	72%
Chile	30,810	54%
Colombia	50,171	43%
Ecuador	8,568	71%
Peru	26,954	60%
Venezuela	14,308	45%

Source: Andean Commission of Jurists (www.cajpe.org.pe/RIJ/bases/realjuri/ind5.HTM)

Access To Justice: The Findings

The Quebec City Summit of the Americas Plan of Action deals specifically with mechanisms to:

- Support public and private initiatives to educate people about their rights; and
- Promote measures that “ensure prompt, equal and universal” access to justice.

Public Defenders and Legal Aid

One of the key components of an accessible justice system is the right to fair and impartial representation. Article 8, Section E of the *Inter-American Convention on Human Rights* states that all individuals have the “inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own council within the time period established by law”.

Countries across the hemisphere provide free legal counsel for low-income individuals who have been charged with a criminal offence. Often public defenders work for a government agency charged with providing representation in criminal and/or civil cases (*defensorías públicas*).³ According to data collected at the First Inter-American meeting of Public Defenders in September 2001, 15 countries surveyed had a legal aid or public defense system available to represent those unable to retain their own counsel in criminal, and in some instances civil, labour and family related cases. The data for these programs were varied — from the number of clients served, the number of lawyers on staff and the percentage of cases resolved through legal aid services.

Despite their widespread existence, legal aid services throughout the Americas are still grossly insufficient and have failed to evolve with the increase in population and demand. The data in Table 5 demonstrate some of

³ Countries may also supplement this with a voucher system, in which those in need are given vouchers redeemable with certain private law offices. In addition to the public defenders offices, there are additional types of public and private services which provide assistance to those in need, as well as information and counseling on issues of law and rights. Many countries have a mix of such clinics set up by universities, law schools, non-governmental organizations, bar associations and professional organizations.

the major challenges facing the public defenders/legal aid services. In the majority of cases the programs are marked by an inadequate supply of lawyers, with ratios of lawyers per capita reaching as high as one lawyer for over three hundred thousand citizens. The impact of this shortage in legal services is heightened by the fact that in half of the countries surveyed, over 75 percent of the criminal cases are dealt with through legal aid. Hence, the vast majority of criminal cases face excruciating backlogs — which contribute to long periods of imprisonment prior to the completion of a trial.

Table 5 – Public Defenders in Latin America (2000–2001)

Country	Population per legal aid lawyer	Number of legal aid lawyers available	Percentage of cases served by legal aid services	Year service created
Trinidad & Tobago	4,313	300	75% of penal cases 35% of civil cases	Amended 1999
Canada (Ontario)	2,880	3,993	—	1967 (Provincial)
El Salvador	8,815	712	90% of penal cases	1983
Paraguay	27,480	200	90% of penal cases 60% of civil cases	1998
Colombia	36,801	1,150	17.5% of all cases	1992
Argentina	43,210	857	85-90% of penal cases	1994
Brazil	56,898	3,000	90% of penal cases 60% of civil cases	—
Panama	59,500	48	8% of all cases	—
Peru	98,627	263	—	—
Bolivia	101,573	82	49% of penal cases	1992
Dominican Republic	215,282	39	—	—
Mexico	144,141	686	80-90% of penal cases	1998
Nicaragua	338,067	15	—	1999
Ecuador	383,212	33	30% of cases	—
U.S.	—	—	80-85% of cases	1964

Source: Compiled from the Justice Studies Center for the Americas, “Primer Encuentro Interamericano de Defensorías Públicas” (<http://www.cejamericas.org>).

At this moment, public defense is at a level that falls below the basic standards and fails to meet expectations — in terms of the quantity and quality of the service provided. It has also been argued that while legal aid reforms are politically expedient and enjoy popular support, the provision of legal representation fails to deal with the basic inefficiencies of the system, and may do little more than patch up larger problems, being unsuccessful in having a larger social or legal impact.

All of this said, it is heartening to note that of the countries that provided data, over half have set up a public defenders office within the last decade. While there remain issues of capacity, administration and coverage with these services, the very fact that they have been formed does represent encouraging progress. In addition, the first Inter-American meeting of Public Defenders that produced this data, and similar conferences and budding public defender associations, all affirm that these bodies are beginning to gain strength. Continued meetings, research and profile-raising activities will enable defenders to better lobby for and represent their clients.

Human Rights Ombudsman — Defensoría del Pueblo

One exciting new development in the past decade has been the creation of national human rights ombudsman offices (*Defensorías del Pueblo*) in eleven countries across the Americas. The *Defensorías* are administrative bodies charged with overseeing the guarantee of citizens' rights *vis-à-vis* the government, and all of its related agencies and departments. These offices field citizens' complaints of violation of the law. While not imbued with the ability to pass rulings or impose judgments, they work to provide resolution to problems related to state services, and they investigate police, prison and judiciary (mis)conduct (Unger, pp. 36-37).

Formed in the majority of cases during the 1990s, the ombudsmen have thus far been successful, gaining wide spread popularity and trust, and acting as strong advocates of the citizenry. The *Defensorías* investigate specific instances of abuse and misconduct, while at the same time helping to make the connection between isolated cases and broader social problems, including marginalization, poverty, and violence against women and children. Through their work they raise the profile of ongoing abuse, educate people about their rights and the responsibilities of the state to its citizens. By providing representation and outreach, they have also been instrumental in facilitating connections between like-minded organizations allowing,

previously marginalized groups to present their grievances and concerns on a larger scale.

Like judicial councils, the *defensorías* do face their share of politicking and pressure from powerful sources whose best interest is not to have them succeed. They do face substantial roadblocks, and their attempts to make lasting change, uncover large-scale endemic abuse and structural /institutional deficiencies have been met with opposition. Opposed sectors have aimed to limit their effectiveness by limiting their annual budgets and cutting short the terms of incumbent defenders. However, the preliminary reviews of these bodies have been positive. The institutions maintain a high profile in many countries, are generally administered by dedicated staff, and enjoy the trust and confidence of the public. In Peru, the *Defensoría* is one of the most credible and independent bodies in the country; it enjoys high levels of public support (Unger, p. 198).

Oral Proceedings

The inaccessibility of judges and decision makers is a key impediment to accessing justice. These problems are in part due to long backlogs in court cases, which are affected by the criminal procedural codes in place in many countries throughout Latin America and the Caribbean. Instituted under penal code reform, in recent years democracies have begun to revise their procedural systems, moving from inquisitorial and written, to oral and accusatorial models. This has been undertaken in an effort to streamline the administrative structure, while protecting constitutional and human rights.

Under the inquisitorial/written system the pretrial process (*sumario*) requires the preparation of an extensive written statement that is presented directly to the judge of the case. Judges make their decision based on the submitted written documentation without ever having to interact with or hear testimony from those involved in the case. This system is problematic for several reasons. It is a slow process that is biased against those poorly represented, who often lack access to information, skills and the resources necessary to effectively present their case. This system also lacks transparency and provides little or no public access to decision makers.

Table 6 – Introduction of Oral Proceedings

Country	Year of Reform
Argentina	1992
Bolivia	1999
Chile	2000
Ecuador	1999
El Salvador	1994
Guatemala	1994
Honduras	1999
Paraguay	1998
Uruguay	1997
Venezuela	1999

Sources: Unger, p. 144; DPLF Country Report (El Salvador, p. 15); Andean Commission of Jurists, (www.cajpe.org.pe).

During the 1990s, ten countries moved to an oral proceedings model, a change that has a tendency to make trials simpler, faster and cheaper. The accused are allowed to present their arguments to the court, permitting the prosecution and defense to debate the case under equal conditions. The immediacy of the proceedings offers the public access to decision makers and forces the judge to provide a logical ruling based on the evidence introduced. In addition, this process reduces the complexity of the judicial process and makes the system less open to corruption and abuse (Human Development Report 2002, p. 123).

In the inquisitorial system, judges are also responsible for collecting evidence both for and against the defendant — so the one trying is also the one judging — which raises questions of impartiality and accountability. Under the new system the investigatory roles (investigating and charging a suspect) and the judicial roles (trying and judging a suspect) are separated, placing the investigatory role with the public prosecutors office. With the public prosecutor responsible for the investigation, legal formalism in the trial investigation is reduced, lessening the opportunity for conflict of interest, while making proceedings more efficient.

Access to Justice: Challenges for the Future

The past decade has witnessed a host of reforms throughout the Americas that have laid the groundwork for a better-represented and better-

informed citizenry. These positive and hopeful developments, brought about by an increased focus on the issue of judicial access by national and multilateral bodies, include:

- The growing number of Public Defenders, and recent efforts of Public Defenders from different regions to connect with each other and share information and strategy — which will build knowledge, capacity and the profile of these organizations;
- The formation of a Human Rights Ombudsman (*Defensoría del Pueblo*) in eleven countries, bodies that until now have been met with success and strong public support; and
- Reform of criminal procedural codes that improve the accountability of judges, while increasing access of the public to court systems.

While many individuals throughout the hemisphere currently lack access to justice, it is hoped that the aforementioned measures will improve the situation. Beyond these reforms, governments and citizens should address the additional challenges of:

- Lack of sufficient data and recording systems, which reduces governments ability to evaluate courts performance and plan for the future;
- Discrimination and prejudice that pervade all levels of society and affect expectations and demands of the justice system, as well as how vulnerable groups are treated by those in power; and
- Lack of awareness within marginalized groups of their political and civil rights, in part due to a clear shortage of public legal information and education. The deficit of knowledge about legal and social rights limits expectations and restricts the vigor with which people claim these rights.

MULTILATERAL ACTIVITY IN THE FIELD

Judicial reform has become an increasingly important issue for several multilateral agencies over the past 15 years. The World Bank, the Inter-American Development Bank (IDB), the Organization of American States (OAS) and the Economic Commission for Latin America and the Caribbean (ECLAC) have all invested substantial time, effort and resources into summit implementation projects. The endeavors of these organizations have been invaluable and make them key partners in the ongoing achievement of several Summit commitments, including justice-related goals.

In addition to the on-the-ground work funding and designing reforms, many key players — old and new — are actively seeking out and setting up indicators and data collection mechanisms. These tools are essential to providing a thorough understanding of the current situation, and will help to generate a more precise monitoring system. These new indicators will prove extremely useful to donors, international organizations, civil society groups and those interested in contributing ideas and support for multilateral agreements. In addition, they will assist in following-up and advocating the completion and implementation of proposed projects. This information will also highlight and publicize justice issues, bringing them into the public discourse. As a result of placing “pressure” on and demanding accountability from governments, officials will be encouraged to discuss and make public statistics, judgments and the logic behind a system that has, until now, been an area unfamiliar to large portions of the population. At the time of this study, accessible, reliable and uniform data on judicial systems and procedures were difficult, and in some cases impossible, to locate. Further research in this area will provide much needed information.

One very promising outcome of the Summits in the area of justice is the formation of the Justice Studies Center of the Americas, which was approved by the OAS Special General Assembly in November 1999. The Center, headquartered in Santiago de Chile, has the mandate of facilitating the training of justice sector personnel, information exchanges and technical cooperation and also of providing support for reform and modernization process in the justice systems of the Americas.

CONCLUSIONS

Based on the information collected to date, and due to the nature, complexity and breadth of the changes that have taken place there is no definitive answer about the state of judicial reforms. There only exists the ability to provide an indication of how countries are progressing. Overall, advances have been uneven — between and within countries — as well as within different areas of reform. Based on public reaction within some countries, the news is not good. Approval ratings from the Andean countries in the late 1990s demonstrate that citizens of those countries do not have great faith in their systems, and the judiciaries have not succeeded in presenting themselves as accountable and responsive to the

needs of citizens. Chile's judicial system fared the worst, with only a 12% approval rating. Venezuela did a little better at 15.8% and Ecuador and Peru tied for third with an approval rating of 21%. In Bolivia and Colombia, 44% and 65% respectively of those polled approved of the justice system. (Andean Commission of Jurists, <http://www.cajpe.org.pe/rij/>)

Reforms have now been underway for more than ten years. A strict cost-benefit analysis of these efforts may lead many to believe that there is little to show for this time and effort. Yet, the last decade of reforms cannot be considered a wasted period or a squandered effort. During this time, many involved have learned much about the workings of the justice sector — an area that was previously little known. There is now awareness that ensuring access to justice and guaranteeing independence requires much more than reform of legal codes, legislation and court systems. Reformers possess a better understanding of the complexity, interconnectedness and importance of this area, and as a result are better armed to plan and execute future improvements.

As agencies and governments move forward the outcomes of work already done, and the lessons that come from these experiences, must be taken into account. We end this report with some observations and recommendations that countries, reformers and multilateral organizations should keep in mind as they proceed with this important work.

- In many countries a “culture of corruption” remains entrenched within the judiciary, and often has the support/pressure from the political class and private interests who prefer an easily controlled judiciary. Changing this aspect requires more than changes in legislation or organic codes: it requires more entrenched and fundamental changes in attitudes about the purpose and possibilities of the law.
- Civil society, including bar associations, the media, ombudsmen, anti-corruption agencies, think tanks, non-governmental organizations and universities must play an active role in changing this culture, working to reduce the acceptance and tolerance of corruption and lack of judicial independence.
- Reformers must consider the fact that these reforms are inherently political and cultural in nature, not just technical and based on availability of knowledge or resources. As such, international

programs that provide for infrastructure and equipment must also include training for judges and judicial staff, as well as education and awareness-raising programs for citizens.

- Judicial reform must be tailor-made and fit with the particular circumstances in each country. To be successful they cannot, and should not, follow a blueprint model.
- Aid agencies, multilateral entities and reformers must engage diverse groups in the reform process, and seek broad consensus about goals and methods of reforms. The reform process should be inclusive — engaging citizens, civil society organizations and the judiciary itself in public debate. The successful completion of reforms involves increasing trust, interest and expectations of the public, which will in turn lead to increased demand for accountability.
- There is the need for a certain amount of reflection on past experiences, and a reordering of future priorities.

FOCAL urges national governments, civil society organizations and multilateral organizations to continue to support and work towards the goals outlined in the Summits of the Americas Plans of Action. All involved should take account of the current achievements reached in the area of access to justice and independence of the judiciary, and chart out a succinct and comprehensive reform agenda for the nations of the hemisphere.

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