ADMINISTRATION OF JUSTICE IN LATIN AMERICA

A PRIMER ON THE CRIMINAL JUSTICE SYSTEM

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INTRODUCTION

Latin America has undergone a revolutionary political transformation during the last decade as many countries moved from military rule to democratic governments in all but two countries (Cuba and Haiti).

As democratization has taken root, a consensus has developed of the importance of a fair, independent and efficient justice system to the realization of participatory democracy. The significance of the justice sector lies in its basic role as a guarantor of rights and arbiter of conflicts among citizens and between the public and the State. Central to this mediating role is the criminal justice system since it addresses the most serious individual and social conflicts. Ultimately, the state of criminal justice in any country is a key indicator of how a society protects its citizens and the community as a whole from actions which threaten their peace, safety and human rights.

Many critics of the justice system in Latin America have concluded that the administration of justice is in crisis. Delay in processing cases and general inefficiency have given the appearance of an ineffectual and corrupt judicial system which is unresponsive to the needs of the population. The police, usually under the influence of the military and often disrespectful of human rights, has been generally incapable of curbing rising crime rates while the correctional system has been unable to meet the needs of burgeoning inmate populations. Concurrently, there has been a spiraling rise in crime, especially violent ones, resulting in a growing sense of insecurity among the population which has often felt compelled to take measures to protect itself. Finally, corruption, a staple of Latin American government, has become a public issue, rising to first place in almost every survey of popular concerns, leading many to conclude that every democratic government has been a little more corrupt than the preceding one.

Citizens are faced with a complex set of legal institutions detailed in outdated codes written in obscure language. The system is even more enigmatic to the U.S. observer, accustomed to a "common law" tradition and unfamiliar with foreign systems. Thus, for example, the term inquisitorial is used to describe the Latin American system even though it is overly simplistic and fails to convey a sense of a system that can trace its roots 400 years prior to the birth of Christ.

Given its importance to democratic development, it is surprising that although a great deal has been written in recent years about the political systems of Latin America very little has been published about their justice systems. The few works that have appeared in the academic literature have dealt with the legislation of a particular country with the majority of publications being limited to descriptions of formal legal and constitutional issues. This monograph represents a first descriptive approach to a situation that will require deeper research. It is not meant to offer a definitive analysis of

Latin American justice systems. Rather, its goal is to highlight some of the most notable issues facing the sector and encourage further research into this significant area.

This monograph is written for lay persons. Its intent is to describe a justice system which predominates in the majority of the countries in this hemisphere. Rather than attempting to detail all of the areas in which the administration of justice operates, we have limited ourselves to the criminal justice system. Criminal justice is a priority of any justice system since it is that facet of the system which impacts most harshly on the most disadvantaged sectors of society and is that feature which best reflects on the form of social control chosen by a country as well as the manner in which it guarantees fundamental rights. Even this narrow sector must be further limited for the same reasons stated above, requiring the exclusion of extraordinary criminal systems (juvenile justice, narcotics, etc.).

Rather than focusing strictly on the legal system, we have relied on a conception of the administration of justice as a network made up of regulations, institutions, and formal and informal processes. The system operates within a political context and its actors are agencies from the different branches of government (National Assembly, Attorney General's Office, Judiciary, Police, etc.) as well as other institutions responsible for the academic preparation and regulation of the human resources of the system such as law faculties and bar associations.

Due to space limitations imposed by the nature of a primer we had to narrow the scope of this document. In the first chapter we will set out the historical, social, and legal contexts in which the system operates. In chapters two through eight we will describe the major institutions which compose the criminal justice system (police, prosecution, legal defense, and corrections) as well as the procedural context in which laws are implemented. The final chapter will seek to apply a basic set of general principles by which the justice system's efficacy can be measured: independence, accessibility, efficiency, fairness, and accountability.

I. THE GENERAL CONTEXT

An analysis of the justice system is incomplete without taking into account the general context in which the system operates. A historical overview will allow the reader to understand the factors which have led to the state of the current judicial system by analyzing the social, economic, and political issues which have determined its evolution. Since the social context of a justice system is a broad area we have focused our inquiry on the issue of crime and its consequences. Finally, we have included a section which outlines the major features of the "civil law" system which predominates in Latin America.

A. History

1. Conquest and Colonization

The origins of the legal system in Latin America can be traced to the colonization of the region by Spain and Portugal. Our emphasis shall be on the influence of Spain (since Portugal's was primarily limited to Brazil).

The great distances between the major colonial centers, many of which were far inland (for example, Mexico City and Bogota), impeded the Crown's capability of oversight and allowed local officials flexibility in applying colonial rule. Royal rulers solidified their authority over the new colonies by transplanting a number of Spanish institutions. From Aragon, Spain adapted its overall governance model, with viceroys appointed to oversee the major territories, while Castilian innovations, in provincial and regional court administration, were incorporated into the colonial governance model. However, the Crown was reluctant to bring to the colonies the major democratic institutions which restricted royal authority in Spain: the ***cortes*** (an assembly of representatives from the major cities and towns).

As colonialization progressed and the size of the empire grew, the Crown felt compelled to subdivide the viceroyalties into audiencias which were, in turn, further subdivided into ***corregimientos, alcaldías mayores and gobernaciones. Audiencias*** were the cornerstone of colonial government. In addition to their administrative and legislative responsibilities, ***audiencias*** also imparted justice acting as the supreme court of the district. These tribunals first appeared in Santo Domingo in 1511, and spread to the major colonial centers thereafter (See Figure 1). Appointments of ***audiencia*** ministers were either for life or subject to royal wishes.

The Council of the Indies, founded in 1524, had general authority over colonial rule in the New World as it exercised legislative, judicial, and executive powers. It retained supreme lawmaking responsibility and heard appeals from audiencias, and conducted regular inspections of administrative units throughout the Empire. The ***audiencias*** provided a mechanism whereby officials would progress through its ranks in accordance with seniority. The appointees were required to have legal training and would first usually serve in one of the inferior tribunals, aspiring for eventual appointment to the more prestigious audiencias in Lima or Mexico. They usually moved from fiscal (state's attorney) to the highest office, the ***oidor.*** Unlike their counterparts in Brazil, the Spanish positions were originally restricted to persons of Spanish birth, although a practice of selling audiencia appointments eventually allowed a minority of posts to be filled with creoles.

The exclusion of "creoles" prevented the establishment of a local class of functionaries with experience in government and judicial affairs. Thus, there was a lack of experienced personnel to staff the positions necessary for nation building after independence. As a result, many judicial positions were occupied by non-lawyers.

Another institution which influenced the development of Latin America's justice system was the Inquisition. In 1569, the Crown established Tribunals of the Inquisition in Lima and Mexico City with a third created in Cartagena in 1610. Blasphemy, bigamy, and crimes against public morals occupied the bulk of the Inquisition's docket. Complaints triggered action by the Inquisition's courts. Thereafter, the inquisitors would conduct an investigation which could result in the arrest of the suspect. Secrecy characterized the procedure of these tribunals as the accused lingered in isolation, often for years, unable to confront his/her accusers, ignorant of the specific charges brought against him/her.

Spanish colonial criminal procedure was characterized by reliance on laws predicated on inequality of subjects and protection of the Crown's property and economic interests. European procedure relied on a model which emphasized the role of the judge as investigating magistrate, and divided the criminal process in two stages: the investigation and the trial. The first stage was marked by its arbitrariness, secrecy, absence of counsel, defendants uninformed of the charges against them and unable to confront the witnesses against them, and the use of torture to obtain confessions. The second stage, the trial, consisted of a cursory judicial review of the materials presented in the investigation.

The development of the police followed a Spanish model noted for its repressiveness and oriented towards order maintenance and the defense of the Crown. The number of law enforcement personnel in the colonies was small. This task was assigned to marshals (alguaciles), rural police and night watchmen (serenos). The first police departments were established in Chile (1760), New Granada (1791), Brazil (1808), Argentina (1813), and Uruguay (1829). In many countries, the role of police was viewed as complementary to that of the Army.

Punishments for major crimes, usually consisting in whippings, were regularly administered in public to deter potential violators. The death penalty was rarely applied and the primary sanctions were: hard labor, on land or in galleys, or military service. Judges could consider mitigating circumstances in imposing their sentence and exercised considerable discretion.

Penitentiaries were used primarily as holding facilities pending application of sanctions. Jails were ordinarily built inside military fortifications or caves, with an emphasis on security. For example, the prison in Arequipa (Peru) was placed in a natural cave formerly used by the Incas as a holding pen for animals. Its ceiling was so low as to prevent humans from standing erect. Finally, another set of holding facilities were operated by the Inquisition (i.e., in Mexico, the Perpetual Jail and the Secret Jail). By the end of the eighteenth century the humanitarian principles of the European correctional reformers (notably Beccaria and Bentham) were adopted, and the prison system became more humane.

2. Independence

The history of Latin America, following independence from Spain, was characterized by the violence of internal conflicts, political instability, growing supremacy of the executive, and frequent intervention of the armed forces in the political life of the country. The independence of the Spanish and Portuguese colonies coincided with European codification reforms, especially French. Eighteenth century European philosophers were quick to criticize the abuses and harshness of the criminal codes of procedure and to call for change in favor of fairness and respect for the rights of the accused. This movement eventually culminated in the adoption of the French Code d'Instruction Criminelle of 1808, also known as the Napoleonic Code, which influenced the development of legal systems throughout Europe, with the exception of England, and Latin America.

The French reforms incorporated some of the procedural tools of the Inquisition (public prosecution and the search for truth as the ultimate goal of the proceeding), but included important limitations on the State's power to prosecute. A two stage process evolved: the first, characterized by its inquisitorial features (secrecy and reliance on written pleadings and orders), the second, clothed with the adversarial features so common to the common law (public, continuous, and contested oral trial). The political changes also affected the process resulting in new and independent courts with popular participation (through the use of juries). Finally, judicial abuse was curbed by establishing a separate accusatory institution (denominated public ministry) charged with prosecution of crimes.

While constitutions were adopted, almost ***ad infinitum***, codification in Latin America lagged behind. Of the major reforms, criminal procedure was generally the last to be addressed. For example, Argentina adopted a commercial code in 1862, a civil code in 1869, a criminal code in 1886, a code of civil procedure in 1880, and a code of criminal procedure in 1888. Although Spanish law continued to be applied for many years after independence, attempts were made to develop native codes. Latin American codification largely began by copying from European countries rather than reviewing and adapting the achievements of their neighbors. Commonly, its authors were the privileged few who could study in European universities or traveled to professional meetings and brought back the newest code for adoption in their country. This blind copying, oftentimes using poor translations, has continued to the present and led one reviewer to conclude that the process of Latin American codification could be characterized as "legislation by tourism."

Political reforms introduced by U.S. Constitution impacted on Latin America in two areas: political organization and individual rights. Admiration of the U.S. model reached the point that Argentina, following adoption of its constitution of 1853, determined that U.S. Supreme Court rulings should serve as binding jurisprudence for Argentinean courts. By 1875, Argentinean nationalism caused rejection of this extreme view but U.S. influence continued. Perhaps its most notable example was the

emergence of the jury in almost all Latin American countries and the debates over public participation in the justice system which followed.

Finally, while the American Revolution aroused enthusiasm among the forgers of Latin American democracies, its legal thinkers quickly returned to their European roots and retained adherence to the Roman family of law. Law enforcement, meanwhile, became centralized, following European trends, and its function oftentimes focused on national security rather than public safety. The trend toward militarization of police was common throughout the hemisphere.

Correctional policy was affected by humanitarian ideals imported from Europe characterized by sanctions commensurate with the crime and aimed at rehabilitation rather than punishment. The United States also influenced the development of Latin American correctional systems by exporting models of prison construction and organization. The first penitentiaries were built in Peru (1821), Colombia (1828), Brazil (1834), Mexico (1840), Venezuela (1841), Chile (1843), and Argentina (1860). The first correctional codes were enacted in Guatemala (1834), Colombia (1853), and Argentina (1877).

3. Twentieth Century

During this century the region continued to be affected by conflicts between nations and internal violent struggles, oftentimes leading to military takeovers. The decade of the 80s, however, was characterized by an almost uniform return to democracy throughout the region.

European trends dominated the development of criminal law. Positivism influenced the adoption of legislation in El Salvador (1904), Argentina (1922), Panama (1922), Uruguay (1933), and Cuba (1936), while German dogmatism is reflected in new codes in Bolivia (1974) and Guatemala (1980). Finally, the promulgation of a model Latin American penal code influenced the adoption of laws in Costa Rica (1970), El Salvador (1973) and Nicaragua (1974).

Legislatures were slow to develop and quickly came under the control of the Executive. Given the level of executive supremacy, it is not surprising that a pattern of governance through Executive decrees rather than legislation developed and continues to this day. Thus, for example, the major reforms to the Bolivian justice system came about during the *de facto* government of General Hugo Bánzer Suárez (1971-78). Bánzer's government enacted by decree the Law on Court Organization (1972), the Criminal Code (1972), the Family Code (1972), the Civil Code (1975), the Commercial Code (1977), and the Code of Criminal Procedure (1972). Despite the return to democracy in 1982, the Bánzer Codes continue in effect even though many question their legitimacy since they have not been repealed or ratified by the Bolivian legislature.

Primacy of the Executive over the Judiciary also continued throughout this century leading sometimes to clashes between the branches. The judiciary has often been the victim of these clashes, albeit not a principal party in the struggle. In 1985, the Honduran Legislative Branch removed all of the members of the Supreme Court and named another Court, while the Executive maintained its support for the sitting judges. This resulted in the unusual outcome of having two Supreme Courts sitting at the same time. The clash was eventually resolved through a compromise in which another Supreme Court was named.

Judicial independence was formally abolished in many countries during the 70s (Cuba, Panama, and Uruguay) while in others the military regimes established parallel special courts usurping traditional judicial functions and legitimizing blatant violations of human rights (Argentina, Brazil, Chile, Colombia, Cuba, El Salvador, Guatemala, Nicaragua, and Uruguay). Finally, in several countries judicial independence was abrogated by the illegal removal of members of the courts by the Executive (Argentina, Brazil, Cuba, El Salvador, Honduras, Panama, Peru, and the Dominican Republic).

The sale of ***audiencia*** positions during colonial times had created a practice of considering judicial positions as booty for sale by the ruler in power. This continued after independence. This politicization of the judiciary has led to continuous judicial turnover and, ultimately, in compromises between the major political parties to share judicial appointments. For example, President Violeta Chamorro's Government in Nicaragua agreed to a sharing arrangement with the Sandinistas whereby four Sandinista members of the Supreme Court resigned and she named their substitutes. Even though the Sandinistas retained a majority of one vote on the Court they agreed not to reach major decisions without the vote of at least one of the Chamorro appointees.

Militarization of the police continued during this century, especially as a result of U.S. influence (first, following the Monroe and Roosevelt doctrines and later as a result of U.S. counterinsurgency policy to combat communism). For example, in Central America and the Caribbean, the United States developed a policy, proposed by the State Department, to create non-partisan American-trained constabularies (mostly known as national guards). In 1923 the United States obtained a treaty agreement with all Central American countries to create national guards relying on foreign experts to organize and train the new units. Thus, it was not uncommon to find U.S. police advisors throughout the region. Currently, law enforcement assistance is furnished by several countries: France, Germany, Spain, Taiwan, and the United States.

Another factor which influenced militarization of the police was the ascendancy of the military. In several countries the police counterbalanced the power of the military. However, as the armed forces assumed primacy, the police were placed under the direct supervision of the military. For example, in Colombia the national police was in the hands of the Liberals while the Conservatives dominated the armed forces. During the 1950s, the Conservative Government transferred the police from the supervision of

the Ministry of Government to the Ministry of National Defense and eliminated as a potential adversary of the military.

Prison reform continued and was influenced by international corrections movements. Open prisons were built in Argentina, Brazil, Colombia, Costa Rica and Venezuela. Beginning in 1940, many of the countries adopted systems of island prisons and internal exile (Argentina in the Martin Garcia Island, Brazil in the Anchietta Island, Colombia in the Gorgona Island, Costa Rica in the San Lucas Island, Chile in Santa Maria Island, Cuba in Isla de Pinos, Panama in Coiba, Peru in the Fronton Island, and Venezuela in the Burro Island). The condition of human rights remained to be deplorable in almost all correctional systems.

Currently, the administration of justice in Latin America is facing its gravest crisis as it is perceived as unable to respond to popular demands. Added to this crisis of confidence are frequent violations of basic legal norms, lack of interinstitutional coordination, and inability to deal with growing caseloads.

B. Crime

While methodological constraints make exact measurement of the level of criminality in the region impossible, all signs point to rapidly rising crime rates throughout the hemisphere. The reader should be cautioned that it is especially difficult to measure criminality in Latin America due to the deficiency of judicial and police statistics.

In those countries in which crime statistics are regularly reported, serious crime has risen dramatically in recent years. In Buenos Aires, for example, a city that once prided itself on its tranquility, reported crimes have nearly doubled from 56,000 cases in 1984 to 110,000 cases in 1988, while many crimes go unreported because of a public perception that they will go unsolved. Only about 2.5% of reported crimes in that city result in convictions. The increase in crimes has not only been quantitative, but has also been qualitative in the seriousness of certain offenses. Of all crime statistics, one of the most reliable is homicide since the reporting rate is usually the highest of any crime. In Guatemala, for example, homicide rates rose from 18.7 per 100,000 population in 1968 to 113.6 in 1981. While these rates have decreased to 21.3 in 1986, they still remain high. Costa Rica displayed a rate of 3.9 and Panama one of 2.8 in 1984.

Nowhere is the seriousness of violent crime more appreciable than in Colombia. In 1990, Colombian violence reached its highest levels since the government began to keep statistics in the 1950s. With a rate of 70 dead per 100,000 population, Colombia exceeded the United States' 10 per 100,000 rate sevenfold. The problem is even more notable in Medellin, where the murder role rose to 253 homicides for every 100,000 persons. Eventually, serious crime may become so commonplace that violence may become acceptable. President Cesar Gaviria said of Colombia's high murder rates:

"Violence is not new to us; it's a characteristic of this country. It's like it was in the Far West: something that goes along with rapid growth, with the frontier mentality."

Fear of crime has overtaken other national problems in national polls. In 1986, Costa Rica's criminality was ranked as the primary social problem facing the nation while 67% of Santiago's residents in 1991, considered violence to be their primary concern. Similar survey results can be found in many other Latin American countries. This fear of crime had a substantial effect on the quality of life of the population with the majority taking measures to prevent the possibility of victimization. Fear of crime not only affects the daily activities of citizens but also has an impact on their confidence of the justice sector.

Concern over being a victim of a crime leads to a variety of responses. Citizens are arming themselves and spending large sums in securing their homes against thieves. Neighborhood have formed vigilante groups. In Medellin, for example, neighborhood militias are credited with reducing the murder rate in 1982, while political analysts are concerned over the degeneration of these groups into armed bandits or guerrillas. Self-help methods have even engendered cult figures. For example, a man in Buenos Aires shot to death two youths who were trying to steal his car radio. His case was compared to that of Bernhard Goetz, the New York subway vigilante. With public sentiment in his favor, a judge ultimately acquitted him of all charges.

A result of the inability of the justice system to control crime has been a rise in mob violence. In Brazil, for example, officials claimed that some 500 persons would die as a result of lynchings in 1991. One such case gained national notoriety in 1991 when 5,000 residents of Matupa, a remote city in Brazil, kidnapped three suspects arrested for trying to rob a rancher's home and holding the family hostage, and burned them alive. The lynching was filmed and broadcast on national television. Meanwhile, citizens are supporting paramilitary groups who have engaged in "social clean up" campaigns. Most notable of these are the murders of street children in Brazil. A recent report by a Brazilian congressional committee investigating the killings of youths detailed the deaths of 4,611 minors in the last three years. The congressional panel claims to have uncovered the existence of at least 15 organized groups in Rio de Janeiro involved in the killings, with a special emphasis on private security agencies.

The rise in violent crimes have also had a severe impact on local economies. The number of tourists visiting Brazil has dropped from 2 million in 1977 to 800,000 in 1992, largely because of the city's crime rate. While police and private security firms have increased their patrols, bosses of Rio's slum-based crime organizations have promised to assist police in curbing street crime.

The failure of the justice system to curb urban violence has also had political consequences. President Menem, for example, called for adoption of the death penalty in Argentina while Brazilian leaders argued for lowering the age of criminal responsibility in that country. Meanwhile, politicians have begun to campaign on law and order

platforms. Finally, coup attempts have been justified by the inability of the government to guarantee security, as was the case in Venezuela in 1992.

Public dissatisfaction with rising crime rates also extends to crimes committed by public officials. For example, corruption is ranked close to crime in national polls measuring popular concerns. This has been used as justification for the auto coup by President Fujimori in Peru and also served as the rationale for the attempted coups in Venezuela in 1992. Finally, attempts on the lives of allegedly corrupt officials have also been justified by the inability of the justice system to act. Thus, for example, in November of 1992 an attempt was made on the life of a former president of the Social Security Institute in Venezuela, a scandal ridden government agency. A communique by the attackers claimed that "we don't intend to replace the justice system. However, unless there is effective punishment, we will see ourselves forced to continue carrying out our dignified task. We urge the Justice System to act with urgency, making effective the extradition of fugitive officials and handing down sentences to the criminals." This was the second action by the group which also shot Antonio Rios, the president of the Confederation of Venezuelan Workers, who had been released on bail on corruption charges shortly before the attack.

C. The Civil Law Model

Although a more detailed explanation of Latin American criminal procedure is found in a later section of this monograph, in this section we will present a brief overview of the major differences between the civil law system, which predominates in Latin America, and the common law system prevalent in the United States.

Unfortunately, much of what we know about each other's legal traditions is based on ignorance rather than fact. Latin American lawyers may think that their U.S. counterparts are provincial legal mechanics, uneducated in the philosophy or history of their legal system having attended law school for only three years rather than the customary five-year curriculum in civil law countries. Plea bargaining to these lawyers is a legal aberration which results from an absence of sound philosophical underpinnings to U.S. law. The U.S. lawyers, on other hand will portray their civil law colleagues as lacking in advocacy skills, overly concerned with procedure while ignoring substance, working in a system in which defendants' rights are trampled and in which there is a presumption of guilt rather than innocence. While there is some truth to these conceptions, they are simplistic and based more on fiction than on fact.

The civil law tradition is older, tracing its origin to 450 BC, and is prevalent in more countries than the common law. It is characterized by its emphasis on codification, formalism and reliance on abstract principles set forth in treatises. The common law, on the other hand, traces its roots to medieval England and is based on reliance on precedent, the power of judges to interpret the law and, in the United States, the primacy of the Constitution. The justice systems of Latin America are situated in the civil

law family although they have been significantly influenced by the United States, especially in constitutional law and political theory.

One of the central, and most misunderstood features of the civil law system, especially as it relates to the administration of criminal justice, is its "inquisitorial" characteristic. The common law system, on the other hand, is usually portrayed as "accusatorial" due to the role of the parties and its origins. At the core of the accusatorial system is a notion that every wrong is a private wrong, thus, an action must be brought by the injured party or, ultimately, the State on behalf of the collective. The role of the judge is to act as arbiter, hear the evidence and impose sentence. Judges do not have the authority to investigate, determine the type of charges to be brought or initiate the action. The trial revolves around a public and oral contest between the accuser and the accused with the judge as referee between the parties.

The civil law proceeding eliminates the notion of private wrong, with the exception of certain crimes, and makes this an action in which the State, in the figure of the instructional judge, becomes not an arbiter but an investigator who directs the inquiry, determines the charges to be brought, and makes a concluding finding. Due to its investigatory characteristic, the proceedings tend to be written and secret. As the result of reforms introduced during the eighteenth century, notably influenced by Beccaria, what we have today is a mixed system in which the State is represented by a prosecutor, while the defendant's counsel is provided access to the investigative phase of the proceedings.

Normally a civil law trial consists of two parts: the investigative stage (instrucción o sumario) and the trial (plenario). While the modern trend, predominant in Europe, is for the investigation to be conducted by a prosecutor, Latin American systems continue to rely on the figure of the investigating magistrate (juez de instrucción). During this stage the role of the judge is to lead the investigation of the crime, order the detention of the suspects, gather the relevant evidence, and formulate charges against the accused. This phase is usually secret, although the defendant's counsel is given access to the written record, and its results are reduced to writing. The defendant may be requested to testify. While he/she may refuse, this refusal may be taken into account as evidence of guilt. Theoretically, the police is under the command of the judge during this stage and he/she may order them to cooperate in the investigation.

The common law system lacks a comparable stage. The investigation is normally conducted by a police department which must petition a judge to approve actions which may jeopardize a suspect's rights (for example, issuance of search warrants). The prosecutor normally does not enter a case until the police have concluded their investigation and apprehended a suspect. Thereafter, the prosecutor's role is to formulate the charges and act as accuser. Defense counsel's role, on the other hand, is to be an advocate for his/her client with the judge acting as mediator in the contest.

The Latin American trial (plenario or juicio) is routinely a formality in which witnesses are not presented nor crossexamined, and the record consists of the evidence gathered during the preliminary stage. Defense counsel is normally appointed at this point for indigent defendants. The purpose of the trial is to publicly present the written findings (normally the only evidence presented) to the judge and allow both sides to make their arguments.

Perhaps the most controversial feature of the accusatorial system is plea bargaining. Without it the system would collapse, since it is incapable of providing trials, with all their attendant trappings, to all defendants. While it is viewed by U.S. lawyers as an essential evil without which the system could not operate, it is perceived by Latin lawyers as an aberration in which the rule of law is perverted and justice given a back seat to case processing needs. The discretion accorded to common law prosecutors allows for the practice to thrive. Civil law prosecutors, on the other hand, have almost no discretion and must pursue all cases to conclusion lest they be prosecuted for their actions. Finally, plea bargaining is based on the defendant's right to forego a trial by pleading guilty. In the civil law system a guilty plea does not prevent a trial since it is the judge who must determine guilt not the defendant.

Finally, the commonest misperception about the civil law system is that there is a presumption of guilt rather than innocence. No Latin American system rests on this premise. Likewise, common law lawyers point with pride to the existence of a jury as a filter to prevent governmental abuse even though plea bargaining makes a mockery of this right, commonly exercised in less than 5% of U.S. criminal cases. While some Latin American countries have jury systems (for example, El Salvador and Panama), the majority do not. However, in many of the countries, trial is before three judges (their number aimed at curbing potential abuse).

The current trend in Latin America is to move toward an accusatorial system in which the role of investigating magistrate is awarded to the prosecutor, with the judge's role being limited to that of arbiter and guarantor of procedural fairness. While these may be laudable reforms, they underestimate the importance of a strong and active defense and prosecution to the success of an accusatory system. The absence of public defense for indigents in most of Latin America, and weak prosecutorial staffs, make successful implementation of these reforms doubtful. Likewise, they tend to ignore the cost of moving toward such a system. Even Spain, which adopted a jury trial in its Constitution had to delay its implementation due to the costs in physical facilities and fees.

Ultimately, the significance of the U.S. legal system in supporting democracy lies in the ability of judges to interpret and apply the constitution while keeping in check the powers of the other branches of government. Latin American lawyers, for example, are surprised when the U.S. Supreme Court orders a sitting President to present private papers which may lead to his impeachment. Even more surprising is the President's compliance with that order.

II. LEGISLATION

As previously noted, Latin American countries are members of the Roman or civil law family. One of the most notable characteristic of this legal family is its reliance on codification. However, development of comprehensive codes is not unique to the civil law world. Its uniqueness derives from an attempt (first forged in France after the Revolution) to clearly delineate the responsibility for legislating to one branch of government and trial of cases to another. For this conception to work, it required well organized, clear and complete dictates to be followed by the judiciary.

As has already been pointed out, Latin American constitutional roots can be traced to the U.S. Constitution. However, unlike the United States, Latin Constitutions have been overturned with persistent regularity. The 20 countries have adopted some 253 different constitutions since independence (Venezuela bears the unfortunate distinction of having adopted 22 constitutions). Constitutional reform became a means of legitimizing an illegal and often violent change in government rather than representing a true constitutional shift.

Codification has largely been subject to European trends, oftentimes adopting European legislation without taking into account their adequacy for the society in which they were being imported. The worst example is the Dominican Republic which copied a poor translation of the Napoleonic code of criminal procedure (1808) and continues to rely on this ancient code, long since rejected by France, and French jurisprudence, even though the majority of Dominican jurists cannot read French. The current codes of criminal procedure vary substantially in their dates of origin (See Table 1).

A new area of foreign influence on Latin American laws is in the narcotics field. Recently, and largely as a result of U.S. and European influences, Latin American countries have adopted special legislation to facilitate the prosecution of traffickers. Many of the procedural reforms in this area have been adapted from foreign legal concepts, such as acceptance of the results of electronic surveillance as evidence (declared unconstitutional in Costa Rica), elimination of the instructional stage (Bolivia), and even plea bargaining used to obtain the testimony of informants (for example, Venezuela). These foreign concepts have been implanted on legal systems which still retain traditional civil law concepts for all other crimes.

Oftentimes, the parliaments have abdicated their legislative responsibility. For example, a common practice has been to delegate the elaboration of codes to groups of notable jurists who relied on abstract legal notions without taking into account the practicality of implementing these codes in their country. Another disturbing trend has been the continuing reliance on Executive decrees, in lieu of legislation, without the benefit of parliamentary or public debate. Rather than limiting Executive decrees to

administrative matters, they have often replaced legislation and dealt with profound changes to the legal system.

TABLE 1

ISSUANCE DATES OF CURRENT LATIN AMERICAN CONSTITUTIONS AND CODES

COUNTRY	CONSTITUTION	CRIMINAL CODE	CODE OF CRIMINAL PROCEDURE
Argentina	1853	1992	1991
Bolivia	1967	1974	1972
Brazil	1988	1984	1941
Chile	1988	1874	1944
Colombia	1990	1981	1992
Costa Rica	1949	1971	1973
Cuba	1976	1979	1977
Dominican Republic	1966	1884	1984
Ecuador	1984	1938	1983
El Salvador	1983	1973	1973
Guatemala	1985	1980	1992
Honduras	1982	1984	1984
Mexico	1917	1931	1934
Nicaragua	1986	1974	1879
Panama	1972	1986	1986
Paraguay	1992	1910	1890
Peru	1979	1924	1939
Uruguay	1966	1933	1980
Venezuela	1961	1926	1962

SOURCES: Constitutions and Codes

III. POLICE

Law enforcement in Latin America has traditionally been distinguished by its militaristic character, both in organization and function. Even where police are separated from the armed forces, they are often ***de facto*** arms of the military institution. Table 2 presents the primary characteristics of Latin American police.

It is not surprising that the role of police is at the core of political debate in nations emerging from civil war or military governments. In the case of Nicaragua, for example, the issue is control over the armed forces and the Sandinista police; while in El Salvador, a fundamental stumbling block to completion of the peace process is the role and composition of the new police force (the peace agreements call for the elimination of the existing major police forces and the establishment of a new force to be integrated by a majority of new members without ties to the former forces and an equal share of FMLN and government recruits).

In Panama, for example, as the new democratic government establishes itself, almost all of the country's attention has turned to the role of the police forces. At the core of the new government's program are measures to prevent the reemergence of the Panama Defense Forces. Vice President Arias, for example, affirmed in 1990 that Panama no longer has a military force since the army has been transformed into the police:

"We want the policemen of a modern, dynamic and pluralistic society. These policemen must be prepared to face common crime as they have been trying to do so in the past few days. However, they must also be able to face certain security threats in our country because of the weapons--many of them high-caliber--that the dictatorship hoarded and distributed, and because of rebel groups that the dictatorship established when the dictator himself grew afraid of the FDP. The so-called Dignity Battalions were created to serve as neutralizing agents and he trained them for certain guerrilla activity."

It is this duality of mission that is central to the nature of policing in Latin America. Recently, in 1992, a government sponsored constitutional proposal to abolish the military was defeated at the polls in Panama. While this was primarily viewed as a repudiation of an unpopular president, Guillermo Endara, it also reflects nationalistic pride in having a military.

A common reference in discussions of military versus police functions is made to Costa Rica. In 1949, Costa Rica proscribed the army as a permanent institution. However, the decision to eliminate the armed forces, while maintaining police forces, has led to ambiguity in the role of police in national security matters. Absence of an army leads to a system in which there is confusion between national security and internal order maintenance and the police are called upon to address both missions. Thus, for example, while there were disputes with Nicaragua in the 1980s, half of the

traffic police were guarding the border, while government officials argued for a larger number of police to safeguard the capitol. Likewise, there is a feeling that maintaining a nonprofessional police force (for example, firing all police every four years) and depending on political patronage for selection of police are the means of avoiding the emergence of an army. This has led some commentators to argue that Costa Rica has neither a professional army nor a professional police.

TABLE 2

POLICE FORCES IN LATIN AMERICA (1990-1991)

	NATIONAL POPULATION IN MILLIONS	TOTAL ARMED FORCES *	ARMED FORCES PER 100,000 POPULATION	SUPERIOR OF POLICE	JUDICIAL POLICE	LEVEL OF POLICE FORCES	POLICE PER 100,000 POPULATION	COMMENTS
	32686	75000	229	Ministry of Defense	Yes	32000	98	Gendarmería only
	7250	28000	386	--	-	13000	179	Does not include narcotics police
	150189	324000	216	--	--	243000	162	In state military police org. (State militias) under mil. control
	12958	95800	739	Ministry of the Interior	No	27000	208	Carabineros only
	31171	136000	436	--	Yes	80000	256	National police only
	2914	N/A	N/A	Min. of Gov. & Min. of Pub. Sec. & Sup. Ct.	Yes	7800	267	Armed forces were abolished in 1949
	10479	180500	1722	Ministry of the Interior	No	15000	143	Does not include police auxiliaries
	7176	22800	317	--	Yes	15000	209	
	10755	57800	537	Ministry of Government	No	--	--	
	5254	44600	849	N/A	No	10000	525	Armed forces exclude civil defense force. Police figure is the level of strength
	9092	43300	476	Ministry of the Interior	No	10700	118	Police level of strength does not include Treasury police (2100)
	5155	18200	391	Armed Forces	No	5000	97	The police (FUSEP) is part of the Armed Forces
	88928	148500	167	--	Yes	--	--	
	3809	63500	1667	Ministry of the Interior	No	1300	34	
	2397	N/A	N/A	Ministry of Justice & Government	No	9000	375	Defense Forces were abolished after U.S. invasion in 1989. Attempt to constitutionally eliminate them was defeated
	4279	16000	374	Ministry of the Interior	No	8000	185	
	20725	120000	579	--	No	70000	338	National police figures include the Republican Guard, Civil Guard & Investigative Police
	3124	25200	805	--	No	11500	368	Police includes Metropolitan Guard (650) and Republican Guard (500)
	19616	71000	361	Ministry of the Interior, Defense & Justice	Yes	76300	389	

ternational Institute for Strategic Studies, The Military Balance 1990-1991, London: Bassey, 1991. Also studies conducted by the Center for the Administration of Justice at FIU.
tres from the International Institute for Strategic Studies were corrected whenever we had additional information.
lforce figures include active duty personnel only.
n not available at printing time

The duality of the police role, national security versus order maintenance, can be traced back to the colonial period. In most countries, their role has been determined through practice, and they have often been assigned those tasks that do not fit nicely in any other governmental scheme. In the past, some of the "police functions were carried out by magistrates, soldiers, public administrators, local officials or even personal representatives of the national sovereign." Today the police may be variously dependent upon a Minister of the Interior, Minister of Government, Supreme Court, the Army, or a variety of different ministries. Oftentimes, a conscious decision has been made to assign them in this manner to prevent the emergence of a powerful armed apparatus that can challenge civilian or military authority (Costa Rica, for example).

One of the few things which Latin American lawyers learn about police forces in Latin America is that their functions are divided into crime prevention and repression. Therefore, the ideal situation would be to establish at least two police forces, one which is in charge of the deterrence of crime, and another which represses crime once it has been committed. The first is called the administrative police while the second is known as the repressive police. The modern trend is to assign the repressive police to the judiciary since they are leggaly under their direction during the investigative stage and the adminstrative police to the executive. As it will be seen, this is not so easy a distinction. The attempt to separate this function has led to some severe problems for Latin American systems because investigations of crimes cannot be so easily segregated between police agencies.

Unlike the United States, police functions are assigned to bodies with national jurisdiction and a centralized command structure. Only in countries with a federal government structure (Argentina, Brazil, Mexico) does one find provincial and municipal police departments. Organizational models have been influenced primarily by European patterns (especially in the Southern Cone) and by the United States (Panama, the Caribbean and Central America).

Few countries have a professional police force. Entry requirements tend to be low, salaries are inadequate, training is insufficient or inappropriate (militaristic in most countries), and seldom does one speak of a law enforcement career. It is not surprising that police are normally recruited from the lower classes and many turn to crime. Modern trends in policing (community policing, for example) are ignored, and unsuccessful patterns and practices are maintained. Finally, controls over police behavior are limited to scarce internal controls which, oftentimes, seek to immunize police rather than making them accountable for their actions.

Corruption is a legacy of most Latin law enforcement units. One of the most notable examples of police corruption is Mexico. Mexicans have even developed a word for police bribes, ***la mordida*** or the bite. Drivers stopped by police, for example, are routinely requested a minimum of $10 to avoid the inconvenience of having their license confiscated and having to attend a hearing. For the police, who earn an average of

$200 monthly, bribes have become a necessary supplement. Patrol members, in turn, are expected to share the proceeds with their commanders reputedly $32 daily.

Corruption is most prevalent in the struggle to control narcotics. Recently, for example, police officials were implicated in the escape of Pablo Escobar from a Colombian prison while Mexican police were linked to the murder of DEA agent Camarena in Mexico. One trafficker, Oliveiro Chavez Araujo, organized a prison uprising in Matamoros allegedly to protect himself from corrupt Mexican Federal Police officials. Thereafter, the prison director and six high-ranking federal officers were arrested. Just two years before this uprising, the entire federal police detachment was imprisoned for corruption and replaced; one year earlier authorities arrested one of the country's highest ranking drug enforcement officials for offering bribes exceeding $20 million to other senior law enforcement officials.

Poor working conditions have also resulted in police unionization and given rise to numerous strikes. Some strikes have turned violent as the central government has resorted to the military to bring pressure on the police. The government of Uruguay, for example, recently capitulated and awarded a 50% salary increase when police went on strike. Hundreds of officers camped out near the presidential palace and the military refused to replace civilian police in patrol duties. Greater protection for police has also given rise to strikes. The police in Medellin, Colombia, for example, threatened massive resignations after 141 agents had been killed in the first six months of 1990.

Possibly the most significant development in Latin American law enforcement has been the emergence of a large and unregulated private security apparatus. While there is very little information on the growth of private security, since it tends to be unregulated in the majority of countries, the presence of private security is obvious to travelers to the region. Visitors are faced with bars on most residential and commercial windows while gun-toting security guards stand at store entrances. The Confederation of Peruvian Industrialists estimates that companies in that country spend more than $150 million annually on private security. In 1980 there were 41 security firms in all of Peru, by 1991, more than 300 were operating.

Finally, a complicating factor, as these countries debate the role of police, is the war on drugs. In Bolivia, for example, the U.S. has brought strong pressure to bear to involve the military in antinarcotics operations, arguably a traditional police function, while developing specialized and militarized police units. Like many other Latin American police forces, the Bolivian police have often found themselves subordinate to the military and involved in political rather than crime repression functions. Police are badly paid, do not enjoy the prestige of their military counterparts, and are held in low regard by the general population. U.S. pressures have led to the establishment of specialized antinarcotics units which have been viewed with jealousy by the rest of the police, and with suspicion by the armed forces, leading to clashes with counterparts in the sector.

Colombia and the United States recently agreed to exclude that country's military from the drug strategy and redirected U.S. assistance from the military to the police. Shortly thereafter, Bolivia also removed its military from the drug war. Finally, the Aylwin government in Chile recently transferred the Carabineros, the nation's police force, from the armed forces to civilian control in the Interior Ministry, after 17 years of military control.

Resolution of the debate over the role of police in democratic Latin societies will not only affect the future of the justice sector but may be fundamental in determining the persistence of the current democratization trends in the region. The debate in Panama has brought fundamental questions to the forefront and brought recognition to the importance of the law enforcement role to a democracy.

The debate, however, is far from over. Colombia, in its new 1991 constitution, opted to maintain the police under military control. Of special note is the maintenance of jurisdiction by military courts over police misconduct, further removing them from civilian oversight.

IV. PROSECUTION

An American prosecutor who visits his/her Latin American counterpart will be shocked to find his/her colleague to be, possibly, the least important figure in the criminal justice system. Prosecutors lack the power to supervise investigations, file charges, or exercise discretion. During the investigatory stage they are often depositories of documents generated by the police or the investigating magistrate and during the trial his/her presence is largely a ceremonial legal requirement.

Unlike the U.S. Attorney General, this country's chief law enforcement officer, the Latin American prosecutorial agency is relegated to be the poorest entity in the system under whose leadership labor badly paid professionals. Fortunately, their role is changing as countries debate the function of the prosecutor while moving toward accusatory systems of criminal procedure. Generally, this is one of the agencies in the justice sector most in need of modernization since they are expected to combat crime under a code of criminal procedure which accords them a limited role and are assigned some of the smallest resources of the sector. The modern European trend, among civil law countries, is the elimination of the investigating magistrate and the transfer of these functions to the prosecutor. However, this pattern has been slow to take root in Latin America.

The Latin American prosecutorial systems are varied even though usage of the term Public Ministry (***Ministerio Público or Fiscalía General***) is common to all the countries. This term, however, is misleading since it describes a function rather than an institution. In some countries, the prosecutorial function is totally carried out by the

executive (Bolivia, for example). In others, the executive intervenes in the selection of their personnel or provides administrative support (Panama and Brazil), or the prosecution function is assigned to an autonomous agency, usually the Procuracy (***Procuraduría*** in Colombia, Ecuador, Guatemala, Honduras, Mexico, Panama and Venezuela).

The prosecutorial body has jurisdiction over the prosecution of all crimes which reach the courts. Additionally, the law often assigns to them responsibilities totally outside of their primary function as prosecutors. For example, in Bolivia, the prosecutor is charged with insuring that the public defenders attend daily criminal proceedings. In Venezuela, the Fiscal General acts almost as an ombudsman and is even assigned the role of insuring that the judiciary and the correctional system comply with the law. Finally, in many countries this office is also charged with representation of the State in civil matters, intervention in family cases including juvenile proceedings, legal counseling of State entities and officials, and prosecution of corruption. As a result of the broad scope of functions which are legally assigned to them, prosecutors are hampered in carrying out their primary task, the prosecution of crime.

Unlike U.S. prosecutors, their Latin American counterparts have limited discretion in carrying out their duties and have little control over the charges to be filed, the investigation of the case, or the presentation of evidence at the trial. Their function is determined, in large part, by the procedural system and the existence of an investigating judge. Only in Panama is the investigative function historically been solely assigned to the prosecutor.

The nature and severity of the offense determines the type of proceeding to be followed, including who may bring the prosecution. For the majority of serious crimes, the prosecution is brought by the State. However, in some cases, the prosecution must be brought by the injured party (for example, rape and slander) since the law assumes that the injury is a private concern. In those instances the prosecutor may not intervene at all.

Unlike the United States, where the prosecutor has almost unrestricted and exclusive discretion in the filing of charges, this power is usually reserved to the judiciary in most Latin American countries. Even the receipt of the complaint is not restricted to the prosecutor since they may be filed with the police, the courts, or other agencies. The result is that in many countries the majority of prosecutions are initiated by non-prosecutorial entities (for example, Honduras).

The passive role of prosecutors in the criminal process is common to most of the region. Nevertheless, in recent years, there has been a trend towards strengthening this institution by guaranteeing its autonomy and charging them with broader powers, especially during the investigatory stage.

Due to the utilization of judicial officials, and in some countries even the police (Cuba, for example) as investigating magistrates, the prosecutor is generally relegated to a paper pushing role, and his/her function has been described in some countries as "null". A review of court records in Nicaragua in 1987, for example, indicated that in 88% of the cases the prosecutor's activity was limited to presenting the criminal complaint and compliance with insignificant procedural requirements giving the impression that their filings were ***pro forma***. In only 3% of the case files there was evidence that they appeared or presented evidence.

The prosecution's role in appeal proceedings is frequently more passive. Normally, the prosecutor does not appeal from judicial rulings and when appearing, he/she normally files a minimum of pleadings.

The passivity of the prosecutor serves to explain the fact that in many countries there are much fewer prosecutors than judges. For example, in Guatemala, there were 30 prosecutors appearing before 47 trial judges and 97 justices of the peace in 1986. In Bolivia, a total of 92 prosecutors must prosecute cases before 424 judges giving a ratio of almost five judges per prosecutor in 1991. Considering that the majority of the Bolivian courts are unipersonal each prosecutor must cover proceedings in approximately five courts. This situation is further complicated by rotational systems in some departments. In Santa Cruz, for example, the prosecutors are rotated every two months, insuring a lack of continuity in the processes.

Even though many countries require that the prosecutor act as a check on the power of the judge by being notified of all actions taken during the investigative stage, in reality they are mostly irrelevant to the process. For example, in a 1989 study of Guatemalan justice, 17.7% of judges interviewed, stated that the prosecutors have no functions in their court while only 3.5% stated that they participate in the investigatory stage, even less in trials (1.2%) and only 7.1% felt that they acted as the official accusers during the process. In the most extreme example, Chile, there are no prosecutors since it is assumed that the investigating judge will undertake these responsibilities.

In many countries, prosecutors work under the most difficult conditions. For example, in 1986, Honduran prosecutors had: no support staff; no offices, desks, or even office supplies; they had to take their work to their own private offices to have it done. Moreover, the salaries and benefits of prosecutors are, frequently, woefully inadequate. Although they must meet the same qualifications for selection as judges, in some cases, the salary differences are as much as 50 percent (Bolivia, for example). For obvious reasons this discriminatory salary policy leads some into illegally practicing law that contributes to corruption. Additionally, in some countries with specialized narcotics legislation, salary differentials between narcotics prosecutors (frequently supplemented by donor countries, especially the United States) and the rest have the potential of aggravating the low morale of the lower paid officials.

While in a majority of countries all prosecutors are lawyers; in others, lay persons are allowed to represent the State. In Nicaragua, for example, 60% of the prosecutors were not lawyers in 1991. State representation by nonlawyers is most prevalent in lower courts. For example, in the Dominican Republic, 46% of the prosecutors working at the justice of the peace level were not lawyers in 1988. Other countries have assigned these functions to political officials. For example, in Bolivia, since no prosecutors are assigned to provinces, their function is carried out by a ***promotor fiscal*** who often is not a lawyer and receives no remuneration for his service.

The low prestige of the profession, combined with low salaries, has often led to abuses and corruption. For example, in Mexico, President Salinas in 1991 fired his attorney general following a critical report of police abuse and prosecutorial inaction by Americas Watch and ordered a reorganization of the office. A successor, Ignacio Morales Lechuga, was also dismissed as a result of charges that he failed to curb police abuse and corruption. Likewise, the Attorney General of Paraguay, Diogenes Martínez, was forced to resign in 1990 for failing to bring charges against members of former president Stroessner's regime. Martínez had previously refused to resign claiming that he had been appointed by the Senate and was, thus, autonomous.

The debate over prosecutors in Latin America has centered on their institutional situ. While some argue that they should be in the executive or the judiciary, others would like them to be an autonomous institution. Table 3 presents the main characteristics of Latin American prosecutorial bodies.

For those who argue for a judicial situ, the most notable example is Costa Rica in which a chief prosecutor leads an office within the Judiciary and all of its employees are judicial officers selected by the Supreme Court. Other countries, for example Honduras, have split representation of the State between the executive and judicial branches with prosecutors being employees of the latter, and ***procuradores*** responsible for civil representation of the State, being employed by the executive. Finally, in some countries, even though the prosecutors are employees of the judiciary, they are appointed by the executive (for example, Paraguay) while in others the title judicial officer is illusory since their are totally dependent on the executive for their subsistence (for example, Bolivia).

The most prevalent model has the prosecutorial function being totally carried out by the executive (Argentina, Colombia, Guatemala, Mexico). In others, the executive intervenes in the selection of their personnel or provides administrative support (Panama and Brazil). Recently, there has been a tendency among civil law nations (Costa Rica and the Dominican Republic) toward judicialization of the prosecution function, the idea being that since they have quasi-judicial functions, they ought to have some of the independence and security accorded to judges.

Finally, the least prevalent model is that of the autonomous attorney general selected by the Congress and serving a fixed term as a constitutional officer (for

example, Venezuela). While this allows the attorney general autonomy, it often leads to clashes between the other branches and this officer.

TABLE 3

PROSECUTION (PUBLIC MINISTRY) IN LATIN AMERICA

SUPERIOR	INVESTIGATIVE OR ACCUSATORY FUNCTION	CIVIL REP. OF THE STATE	SELECTION OF ATTORNEY GENERAL (FISCAL GENERAL)	TERM OF ATTORNEY GENERAL	SELECTION OF PROSECUTORS	JURISDICTION	COMMENTS
Judiciary	Accusatory & Investigative	Separate	--	--	--	Criminal & Juveniles	Movement toward a common law-style prosecutor
Autonomous	Accusatory	Yes	The President from a slate by the Senate	10 years	Ministry of the Interior	Criminal, Family & Juveniles	In reality the Undersecretary of Justice in the Min. of the Int. regulates. No control over their own personnel.
Autonomous	Accusatory & Investigative	No	The President	--	--	Criminal & Juveniles	
--	--	--	The President	--	The President from a slate by Sup.Court	Criminal & Juveniles	
Autonomous	Accusatory, Investigative & Instruction	--	The President from a slate by Judicial Council	10 years	--	Criminal & Juveniles	Movement toward a common law-style prosecutor as they move toward accusatory system
Supreme Court	Accusatory	No	The Supreme Court after a contest	4 years	Supreme Court	Criminal & Juveniles.	No organic law defines their duties
Executive	Accusatory	--	Executive	Fixed by Executive	Executive upon recdom. of Atty Gen.	Civil, Criminal, & Juveniles	
Autonomous	Accusatory & Investigative	Yes	Congress from a slate by the Pres.	5 years	Attorney General	Criminal	
Autonomous	Accusatory	Yes	Legislative	3 years	Attorney General	Criminal, Civil, & Juveniles	
Executive	Accusatory	No	The President	5 years	Attorney General	Criminal	
Autonomous	Accusatory	Yes	Supreme Court	4 years	Supreme Court	Criminal and Civil	
President	Accusatory	Yes	Executive	Discretion of President	Attorney General		
Ministry of Justice	Accusatory	Yes	The President & Council of Min.	6 years	Attorney General	Criminal, Labor, Civil, Agrarian & Finance	Low number, 60% of whom aren't lawyers
Autonomous	Accusatory & Instruction	Separate branch	Cabinet Council & Legislative	10 years	Attorney General	Criminal	There is no law which delineates their functions
Autonomous	Accusatory	--	Executive	5 years	Executive	Criminal, Family & Juveniles	
Autonomous	Accusatory	--	The President & Senate	--	--	Criminal & Ombudsman	
Executive	Accusatory	--	Executive ratified by Senate	--	Executive ratified by Senate	Criminal	
Autonomous	Accusatory	Separate branches within the same institution	Senate	6 years	Attorney General	Criminal, Civil, Juveniles Corruption, Human Rts, & Ombudsman	

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...not available at printing time

V. LEGAL DEFENSE

The right to counsel is guaranteed in all Constitutions and/or codes of criminal procedure in Latin America. In practice, however, the right to counsel is constantly abused. Courts rely on court appointed counsel for provision of legal service to indigents rather than establishing and adequately funding public defender offices. In those cases in which there is state funding it is often insufficient. Finally, in many countries, the right only attaches at trial leaving the accused unrepresented during the most critical stages of the process.

The importance of an adequate defense to the development of a fair and efficient justice system cannot be underestimated. Any criminal proceeding requires the presence of an attorney, either private or public, for an expeditious and equitable resolution. In systems as formalistic as those which predominate in Latin America, access to courts is largely determined by the ability to retain counsel or to have counsel provided in cases of indigence. In addition to the violation of procedural rights of indigents, the lack of an adequate defense affects adversely the process (since this is a major cause for procedural delay).

Violations of the right to counsel are common to all legal systems in the region. While a reading of codes and constitutions would indicate complete fulfillment of the right, practice indicates otherwise. In a 1986 survey of inmates in Guatemala the researchers found that 93% of inmates questioned did not have a lawyer during their initial detention and 20% did not have one during the entire instructional stage. The most shocking finding was that 20% of defendants did not have a lawyer during their trial.

A critical factor affecting the right to counsel is the procedural stage at which it becomes effective. There are variations throughout the region: a) from the moment of arrest (Bolivia, Mexico and Panama); b) just prior to a statement by the accused (Costa Rica and Peru); c) from the point at which the defendant makes a formal statement (Argentina, Colombia, Guatemala, Honduras, Mexico); d) from the commencement of the investigatory stage (Ecuador); e) from the point at which the defendant ratifies all prior statements before a judge (Uruguay); f) during the investigatory stage (Cordoba, Argentina); g) from the point at which the criminal proceedings begin (El Salvador); h) at the trial (Nicaragua and Venezuela). These differences are complicated by a lack of uniformity in defining the terms themselves. For example, there are wide variations as to the point at which the criminal proceedings begin or the commencement of the investigatory stage. The most serious problem occurs in those countries in which the right is only applicable to the trial stage. Since the bulk of the case is developed during the preceding instructional phase the defendant is compelled to forego counsel during the most critical part of the criminal proceeding.

Public defense of indigent criminal defendants is currently fulfilled through one of three mechanisms (See Table 4). The primary method is through court appointed and unremunerated counsel (abogados de oficio). This usually applies to newly graduated attorneys who agree to take on all assigned cases during a specific period. This system tends to result in the delivery of poor or unfulfilled legal services since attorneys are poorly paid, are only required to appear at the trial, and are seldom supervised by the judge or any other entity.

In addition to court-appointed counsel, another provider of legal services to the poor are law school clinics (Colombia, Ecuador, Guatemala, Honduras, and Panama). Because the client population far exceeds the capacity of the clinics, the clinical programs of the law faculties are pressured to take many cases with inadequate funding, and limited supervision of the students.

A third source of legal services are a number of nongovernmental organizations, many of which were established during military regimes as a means of safeguarding human rights (Chile and El Salvador, for example). In addition to human rights organizations, a number of other philanthropic organizations provide such services. In Panama, for example, the Panamanian White Cross and the National Refugee Office provide legal assistance to indigents. However, since they are located in the capital and have limited resources these groups barely meet the legal needs of the poor.

Finally, the most successful means of safeguarding the legal rights of indigents is through the establishment of State funded public defender offices. This, however, is a very costly venture and only a few countries have taken this step. In Costa Rica, a State funded public defender office operates nationally under the Judiciary and defends all criminal cases regardless of financial need. Chile also provides a State funded cadre of defenders (the ***Corporación de Asistencia Judicial***) under the Ministry of Justice.

Other countries have established public defender systems but have provided them with inadequate resources. In Paraguay, for example, there is a small cadre of public defenders employed by the Judiciary, six in the capital and six in the interior. Given the large number of pending criminal cases (and the indigence of most defendants), one can readily see that the number of defenders, 12 in all, is totally inadequate to meet the demands on the system. The result is that legal defense is perfunctory at best. For example, these lawyers represent the interests of interned juvenile delinquents (approximately 120 currently) who are incarcerated 50 kilometers from the capital. Not only do they have few attorneys to represent them but have no funds with which to transport themselves to the place of detention.

In many of the countries, even though there is a constitutional mandate for the establishment of a public defender system, lack of funding inhibits it. For example, while the Constitution of Ecuador provides for the employment of public defenders for indigents, only since September 1989 have a few public defenders been assigned to the criminal courts. By the end of 1990, there were only 21 such defenders for the whole

country. Similarly, even though Panama's constitution requires free legal assistance to indigents, there were only 20 public defenders in 1991 with each having a caseload of 300 cases. Finally, the new Colombian constitution calls for the establishment of a new public defender system. However, implementing legislation was watered down so that only 70 lawyers will be hired and its overall personnel was reduced from 700 to 145. This compares with a proposed staff of almost 10,000 for the new prosecutorial office.

TABLE 4

PUBLIC LEGAL DEFENSE IN LATIN AMERICA

PUBLIC DEFENDER UNIT	LAW FACULTY CLINIC	COURT APPOINTED COUNSEL	PROCEDURAL INITIATION STAGE OR POINT	COMMENTS
--	--	Yes	Defendant's statement taken within 24 hours after arrest	If the accused refuses to make a statement of after statement he/she is informed of his/her right to Counsel.
No	Yes	Yes	Arrest	Illusory. There are only 11 nation wide. Low wages affect quality & duration of process.
--	--	Yes	Defendant's statement	Named by judge conducting the investigation.
No	--	Yes	Defendant's statement, especially if imprisoned	A national system of publicly funded public defenders operates (Coop. de Asist. Legal) under the M. of Justice
Yes	Yes	Yes	Defendant's statement	CCP allows law clininc students to represent defendants. Located within the Ministry of Justice.
Yes	No	Yes	Defendant's statement	Satisfactory & effective. Full Dept. within the Judiciary.
No	Yes	Yes	Trial	
Yes	Yes	Yes	Beginning of Summary Stage	
No	--	Yes	Initiation of the Process	Court appointed counsel is primary mechanism. Public Defenders are named by the Judiciary. Only 21 nationally.
No	Yes	Yes	Defendant's statement	Ineffective. Whole sections of the country have no legal aid for inmates.
No	Yes	Yes	After defendant's statement	Non existent. In practice, defendants have no defense during the investigative stage.
--	--	Yes	Defendant's statement	Not complied with uniformly. Law clinic services are provided through interships.
No	Yes	Yes	Trial	
Yes	Yes	Yes	Arrest	Inmates indicated that Defense Counsel is almost inactive during the process, appeals were almost non existent.
Yes	Yes	Yes	Defendant's statement	20 Public defenders nationally, services provided are limited.
--	--	Yes	Defendant's statement	
--	--	Yes	Defendant's statement before the Judge ratif. other statments previously made.	
es	Yes	Yes	Trial	No defense during investigation. Defense provided only at trial stage.

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at printing time.

VI. COURTS

While there are many differences between the common law judiciary and the Latin American system, none is more telling than the role of the judge in each system. In the United States, the federal judiciary is a respected and revered institution to which citizens look to as the ultimate protector of rights. Judges are selected through a political process, but it is expected that their decisions will be free from political considerations. They normally enter the judiciary late in life after a successful private practice, and see appointment to the bench as the culmination of a legal career and a financial sacrifice. The system is characterized by its independence from the other branches of government and the judge is expected to interpret and apply the Constitution. Supreme Court nominations are a topic of public debate and the hearings for nominees are televised spectacles which attract a large number of viewers.

On the other hand, the civil law judge in Latin America enjoys low prestige, and has little discretion in interpreting the laws he/she is bound to apply. The notion of judicial independence is given lip service as political influences dominate the interior workings of many courts and few steps are taken to curb or sanction judicial misconduct. The highest aspiration of judges is the adoption of a civil service system which will place them at an equal level with most other public employees. Under that system, he/she would enter the judiciary after graduation from law school and live out his/her professional life in the courts. Selection and promotion would be based on merit determined through a system of competitive examinations.

A. Court Organization

Basic principles of judicial organization in civil law countries are similar to those prevalent in common law countries. First, any penal case must be brought before a first instance court with a second instance being reserved for appellate review of errors of fact and law. Secondly, all constitutions have adopted the concept of separation of powers as the primary guarantor of judicial autonomy. Thirdly, almost all countries espouse a commitment to popular participation in the justice system reaching its zenith in those countries which have incorporated a jury for the trial of criminal cases (Brazil, El Salvador, Mexico, Nicaragua, and Panama). Finally, most civil law countries accept the notion that all courts respond to a hierarchical pyramid with the supreme court at the peak. Latin American countries, however, are characterized by a variety of different and, sometimes, parallel judicial institutions (for example, military and administrative tribunals) which often operate independent of the judiciary.

Generally, the organizational scheme can be summarized as follows: a supreme court, appellate courts, and courts of first instance. This model is replicated even in those countries which have adopted a federal system of government (Argentina, Brazil, Mexico). Supreme Courts are subdivided into chambers with almost exclusive jurisdiction over specific areas of law (criminal, civil, family, etc.). Appellate courts may

also have exclusive jurisdiction depending on the nature of the case before them. Lower courts are generally unipersonal while appellate courts tend to act as collegial bodies with panels of three or more judges. For one of the most recent organizational reforms see Figure 2 which presents the new Colombian judicial system.

Resolution of cases are usually assigned to two levels of lower courts depending upon the severity of the criminal offense. At the lowest end of the judicial pyramid are courts charged with the trial of misdemeanors (***faltas*** or ***contravenciones***) while the highest trial courts are assigned the task of trying felonies (***delitos***). All of these decisions may be appealed to the next judicial level with the supreme court being the final arbiter.

TABLE 5

PRIMARY REQUISITES FOR THE SELECTION OF SUPREME COURT MAGISTRATES IN LATIN AMERICA

COUNTRY	APPOINTING INSTITUTION	TERM	AGE	YEARS AS A JUDGE	YEARS AS A LAWYER
Argentina	President & Senate	Life	30	-	-
Bolivia	Chamber of Deputies from slates nominated by senate	10	35	10	10
Brazil	President & Senate	Life	35	-	-
Chile	President from a slate of 5 proposed by S. Court	Life	-	-	-
Colombia	Selected by the Supreme Court from lists prepared by National. Jud. Council	8	35	10	10
Costa Rica	Legislative Assembly	8	35	5	10
Cuba	Nat. Assembly	5	N/A	8	8
Dominican Republic	Senate from a slate	4	35	12	12
Ecuador	Congress	6	40	15	15
El Salvador	Legislative Assembly	5	40	6	10
Guatemala	Congress under a complicated formula of candidate slates	5	40	5	10
Honduras	Congress	4	25	5	10
Mexico	President	Life	35	-	5
Nicaragua	Nat. Assembly from a Presidential slate	6	25	-	-
Panama	Cabinet & Legislative Assembly	10	35	10	10
Paraguay	President	5	35	-	-
Peru	President Judicial Council & Senate	Life	50	10	20
Uruguay	Gen. Assembly	10	40	8	10
Venezuela	Congress	9	30	-	-

SOURCE: Studies conducted by the Center for the Administration of Justice at FIU.
N/A = Non applicable
-- = Information not available at printing time.

In some countries the lowest trial courts are situated outside of the judiciary. Panama, for example, assigns the resolution of misdemeanors to ***corregidores,*** usually municipal officials under the supervision of the executive. Summary proceedings, in which counsel seldom appears for the State or the defendant, predominate in the lowest courts and they are often characterized by violations of the basic rights of defendants. Lack of a trial record usually prevents appeals from these rulings even though the penalties can be very severe (two years incarceration in Panama, for example).

B. Court Administration

The recognition that court systems can be more efficient by the application of administrative concepts routinely used by the remainder of the public sector is of recent origin in the United States. Thus, it is not surprising that court administration is incipient in Latin America.

Growing caseloads and a popular perception of the system as unable to dispense justice has brought court administration to the forefront of discussions of Latin American judiciaries. For example, a 1992 report by the World Bank concluded that "the Venezuelan judiciary is in crisis. The penal and civil courts are encountering serious case backlogs, procedural congestion, and judicial delays with the resulting effect of inefficient, costly and detrimental delivery of services. These delays contribute to the appearance of impropriety and public perceptions that the courts are unresponsive, corrupt, and politically-influenced. The lack of proper court administration is reflected in archaic procedures, inadequate control mechanisms, duplication of effort, weak administrative and logistical support to the judges, and inadequate judicial statistics which fail to provide a complete picture of the problems and are of little use for improved court management and planning."

While there are elements of administrative systems at the national and regional levels and, to a lesser degree, at the local level, they are highly centralized. Judges generally believe that the administrative systems do not function well and are a fundamental cause of delay. Funding for the courts has normally been inadequate, because of the weak position they occupy relative to the other branches of government as well as their inability to develop budgets and to administer them efficiently. This has resulted in a regional cry for constitutional provisions which mandate a percentage allocation of the national budget to the judiciary. Together with judicial career, this is seen as the main guarantee of judicial independence.

While some countries have been able to achieve this constitutional goal (6% in Costa Rica, 3% in Honduras, and 2% in Guatemala, Panama, and Peru) the rule has seldom been complied with. Even in these countries the practice is to receive a gross allocation from the executive and to develop a budget accordingly. Discontent with low budgets has led to judicial strikes in several countries. However, the trend is still to fund judiciaries insufficiently and for poor administration of these allocations by the courts.

Planning is a concept alien to most Latin American judiciaries and only recently have courts established planning offices. Judges have generally tended to view planning (especially the establishment of judicial statistics) with skepticism. The primary factors for this resistance appear to be a fear of the unknown and concern over the potential for control over their individual practices.

C. Selection and Tenure

The methods and criteria employed in judicial selection are fundamental to the eventual composition of any institution since it will determine its future composition. Most of the Latin American countries set forth some sort of minimal qualifications for judicial positions. Unfortunately, these are often restricted to the highest posts without any mention of qualifications for the lower posts.

There are four general mechanisms used for judicial selection in the Western World: popular election, appointment by the executive, selection by the legislature, and appointment by the judiciary itself. Within these models, there are numerous variations. Table 5 sets forth the primary requirements to be named a supreme court justice for all countries in Latin America as well as their tenure and selection mechanism.

Popular election is not currently used in any Latin American country. Some countries have opted for variations of executive selection mechanisms. Brazil, for example, calls for the selection of the Supreme Court by the President of the country, with the approval of the Senate. Mexico and Argentina follow a similar pattern. Chile provides for a mixed system in that the members of the Supreme Court and lower courts are named by the President from a pool to be proposed by the judiciary. The Peruvian President, on the other hand, appoints members of the judiciary with the approval of the Consejo de la Magistratura and the later ratification of the Senate. There is no Latin American country in which the executive has the unfettered discretion to name all judges.

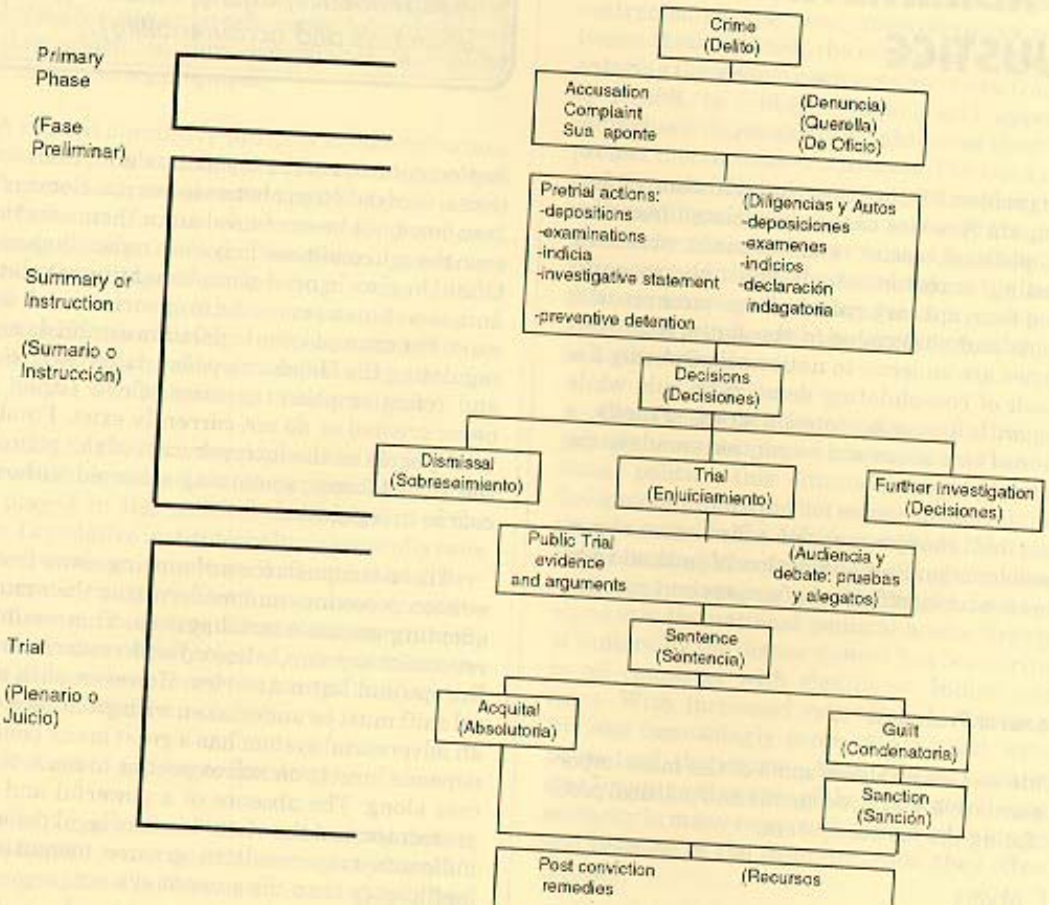
Legislative selection is a feature common to many of the Latin American countries. In many of them, the legislature plays a consultative role while in others it carries out the selection itself. The legislature's role is proportionate to the amount of power it holds relative to the executive and the degree of control exercised by outside forces, for example, the political parties or the military. This can place the judiciary in the middle of a struggle for power between the other branches of government. One of the most complex selection systems in Latin America is the Guatemalan system. After years of military rule, the Guatemalan constitutional framers drafted a judicial selection scheme which insured participation of all sectors in the selection of the judiciary. The Supreme Court, composed of nine magistrates, is elected by the Congress following a mixed system whereby four are elected directly by the Congress and the remainder from a list of thirty nominees determined by a judicial nominating commission composed of representatives of law schools, bar association and the judiciary itself. The fourteen

Appeals Courts, each made up of three judges, are also named by the Congress but from a list of candidates (at least two for each vacancy) proposed by the Supreme Court. The remainder of the judges are elected by the Supreme Court.

Opinion surveys and studies have revealed almost universal dissatisfaction among the judges, lawyers, and the public, with the methods used for the selection of judges. Special disdain has been shown for the role which political influence and friendship play in this selection mechanism. While all of these selection mechanisms reflect constitutional requirements, they are affected by the political situation in the countries. The Supreme Court of Bolivia, for example, is elected to ten-year terms by the Chamber of Representatives from a list of three candidates proposed by the Senate. However, each of the seats is assigned to the provinces on the basis of population. Thus, La Paz has two members while Bene has one. This has a substantial effect on the Supreme Court's justices perception as provincial representatives to a national court.

Figure 1

The Primary Steps of a Criminal Process



Even though all of the Supreme Courts in Latin America are selected by one of the other branches, the case is not the same for the other judges. In many countries this selection is made by the Supreme Court or their immediate superior tribunal. One of the most important changes in the Latin American selection systems is the introduction of judicial selection through a merit system implemented by an independent body (usually called the ***Consejo Superior de la Magistratura***). This has been a goal of most countries.

The Latin American experience with selection by judicial councils is largely based on European models, primarily the Spanish and Italian systems. The current Spanish system for the selection of judges is based on open examinations testing legal knowledge and dates from 1869 as an attempt to separate judges from political considerations. Once selected, the aspirant enters formal studies at the judicial school. The original objective of the Judicial Council, established by law after Franco's death, was to provide a mechanism for self-government of the judiciary and among their functions was to be selection of new judges. This initial Council was selected by the judiciary. Reforms to the law in 1985 transferred the power to select the members of the Council from the judiciary to the legislative branch. The new legislation also assigns to the judicial school, the responsibility for personnel selection and training.

The precursor of the judicial council mechanism in this hemisphere is the ***Consejo de la Magistratura*** in Venezuela. This institution is composed of nine members, five chosen by the Supreme Court, two by the Executive, and two by the Congress, and is charged with the selection and discipline of judges. Some of their critics have pointed out that this institution cannot guarantee judicial independence since four of its members are named by the other branches of government, introducing political considerations in its actions. An additional criticism has been the failure to enact a judicial career law which would legally implement guarantees for judges.

Peru is another country which has experimented with the council model. The National Justice Council was a creation of the military government which assumed power in 1968. This new institution was charged with the selection and discipline of judges. A commentator, Luis Pasara, who conducted a study of the judges, remarked that "the interviews of judges demonstrate an enormous insecurity before the CNJ (the Council) due to their ability to sanction them and resulting in a greater degree of inflexibility when applying the law, which is one of the results which the law sought to curb." A similar institution was also established in Colombia, and suffered from many of the same problems. Whether the new Council established by the Constitution will be any better is speculative.

Another important aspect of judicial career is the accountability of the judiciary for failure, errors, or misconduct. This involves a delicate balancing of the rights of the judge, preservation of judicial independence, and the public's right to an efficient and impartial judiciary.

The U.S. model for impeachment of judges has been adopted by several Latin American jurisdictions, notably Argentina, Mexico, and Brazil. In the case of the Dominican Republic, this power appears to be shared between the Judiciary and the Congress since the parliament may remove the judges but this does not preclude the Supreme Court from suspending or dismissing the members of the Judicial Branch. Costa Rica is one of the few countries in which the legislative branch may not sanction or remove any members of the judiciary, even the Supreme Court. One of the major limitations of this model is that the only disciplinary measure which is assigned to the legislative branch is removal from the post, leaving minor misconduct unregulated. Additionally, a trial before a legislative form may paralyze it during weeks and thus, it is rarely used. Finally, making judges subject to scrutiny from one of the other branches of government runs counter to the principles of judicial independence and to modern trends.

Another model is presented by those countries in which the power is left in the hands of the judiciary. Costa Rica presents the most absolute example since all judges are subject only to internal discipline. Supreme Court members may only be suspended, for a one-month period, by a vote of two thirds of the Supreme Court plenum. There is no mechanism for the removal of judges other than waiting until they complete their term. The difficulties presented by this corporative model is illustrated by a recent case, in 1989, in which three members of the Costa Rican Supreme Court were accused by a legislative commission of having acted improperly. The Supreme Court plenum met in extensive secret session and asked for their resignation. Two of the members resigned while another refused to do so. The scandal produced by this case and the inability of the Supreme Court to take speedy and decisive action brought about a public outcry. However, the accused judge continues to sit on the bench.

The conduct of the remaining members of the Costa Rican judiciary is reviewed by a special court (inspección judicial) which has national jurisdiction and can initiate investigations of its own volition or in response to complaints. All matters brought before this body are secret and no access is permitted to its files, even by the accused, something which has generated complaints from judicial officials and appears to violate basic concepts of due process. All decisions are then reviewed by the Supreme Court which must arrive at a majority of the plenum for the imposition of a sanction.

In those countries with judicial councils, discipline matters are normally referred to that body. For example, in Venezuela the Council has sole jurisdiction over judicial discipline. However, most critics complain that rather than actively pursuing corruption , the Council has served to immunize judges by establishing a complex formal system in which conclusion is seldom reached.

D. Background of Judges

The common law countries, primarily England, tend to emphasize age in the selection of their judicial candidates, stressing appointment of older persons, while the

European civil law systems appoint young candidates, easily trainable and desirous of entering a judicial career track. Youth is a characteristic of many Latin American judiciaries. For example, in Costa Rica, the average age of supreme court magistrates was 51 while in Guatemala it was 56 in 1986.

In those countries with a judicial career, especially many European ones (Spain and France, for example), judicial candidates are expected to have a high degree of technical and theoretical knowledge, complemented by training in a judicial school, while in other European civil law countries (Germany, for example) the emphasis on legal knowledge is expected to be obtained solely through law school training. Common law countries, on the other hand, stress background and experience.

The regional trend is to eliminate non-lawyers from judicial positions. Non-lawyers are restricted to practice in the lower courts, especially justices of the peace courts. Thus, in the Dominican Republic, in 1988, in which 28% of the judges are not lawyers, they are only assigned to the justice of the peace courts in rural areas "where it is impossible to find lawyers." Lay judges were also found in Honduras in 1989, where 97% of the justices of the peace did not attend law school. Guatemala is another country in which nonlawyers were permitted to sit as judges in 1989 (31% of all judges were not lawyers) in the justice of the peace courts. Finally, Cuba mandates the participation of lay judges at all levels.

The growing numbers of women entering the profession is a recent development. In Costa Rica, for example, 41% of the lower court judges and 21% of the middle level judges were women in 1988. In those countries which rely primarily on political appointment, male dominance continues to predominate. Discrimination based on gender occurs at all levels, even at supreme courts. For example, the Costa Rican Supreme Court follows a rotational system for assignment of presidents of Supreme Court chambers. The rotational pattern was obviated when a woman was scheduled to preside over the Penal Chamber. They have also tended to be named to judicial positions classified as "female" (primarily judges in family courts). The stability of public sector employment and discrimination in the private bar appear to be factors which will continue to attract women into the judicial profession.

Finally, for those countries with large Indian populations, the tendency is to exclude these populations from the judiciary and the legal profession as a whole. In Guatemala, for example, Indians were under-represented in 1989. Although a majority of the population, only 5% of the justices of the peace are Indians and none can be found at the other levels.

VII. CORRECTIONS

Correctional systems are under attack for not having achieved their stated objectives of neutralization deterrence and rehabilitation. This has resulted in proposals for fixed, harsher punishments with the sole objective of segregating the inmate from

society. In all of the Latin American countries, the prison system is the most neglected and deficient component of the criminal justice system. Rising crime rates, combined with a lack of an efficient pretrial release mechanism, have radically augmented the prison population in the region. While the imprisonment rates are not as high as those of the United States (which leads the world), Latin American rates are much higher than those of European countries. For example, Venezuela, whose population is almost three times smaller than Spain's, has a much higher inmate population.

Correctional systems are regulated by the constitutions, codes of procedures, and special legislation. Many constitutions state the objective of imprisonment as rehabilitation (Argentina, El Salvador, Honduras, Mexico, Nicaragua, Panama, and Uruguay). The codes of criminal procedure, on the other hand, set forth the requirements for arrest and detention, pretrial release, sentencing and postconviction release. Additionally, many of the countries have enacted special legislation to deal with the correctional system (for example, Argentina, Costa Rica, Mexico and Venezuela). Finally, many of the Latin countries have incorporated the United Nations "Minimum Rules for the Treatment of Prisoners" in their national legislation. Generally, supervision of corrections is under the control of the executive: either the Ministry of Justice (Costa Rica, El Salvador, Venezuela), the Ministry of Government (Ecuador, Guatemala), or the police (Ecuador and Guatemala currently and Panama prior the fall of Noriega). The modern trend is away from military or police control.

The personnel of the correctional system is one of the most neglected of the criminal justice sector. In some countries, supervision of prisons is in the hands of the military and/or police whose training follows a military model, while in others, staff are selected on the basis of political factors. There is a dire need for technical personnel with the majority of staff being guards. The Penitenciaría Central in Honduras, for example, with 1120 inmates, only had one psychologist and one medical doctor in 1986. Lack of personnel has led, in some countries, to the utilization of inmates as guards. In almost none of the countries is corrections a career to be followed. Finally, with notable exceptions (Argentina, Costa Rica, Chile, Mexico, Peru, Uruguay, and Venezuela), very little training is provided to correctional staff.

The majority of prisons were built around the turn of the century and their design was influenced by the U.S. Pennsylvania model (almost total constant incarceration). The primary objective of the builders was to insure the security of the prison and to prevent escapes (for example, the Lecumberry in Mexico, Lurigancho in Peru, and Catia in Venezuela). The ultimate in this confinement model was the adoption of island prisons, many of which are still in operation. Finally, many countries have established minimum security prison farms in rural areas (for example, Argentina, Brazil, Chile, El Salvador, Guatemala, Honduras, and Mexico). Lack of investment in improving prison infrastructure, declining budgets and growth in the number of inmates have generally resulted in severe violations of human rights. Additionally, almost no country segregates convicted inmates from prisoners awaiting trial, even though many countries require it in their legislation.

The services offered to inmates fail to meet even the most basic needs. For example, in Honduras, in 1986, there was an allotment of $0.42 for daily nutrition and inmates were not supplied with basic items such as toothbrushes, toothpaste, toilet paper, etc. Most cells are ill equipped to meet basic hygiene and are overcrowded. There are few doctors and in some instances none. Unlike the United States, conjugal visits are the norm and female inmates are often allowed to have their children with them while imprisoned.

Overcrowding is common in Latin American prisons. For example, the Guayaquil (Ecuador) Penitentiary Center housed 1,774 inmates in 1990, even though its capacity was 800. Likewise, the prison population in Venezuela exceeds by 40% its stated capacity. An Amnesty International report on Brazil's prisons described them as housing a rising number of prisoners "in an ever more substandard, crowded and volatile environment." By April 1989, 90,691 prisoners were packed into cells designed for half that number.

One of the major problems facing the prison system is the high percentage of inmates awaiting trial and the delays in processing them. For example, in 1990, Panamanian prisons displayed the following rates of pretrial detainees: 97.2% of the inmates at the Carcél Modelo; 87.7% in Coiba; 92% at the Centro Femenino and; 100% in Colón. The problem of pretrial detainees is compounded by the delays in bringing defendants to trial. This results in a large percentage of the inmates being held for long periods of time, sometimes exceeding the maximum potential sentence, pending trial. For example, the average time spent awaiting trial, in Honduras in 1986, was approximately 17.6 months with 24 % of the prison population being jailed more than two years without trial.

Prison labor is considered to be an integral part of rehabilitation. However, its organization is inefficient in many countries. Even in those countries in which it is offered, it usually consists of menial tasks directed at continued operation of the prison. However, some countries (El Salvador, for example) have established inmate cooperatives for agricultural production. Others have permitted the development of small businesses run by the inmates to supply the most basic necessities, for example food, which the prison is unable to furnish.

Inmate labor is a source of corruption for many of the systems and lack of supervision permits it to thrive. For example, in Honduras almost 1.4% of the total inmate population in 1986 consisted of prisoners "on deposit." These are inmates who have not committed a crime but are being held because of the influence of a family member or enemy without any recourse to release. While the practice is patently illegal, lack of oversight allowed it to persist. Prisoners with money enjoy special privileges. For example, Amnesty International reported that in one Mexican prison, prisoners willing to invest $25,000 can stay in apartments which they can later resell to other inmates. In

another instance, the director of a Mexico City prison ran a prostitution ring for prisoners.

The deplorable conditions outlined above have contributed to the rising levels of violence in prisons. Riots are commonplace bringing about violent reactions from correctional officials. In 1986, for example, the Peruvian military killed 244 Sendero inmates while putting down riots at three Lima penitentiaries. Subsequently, over 30 inmates lost their lives in a similar incident at the Canto Grande prison in Peru in 1992. In another incident, 111 prisoners lost their lives in a Sao Paulo prison, many after surrendering to the military police. Finally, in the latest riot, Venezuelan national guard troops stormed Catia prison in Caracas, leaving 63 dead, in putting down an inmate uprising which coincided with the November 1992 coup attempt.

AIDS is a growing problem for Latin prisons. A 1987 study by the Sao Paulo correctional authorities concluded that 15% of new prisoners entering the main prison were carrying the AIDS virus. The figures rose to 30% of the prison's population by 1989. Few corrections systems have taken adequate steps to prevent further spreading of the disease among the inmates and fear of contracting the disease aggravates prison conditions. Ignorance tends to characterize many of the actions of corrections officials. For example, prison officials in Argentina discontinued a practice of shackling AIDS infected prisoners to their beds after extensive media coverage.

Finally, while in the United States inmate rights are safeguarded by courts applying constitutional norms, Latin American inmates have few recourses to redress grievances. State provided counsel is almost nonexistent for postconviction remedies. For example, in 1987, 72 lawyers were assigned to represent 20,000 prisoners in Sao Paulo's prison system. In those instances in which public defenders have undertaken to represent the rights of inmates, they have often found themselves excluded from the system. For example, in Costa Rica, a public defender was assigned to attend parole and disciplinary hearings. Once the public defenders became too vocal in their advocacy role, the position was abolished. Lack of an oversight authority is a substantial barrier to prison reform.

VIII. CRIMINAL PROCEDURE

Latin American substantive criminal law is very similar to the common law. However, the procedure for determining the guilt or innocence of the accused and the imposition of sentence is very different. The most commonly made differentiation between the two procedures is the simple explanation that the civil law system is inquisitorial while the common law system is accusatorial. This, like many other oversimplifications, has led to erroneous conclusions about the efficacy and fairness of one system over the other.

Perhaps the most important differentiating feature of the civil law system is the emphasis placed on the instructional judge as the active investigator of the facts rather than as a neutral observer. Another feature of the civil law system is the secret character of many proceedings as well as the written nature of the process. When combined with an ineffective legal defense for indigents one can readily determine the potential for abuse. Finally, U.S. criminal procedure is largely determined by judicial rulings applying constitutional law to define procedural guarantees. His/her Latin counterpart, on the other hand, is limited to application of the terms in the code of procedure.

A. Types of Procedures

Generally, the nature and severity of the offense determines the type of proceeding to be followed, including "who" may bring the prosecution. For the majority of serious crimes the prosecution is brought by the State although a limited number of cases may only be pursued through private prosecution (for example, rape or slander) Most offenses can be classified as crimes (***delitos***), akin to felonies in the U.S., and, petty crimes (***delitos menores***) or misdemeanors (***contravenciones***). Generally, simplified procedures are utilized for the resolution of minor crimes. In Panama, for example, there are no written procedures for the trial of minor cases (***contravenciones***) even though the judge may sentence the accused to up to two years imprisonment. Due to the varieties of procedures and the difficulty of determining those that are operational, this analysis is restricted to the procedures applicable to serious offenses.

The majority of Latin American systems can be categorized as "mixed" systems. This model is a compromise between the accusatory and inquisitorial systems and consists of a process composed of two stages: investigatory or summary, and a final one (plenary or trial). The first stage is characterized by its inquisitorial features (investigation reduced to writing and partially secret) while the second is influenced by adversarial characteristics (oral proceedings, the public nature of the process, continuity and the right to confront witnesses). While the "mixed" systems predominate in Latin America, almost all of the legislation includes, in practice, a strong influence from the inquisitorial model.

B. Fundamental Guarantees

Even a cursory reading of most Latin American constitutions and procedural codes would lead the reader to conclude that human rights are adequately safeguarded. However, Latin countries have been among the nations most often cited for human rights abuses. Their statutes and constitutions must be read with care since guarantees are not always followed and are often suspended. For example, fundamental guarantees were suspended during most of the Sandinista government in Nicaragua; Chile also suspended guarantees following a right wing military coup; and, Paraguay enforced a state-of-siege decree almost continuously from 1954 to 1987.

Sometimes suspensions may be limited to areas of conflict (for example, provinces in El Salvador and Peru), or procedural safeguards are simply ignored.

Among some of the major "due process" requirements are: the privilege against self-incrimination, the prohibition of defendants being held incommunicado, the right to counsel, the right to a public trial, and fixed periods for the completion of the different procedural stages. Even though all of these guarantees are written into the Constitution, they are not always followed. For example, although there is a presumption of innocence, it is often violated by pretrial incarceration, which sometimes may exceed the maximum potential sentence for which the accused was detained in the first place. Likewise, the right to counsel is guaranteed for all defendants, yet it is effectively denied for indigents by the absence of an effective system of public legal defense, and the fact that court appointment of counsel usually does not take place until the opening of trial, ignoring the necessity of representation at critical pretrial stages. Finally, the continuing existence of special courts outside of the judicial system brings into serious question the notion of judicial impartiality.

Confessions continue as the main evidentiary proof in Latin American courts due to the absence of modern police investigative tools and tradition. Napoleonic legal traditions did not place the degree of emphasis on defendant's rights as the common law so that the privilege against self incrimination did not achieve the significance that it did in the United States. Most Latin American constitutions or codes of procedure guarantee to criminal defendants the right to abstain from making any statements which might incriminate them and bar the introduction of coerced confessions. However, they allow questioning of the accused during detention but compel it to be taken before a judicial officer. Routinely, statements are taken before clerks or police. The accused may refuse to testify, though no warnings must be made as to his/her right to remain silent. The defendant may also refuse to testify at trial. However, the refusal of the defendant to testify shall be taken into account by the court in weighing the evidence.

Search and seizure guarantees have also not been implemented to the degree that they have in the United States. While in most Latin countries searches cannot be conducted without a search warrant issued by a judge, in Panama, the prosecutor may issue the warrant. Additionally, the common law demands that the warrant be issued by a "neutral and detached magistrate" to insure the objectivity of the issuance. This varies considerably from civil law practice in which the magistrate charged with the investigation and formulation of charges is a judge and may, thus, issue search warrants. Finally, privacy rights extend only to the domicile and correspondence so that searches of the person or vehicles are not protected.

Interception of communications, especially electronic surveillance, have been a thorny issue for Latin American courts. The Costa Rican Supreme Court, for example, recently invalidated legislation authorizing electronic surveillance on the grounds that it

violated the constitutional provision which guarantees the inviolability of the home and correspondence. This ruling prevents such surveillance even under a court order.

Finally, a major difference between U.S. and Latin American practice is the ability of a U.S. prosecutor to offer a defendant reductions in charges or sentence in exchange for a plea of guilt or cooperation. This allows the system to move speedily and prevents backlogs. Latin practice, on the other hand, prohibits plea bargaining although it is being introduced for prosecutions of narcotics cases.

C. The Stages of the Process

The criminal process is normally divided into two primary stages. The investigative (instructional) stage has as its purpose the investigation of the crime and the determination that there is probable cause to proceed to trial against an accused. The trial stage has the objective of determining the guilt or innocence of the accused and the imposition of a sentence upon conviction (See Figure 3)

1. The Instructional or Summary Stage (*Instrucción or Sumario*)

Possibly the most confusing phase of the Latin American criminal process is the summary or instructional stage. While it is clothed in legalistic terms which appear to guarantee a defendant's rights, it is characterized by its secrecy and arbitrariness. The presiding figure protects the rights of the accused while also pursuing an investigation which will usually result in his conviction. The conflict of roles is greatest when the magistrate, for example, in Panama, is a prosecutor who abandons his/her role as accusing party and assumes that of arbiter, while issuing search warrants and arrest orders.

As has been stated earlier, the purpose of this stage is to reach some tentative conclusions as to the existence of a crime and the culpability of parties. The investigatory phase is generally assigned to a judge who is given extraordinary discretion to receive and evaluate evidence. Panama is the only country in which the investigation is conducted by a prosecutor; in Ecuador, intendants, comisars and political lieutenants, appointed by the executive, may play the role of investigating magistrate; and, in Cuba, the police prepare the preliminary phase under the supervision of the prosecutor.

The criminal proceeding is initiated after some evidence of a crime has been brought before a competent authority. A crime may be reported to the prosecutor or the court. Once the complaint is filed, the judge initiates the investigation. In some cases, the law requires that the victim file the complaint and also prosecute the crime privately. Police could also initiate the process if they detained the defendant ***in flagrante delicto***. Finally, the court can proceed ***ex oficio*** based on the evidence at its disposal.

Upon arrest, whether pursuant to a judicial order or not, the defendant must be brought before the corresponding judicial officer. Thereafter, all of the steps of the investigation are under the jurisdiction of the investigating judge, even though this does not occur in practice. A cursory review of the number of investigating judges available in any jurisdiction establishes the impossibility of total judicial supervision of criminal investigations. The result, therefore, is that the supervision is limited, at best, to the most crucial stages and the investigation remains in the hands of judicial clerks or, most often, the police.

One of the major decisions taken during the investigatory stage concerns the detention or release of the accused. While most Latin constitutions provide for a number of pretrial release mechanisms (release on the defendant's own recognizance, for example), the favored technique is to require monetary bail, a measure that most defendants cannot meet. In practice, pretrial incarceration operates as a "sentence in advance." A result of this practice is the alarmingly growing percentage of the inmate populations which are pretrial detainees with almost 70% of the inmates in Latin American correctional institutions awaiting trial.

The first investigatory actions are the taking of statements from the victim and witnesses as well as the issuance of orders to search premises and/or secure evidence. While the defendant may refuse to make inculpatory statements, he/she may be required to provide basic background information. The defendant will then usually be advised of the charges and the complainants and afforded and opportunity to make statements regarding them.

figure 3

Although secrecy is at the core of the investigatory stage, the defendant shall normally have access to the case file, participate in hearings and offer proof on his/her own behalf. Likewise, while isolation of the defendant may be ordered it seldom extends to denying defense counsel access to the accused.

Upon the conclusion of the investigatory stage, the presiding officer shall forward the case file to the trial court with a recommendation as to the disposition of the charges.

2. The Trial (*Juicio or Plenario*)

The majority of countries recognize principles of orality, publicity, the adversary nature of the process and the need for continuity. In practice, however, the trial becomes a bureaucratic step in the process since the determinant evidence has been gathered during the previous instructional stage or even, in many instances, by the police prior to forwarding the case to the judiciary. Upon the receipt of the file, the trial court may take a number of actions: 1) return the case for further investigation, thereby, expanding the term of the summary stage; 2) dismiss the charges, either temporarily or with prejudice; 3) move the case to trial.

Once the court, usually a panel of judges (especially in the most serious cases), has been constituted and preliminary matters dealt with, the oral trial begins with the reading of the charges. The prosecution will usually present its evidence first and the defense will follow. While the defendant may remain silent, his silence may be considered by the court in determining guilt or innocence.

Although a reading of the codes of procedure will lead one to conclude that most cases in Latin America result in a trial in which all of the evidence is presented, the reality is far from this. In the majority of instances a lawyer interviews his/her client for the first time at the trial. Both sides stipulate as to the evidence in the file prepared by the investigating judge and arguments are presented based on the written materials. In few instances is evidence presented at this proceeding. Upon the conclusion of the trial, the court shall issue a sentence which consists of two parts: a finding of guilt or innocence and a sanction.

3. Appellate Remedies

Most jurisdictions offer simplified procedures whereby ordinary citizens may present requests for extraordinary relief (***habeas corpus*** and ***amparo***). Habeas corpus has been recognized traditionally as a rapid means of securing a judicial review of detentions. After independence, legislators, well versed in English law and determined to curb the abuses of the past, viewed ***habeas corpus*** as a fundamental tool to prevent judicial abuse. ***Habeas corpus*** petitions shall usually be reviewed in a simple and expedited manner. While the defendant may usually appeal the decision, this right may be negated to the prosecution.

Amparo, on the other hand, is a uniquely Latin American remedy which partially replicates ***habeas corpus*** while also allowing challenges to the constitutionality of laws and regulations. Its object is to protect persons whose constitutional rights have been violated through laws or acts of government officials.

Unlike ***amparo*** and ***habeas corpus***, which may be brought at any time, an appeal is a review remedy which challenges final orders. It can only be made in a limited number of cases since it allows the higher court discretion to review any facts presented in the lower court as well as new ones. Cassation is the most frequently used postconviction remedy to review final sentences. It is traditionally addressed to correct errors of substantive or procedural law which may give rise to a reversal, affirmation or modification of the original sentence.

An unusual feature of Latin America appellate practice, to a U.S. lawyer, is the right of the government to appeal an acquittal. While this is barred by the double jeopardy provision of the U.S. Constitution, it is permitted in Latin America wherein the reviewing court may even change the finding to one of guilt.

D. Duration and Compliance with Procedural Periods

All of the codes set forth time periods for the completion of steps within the process. The greatest exactitude is required for the summary stage since noncompliance may result in severe violation of fundamental guarantees and extension of terms impacts on the prison population due to the high percentage of pretrial detainees in most of the countries.

The terms for the completion of the summary stage range from 8 days in Nicaragua to six months in Argentina. Even though the majority of prescribed terms, in the countries, appear adequate to insure a speedy process, in practice these terms are not complied with in any of the countries in which research has been carried out and the duration of these stages is greater every year. For example, in Colombia, criminal proceedings average 836 days even though the law demands that they be completed within 276 days. In Costa Rica, the process is progressively lengthier growing from 10 months and three weeks in 1983 to 13 months and one week in 1986. Finally, in Venezuela, an average case takes more than two years from the moment in which the accused is charged and up to four years for the resolution of appeals. In general, most countries average approximately two years between the commencement of the criminal proceeding to its end.

Judges, prosecutors, and lawyers generally agree that the primary causes of delay are: complexity of laws and procedures; reliance on written proceedings; passivity of the prosecution; excessive caseloads; poor court organization and judicial administration; actions of defense lawyers and a lack of human resources. Even the laws themselves contribute to these delays by allowing numerous extensions of the

terms. In some countries the law provides for compliance with terms which are practically impossible. Thus, for example, in Guatemala the Constitution establishes that a detainee must be brought before a judicial authority within six hours after arrest and must be questioned by a judge within the first 24 hours after arrest. Given the geography of Guatemala, compliance with these terms is almost impossible with the exception of urban centers.

The result of these delays is lengthy periods of incarceration for persons awaiting trial, unequal application of the laws, a decrease of public confidence in the system, increased reliance on self-help methods, and a decreased probability of accurately determining the facts.

IX. PROBLEMS FACING THE ADMINISTRATION OF JUSTICE

The problems facing the administration of justice in Latin America cannot be isolated from the overall political, social, and economic obstacles confronting a region which has only recently emerged from military rule. In large measure, the dilemmas and challenges of the Latin judiciaries are endemic to nations confronting the dual task of consolidating democratic rule while dealing with a severe economic crisis. Finally, a tradition of formalism and corruption stands in the way of real progress.

This final chapter includes a discussion of general problems and an evaluation of judicial independence, access, efficiency, fairness and accountability.

A. General Problems

This section analyzes some of the most important normative, social, economic and political problems facing the justice system.

1. Norms

Latin American law is characterized by extensive copying of foreign models with little reference to the social and economic reality of the country in which the code is being applied, uncoordinated participation of diverse institutional actors in the implementation of the legislation and, even sometimes, contradictions between norms. Some of the laws have not been revised since their enactment even though conditions may have radically changed. Often they are in need of implementing regulations and, sometimes, even refer to agencies which do not exist. For example, the legislation establishing and regulating the Honduran police dates back to 1906 and refers to police agencies which either were never created or do not currently exist. Finally, it totally ignores the incorporation of the police into the armed forces, something achieved without recourse to legislation.

There is a push toward moving away from the written procedure and modernizing the system by adopting an adversarial system. This would be a revolutionary step, in accord with modern trends in Europe and Latin America. However, such a radical shift must be undertaken with great care. While an adversarial system has a great many benefits it depends largely on active parties to move the process along. The absence of a powerful and active prosecutor and the virtual lack of legal defense for indigents may result in greater inequities and inefficiency than the current system.

The normative structure is complicated by the diversity of actors who may legislate. In addition to the legislative branch, there are a number of quasi-legislative bodies beginning with the President and extending to the directors of innumerable public entities. The preponderance of the executive in the issuance of norms is especially noteworthy in recent years. For example, in Bolivia, between 1980 and 1989 the executive enacted more than 23,500 legally biding norms including decrees, ministerial accords, resolutions and ordinances.

The varied types and numbers of institutions engaged in normative production result in a great deal of confusion and impede access to knowledge of the law which, in turn, contributes to popular distrust in the legal system.

A related normative problem is dissemination of information about the law. Laws are reported through an antiquated system in which legislation is published in **Gacetas** which are not indexed and are irregularly published. Therefore, it is not uncommon for a judge to issue rulings on legislation which has been amended or repealed. Lack of adequate libraries further complicates normative compliance. This problem is especially acute for rural judges who lack access to information.

Finally, legislative development is closely tied to the weak role which Latin American legislatures have played in the political development of the region. Legislative institutions have generally been superimposed on an entrenched administrative-bureaucratic structure. Despite a pervasive constitutional commitment to parliamentary government, effective, democratically elected representative institutions have been more the exception than the rule in Latin America.

2. Social and Economic Problems

The rapid growth of the region's population over the last 20 years, and the accompanying shift in its geographic distribution from rural to urban areas, have placed increased demands on the judicial system. The inevitable increase in crime rates that accompanied urbanization, and the legal demands of modern society, brought increased numbers of cases before the courts. Even in rural areas, however, the courts saw increasing numbers of cases as disputes developed more frequently over agrarian rights.

Depressed economic conditions in the 1980s further contributed to demands on the courts, as crime rates increased throughout the entire hemisphere. For example, in Ecuador, criminal cases rose abruptly in the early 1980s as the economy contracted sharply, and unemployment rose. Between 1980 and 1985, the number of criminal cases entering the system each year had risen from 2,013 to 13,598. In addition, middle and upper class individuals increasingly sought to use the courts to protect their economic positions. The rise in crime, and the resulting popular fear, generated distrust in the ability of the system to deal with the problem of security. Citizens have resorted to self-help measures, armed themselves and taken the law into their own hands. An unregulated private security apparatus may become the largest growth industry in Latin America.

Despite the fact that, traditionally, indigenous groups have not played an important role in national politics, this situation may be changing. Indigenous groups did not escape the social changes that occurred in the 1970s and 1980s. Most important has been the formation of regional and national organizations which brought Indian concerns into the national political arena. Treatment of Indians by the justice system has been criticized in all countries with significant Indian populations. With increased migration to urban areas Indians increasingly came into contact with the police and the courts. As a group, Indians are disadvantaged because of their poverty, their unfamiliarity in many cases with the Spanish language, and because of the discrimination they often encounter.

An important social factor is the shifting role of women in social and political movements. Women have emerged as a powerful social force and political force with their numbers continually rising among the ranks of justice officials. As women grow more powerful, the social and legal landscape may shift significantly on such issues as abortion, rape and other sexual offenses. The number of reported cases of rape, for example, has risen significantly with the advent of educational campaigns by women's organizations, while prosecution of doctors or women for illegal abortions are rare. The percentage of women occupying important positions in the justice sector has grown rapidly in recent years. Currently, in many courts and prosecution offices a majority of lawyers are women while they also tend to staff many of the professional slots of the correctional system. Law enforcement has, however, lagged behind and it remains a male dominated sector.

Finally, for several Latin countries, especially the Andean countries, drugs continue to be the primary social problem to be addressed by the justice sector. Colombia's judiciary has been decimated by traffickers while Bolivia's and Ecuador's have been seriously undermined. As demand for cocaine grows, developed countries (the U.S. and other foreign powers, primarily Europe) pressure Latin countries to take measures to reform the administration of justice to meet the cocaine threat to the consumer nations. The judiciary has been encouraged to support special legislation which radically changes its criminal procedure and establishes parallel courts while the executive is encouraged to militarize repression and interdiction efforts.

3. Political Problems

As many nations in the region celebrate their first decade of democratic government, the political problems facing Latin America appear almost insurmountable. The transition to democracy has, itself, presented major problems to the justice system. The judiciary of Panama, for example, has been criticized both for intervening against former members of Noriega's PDF while not moving fast enough on prosecuting them. Chile and Argentina, on the other hand, struggle with the issue of amnesty for human rights violators as well as the power of military courts to protect these offenders.

The executive presidentialist model, which has predominated for so long, shows signs of weakening as the legislative branches seek out areas of influence. Oftentimes, the justice system, and especially the judiciary, is caught in the middle of these power struggles. Party politics is generally the cause of these disputes. For example, the Bolivian Supreme Court has recently, between 1990 and 1991, been involved in a life and death contest with the governing party over the suspension of eight Supreme Court justices by the Congress. The conflict arose when the Court, controlled by the opposition party, invalidated a beer tax. The Government threatened to try the Court on charges that they favored beer companies. The Court escalated the level of conflict by threatening to review the legality of the election which brought President Paz Zamora to power. Additionally, they threatened to try the President for the recent expulsion of two drug traffickers to the U.S. The Congress then suspended 8 of the Court's 12 members. Eight months later the political parties reached agreement on electoral reform, the President issued decrees for the reform of the judiciary, and the Court was reinstated.

Party politics have also apportionment of Supreme Court positions among political parties. President Chamorro in Nicaragua, for example, reached an agreement with the Sandinista-controlled Supreme Court to name four its members while the Sandinistas retained five but to require more than a majority vote on certain critical issues.

The role of police in maintenance of national security and their relationship to the armed forces has also been a source of internal political debate. Recently, for example, although primarily viewed as a reaction against an unpopular president, a Panamanian constitutional amendment abolishing the armed forces was rejected by voters while in other countries, fear of crime, has generated some popular support for the military taking over civilian police functions.

The debate over the role of police is especially acute in countries emerging from civil conflicts and military dictatorships. In Nicaragua, an agreement between the Chamorro government and the Sandinistas has resulted in maintenance of Sandinista control over the police while decreasing their role in national security. In El Salvador, a crucial point of the peace accords was an agreement to abolish the existing police forces while establishing a new national "civilian" police composed of members from

both sides to the conflict. Finally, President Aylwin in Chile recently accomplished a peaceful transfer of the police from the ranks of the armed forces.

Drugs have tended to dominate the foreign policy of many Latin American countries. Efforts by the United States and other consumer nations to pressure reforms in the local justice systems have been characterized as meddling in internal affairs. None have been more highly criticized than the expulsion of nationals for trial in the United States. This nationalistic reaction reached its peak with the United States Supreme Court's decision legitimizing extraterritorial kidnappings by U.S. officials.

Finally, crime has become a central political issue as political parties campaign for greater repression and maintenance of law and order. This, in turn, presents the possibility that the autocoup of President Fujimori in Peru and the two coups in Venezuela may be repeated in other countries.

4. **Human Rights**

While the issue of human rights is dealt with throughout the preceding sections and those that follow, the problem is so significant as to require separate mention. Although the darkest period in the region's recent history has ended with the end of military rule, human rights violations continue to dominate much of the debate over the state of the justice system.

A reviewer of Latin American constitutions and codes would conclude that the fundamental rights of citizens are adequately guaranteed. In addition, most countries are signatories to United Nations conventions (Minimum Standards for the Treatment of Prisoners, for example) as well as the Interamerican Convention on Human Rights. Also, the Interamerican Court of Human Rights, under the aegis of the Organization of American States, has recently become more activist. For example, it has condemned Honduras for its role in political disappearances and Costa Rica for lack of a right to a first appeal from a judicial ruling.

However, codes, compacts and constitutions do not tell the whole story. Extrajudicial killings and disappearances continue with new forms of violence constantly developing. For example, hundreds of street children have been murdered by paramilitary forces in the streets of Brazil's major cities. Judges are routinely killed and threatened by organized crime figures or political thugs while journalists are slaughtered for criticizing one or another group or faction. Torture and abuse in prisons and at the hands of police go unpunished. Witnesses hold back for fear of reprisals while the worst violators of human rights during the military regimes are beneficiaries of amnesties or take refuge in military tribunals which claim exclusive jurisdiction over actions of the police or military.

While legislatively mandated procedural terms present the picture of an expeditious criminal process, the majority of prisoners linger in confinement awaiting

trial for terms often exceeding the maximum potential sentence. The right to counsel is illusory due to a lack of funding for the establishment of a public legal defense system and its limitation to the trial, the least important of the stages in a criminal proceeding further weakens it.

Standing to prevent the abuse of human rights is a cadre of passive judicial functionaries subservient to executive authority and more at home with formalism than judicial activism. Prosecutors primarily file papers and seldom initiate investigations on their own. Assisting these justice officials are law enforcement personnel who are underpaid, unappreciated and subservient to the military.

While this may present a grim picture, there are signs of hope. The justice system has historically been unimportant to the political life of Latin American states. Growing fear of crime and popular discontent with the efficacy of the justice sector has driven this system to the forefront of national politics. No longer can problems of public safety, judicial inefficiency, systemic unresponsiveness and human rights be routinely ignored. The manner in which governments address these issues may well determine the course of Latin democracies.

B. Judicial Independence

True justice must be independent, both externally (economic independence, independence for the Judicial Branch to hire and fire its personnel, and functional independence, which implies that judicial decisions are not motivated by external pressures), and internally (freedom for the lower judicial instances to act independently of those above, yet respecting the existing hierarchy).

Latin American justice systems are generally perceived as dependent, primarily on the executive. Several factors have been identified as contributing to this: 1) a tradition of executive supremacy; 2) political instability; 3) the civil law tradition which emphasizes a bureaucratic role for the judge in application of the laws; 4) the complexity and formalism of the system; 5) lack of a political base which supports and/or to whom the system is accountable; and, 6) the procedures for the selection, promotion and discipline of judges.

The doctrine of separation of powers, copied from the U.S. Constitution, has been praised by Latin American jurists as a hallmark of judicial independence in the region. The rationale of this doctrine is to counterpoise three branches of government with distinct functions as checks on the others, thus, reducing the possibility of a predominant branch. However, for Latin America, the principle has remained more a myth than reality.

Latin America has been characterized by presidentialist models in which leadership was exercised in an authoritarian manner by charismatic figures. Under this

pattern the judiciaries have been the weakest of the three branches. Their subservience is been most accentuated during military dictatorships.

The history of judicial subordination to the military is interminable. This has been accomplished through violence, threats, purges and removal. Thus, for example, almost the totality of the justices of the supreme courts of Argentina, Brazil, Cuba, El Salvador, Peru and the Dominican Republic were removed from office by military regimes at different points of their recent history. In Argentina, for example, even though these judges enjoy a constitutional mandate of lifetime tenure, supreme courts have been removed six times in the last 30 years.

In other instances, the Supreme Court has acquiesced in the takeover and legitimized it. Thus, in Chile the Supreme Court took overt steps to legitimize the coup, for example, by swearing in Pinochet and later by making statements justifying the military action.

During democratic periods the courts have also remained subservient to the other branches. While in most countries of the world the legislative or the executive appoints the supreme court members, and their budgets are approved by the legislature, the dependency in Latin America has extended to day-to-day operations. Thus, for example, it was not until 1986 that the Ministry of Justice in the Dominican Republic ceded supervision of the support personnel and administrative affairs of the courts to the Judiciary. In most other nations obedience is more subtle as judicial functions are regulated by administrative fiats from the Executive.

Judicial slots are a source of political patronage to be distributed on the basis of party affiliation or sold. The distribution of judicial spoils is often carried out quietly and informally, however, some countries (Colombia, for example) have formalized it. Rather than being rare, apportionment of judicial positions among political parties is not uncommon

Finally, a growing threat to individual and institutional independence of the judiciaries is the threat to their physical security posed by organized crime. While Colombia's judiciary presents the most extreme case, the impact of threats on Latin judiciaries cannot be underestimated as lawyers make choices on entering the judiciary or weigh a particular ruling. Colombia tried to minimize the effects of threats by establishing secret tribunals, also known as "faceless judges," in which the identity of the judge is not known to the accused. However, critics have pointed out that given the resources of organized crime it is unlikely that this secrecy can be maintained for long. As long as governments fail to adequately fund security for their personnel, judges will continue to be martyrs to the drug war.

Ultimately, the greatest test of judicial independence is the court's reaction during extraordinary periods characterized by the abuse of human rights. Chile, for example, enjoyed a long standing judicial and legal tradition prior to Pinochet's coup, yet its

Supreme Court embraced the new regime and looked the other way in the face of generalized human rights abuses. Observers have asked themselves how a Supreme Court enjoying a democratic tradition dating back to the beginning of this century could have been coopted so easily.

Perhaps the answer lies in the role which these judges saw for the judiciary. Thus, for example, when challenged by the left during the Allende period, the judiciary took refuge in a conception of the judicial role as legal bureaucrats applying the law by rote and unconcerned with the social or political implications of their decisions. However, the Court assumed an activist role in its challenges to Executive action, especially in protecting private property and opposing nationalization. Thereafter, they remained silent during the Pinochet government's worst repression and abstained from ruling on human rights complaints.

During the military period, the independence of Latin American courts was tested, and judiciaries failed the test as persons seeking their protection were ignored and military crimes went unpunished. What course this repression would have taken had the courts challenged it is a question for future historians to speculate.

1. Unification of the Judicial Function

An indicator of judicial independence, closely related to the doctrine of separation of powers, is the concept of a unitary court system so that all disputes involving law may ultimately be resolved by the judiciary. While most constitutions recognize this principle, in practice, parallel courts exist in all countries. Of special concern are military courts whose power, oftentimes, extend to civilians and are used to protect the police and military from civilian justice. Additionally, some police courts have authority to conduct investigations and/or try minor criminal offenses.

In addition to these special courts, a number of other courts coexist outside the judicial system. The executive has tended to control those courts which deal with sensitive political issues, such as land and labor, and has frequently placed them outside of the judicial structure. For example, in Bolivia although labor judges are formally housed in the judiciary and are named by the Senate from a slate proposed by the Supreme Court, they depend totally on the Ministry of Labor for their budget. Mining court judges are not part of the judiciary even though its members are named by the Senate from a slate proposed by the Supreme Court. Likewise, Tax Court judges are named by the Supreme Court from a slate proposed by the Ministry of Finance but they are outside the judiciary.

The concentration of the administrative tribunals in the hands of the executive brings into question the degree of autonomy of these courts. While their decisions may be appealed to the Supreme Court, the power and significance of these courts detracts importance of the judiciary to national life.

2. Judicial Career

While a number of factors, outlined above, have been identified as contributing to the low levels of judicial independence in Latin America, most national commentators have focused on the lack of a judicial career and financial autonomy as the primary factors.

Of these two factors, professionalization of the judiciary (judicial career) is the most cited in Latin America. The difficulty of dealing with the concept of judicial career is that few authors have defined what they mean by the term. In general, the term is used to refer to the establishment of a merit-based personnel system with guarantees of stability and adequate compensation.

While many countries in Latin America have legally mandated judicial career systems, they are not fully implemented. In others, judicial career patterns have emerged without any legislation (Costa Rica, for example). Generally, however, the practice is for the judiciary to be considered part of the political patronage spoils to be divided up among winners of electoral contests.

Job security is a key factor in the Latin American notion of judicial career. Within this concept, judges are promoted and receive economic benefits in accordance with their years in office and merit. Additionally, they enjoy a permanent position, from which they cannot be transferred without their consent (Innamovility). Judicial stability, under this concept, is guaranteed by lifetime tenure of the judicial position and, essentially consists in permanence in the position while standards of conduct are maintained. Removal should only take place for cause and through a well established mechanism for removal.

As we have seen earlier, tenure guarantees have proven to be illusory oftentimes, especially when faced with military regimes. Lifetime tenure is not common in Latin America. With the exception of Argentina, Brazil, Colombia, Chile and Peru, the majority of supreme court magistrates serve for fixed terms. While some countries may not formally grant lifetime tenure, they may effectively do so in practice. In Costa Rica, for example, Supreme Court magistrates are elected by the National Assembly for periods of eight years. However, upon expiration of their term, they are automatically reelected to equal terms unless the Assembly, by a two thirds vote decides not to renew them. Lower court judges are selected by the Supreme Court for periods of four years, they have tended to stay in their positions beyond their initial term.

Another principle closely related to the innamovility of judges is a prohibition against involuntary transfers from the position they were originally assigned. Thus, the new Panamanian Judicial Code, for example, provides that the judges may not be transferred without cause. Closely associated with this principle of innamovility is irreducibility of judicial salaries. The recent inflation in Latin America has made weakened the guarantee of irreducible salaries.

Merit-based selection of personnel is the basis of the judicial career. Most Latin American systems have been noted for political interference in the selection of judges. Likewise, their tenure has been dependent on political shifts. Thus, for example, it is not surprising to discover that Bolivia has had seventeen supreme courts since 1950.

One of the most important changes in Latin American judicial selection is the introduction of a merit system implemented by an independent body (usually called the ***Consejo de la Magistratura***). Some of its critics have pointed out that this institution cannot guarantee judicial independence since many of its members are named by the other branches of government, introducing political considerations to its actions. Additionally, a pattern has developed whereby seats on councils are targeted for representatives of the main political parties guaranteeing the predominance of political considerations in the Council's deliberations.

While the foregoing indicates a trend toward the establishment of mechanisms aimed at ensuring judicial independence, they will be effective only insofar as the country enjoys political stability. The Argentine Supreme Court enjoys lifetime tenure, for example, yet it has been replaced six times *en masse* in the past thirty-two years. The Brazilian Supreme Court was packed by the military government in 1965 to unsatisfactory overcome rulings by its members. The military junta in El Salvador in 1979 replaced the entire Supreme Court. The Peruvian military junta established a judicial council in 1969 while at the same time dismissing the Supreme Court as part of the legislative package. President Fujimori dismissed 13 of the 30 members of the Supreme Court, as well as over 100 other judges and prosecutors in 1992. Similar situations in Bolivia, Cuba, Haiti, Guatemala, the Dominican Republic and Paraguay confirm this hypothesis.

Finally, President Menem stacked the Argentinean Supreme Court in 1990 by expanding the number of judges from 5 to 9 allowing him to appoint a majority of the Court. The following year he dismissed four of the five members of the judicial body that oversees public spending and named replacements. This year, Argentina's justice minister resigned in protest over President Menem's decision to personally select the members of the penal appeals court which will administer a new criminal code. Similar threats to stack the courts were made by Presidents Aylwin in Chile, and Chamorro in Nicaragua when faced with opposition supreme courts.

C. Justice System Access

Accessibility refers to the right to seek redress of legal rights or settle disputes through the justice system. This principle is conditioned by a series of factors: public knowledge of the law, public confidence, costs, location and number of courts, and corruption.

1. Knowledge of Rights and Institutions

One of the first conditions which must exist for the system to be truly accessible is that the citizenry be aware of the laws and the institutions of the justice sector. While there is generally little information on the level of public knowledge of the law, one could assume that given the complexity of the legal system and the amount of new legislation issued recently, public knowledge is low. This must also be considered in light of the effect of years of military government in which laws charged constantly and rights were not respected. Finally, for many countries, the situation is exacerbated by multi-ethnic populations which have little use for laws and judicial proceedings written in Spanish.

2. Confidence

Another factor which affects access is public confidence in the justice system. Users seldom accede to a system which they distrust. Trust is a product of the perceived impartiality of the system and the equality with which it treats users. Previously we have pointed to the continuing decline in prestige of the justice sector and the little confidence that the public has in it.

3. Costs

Access to the system is also limited by the user's financial resources and the costs of access. Even though the Constitution guarantees equality of all citizens, the lack of an effective system for the legal representation of indigents makes this right illusory for the bulk of the population. A worrisome practice is reliance on partial financing of courts by the imposition of user fees, for example, photocopying, certifications, notifications, etc. Indeed, some members of the judicial staff earn their salaries through fees charged to users for their services, such is the case of notaries, for example. In Bolivia this trend has extended to autofinancing of small claims courts by user fees.

4. Location and number of courts

Popular access to the justice sector and ultimately public confidence is determined by the number and location of courts. In Bolivia, a total of 424 judges provide service to a population of 6,798,000 or one judge for every 16,000 inhabitants. This figure is extremely high for the region. Colombia, for example, has one judge per 8,000 inhabitants while Ecuador has one for every 16,000 residents. The majority of the judges are located in urban areas and courts are generally poorly distributed throughout the national territory. Access to courts is made especially difficult for lower income users because of the lack of public transportation, adequacy of roads, and even climatic conditions.

Judicial schedules also determine whether certain sectors of the population will have adequate access to the justice system. Peru and Chile, for example, hold hearings

only during part of the day, while in other countries, all courts schedule hearings concurrently so that it is not uncommon to find courts to be congested.

5. Corruption

The existence of corruption among justice officials also affects access to the system and the confidence which users have in being treated fairly. All components of the justice system have been affected by this evil. Latin American judiciaries have been plagued by corruption. In addition to bribes, favoritism on the basis of political or judicial influence is another form of interference which affects the equity of proceedings. This latter ill, however, is much more subtle and more difficult to overcome.

The most serious problem for the judiciary is the absence of adequate controls for the prevention and punishment of judicial misbehavior. No specialized corps of functionaries dedicated to investigative complaints against the judiciary generally exist; likewise, no information is available to the public about the method or institution to which they could direct complaints. Citizens seldom file charges due to the impediments in accessing the complaint system and the perception that it will be for naught.

Corruption is also a fundamental problem for most police agencies. Due to inadequate wages, low prestige and lack of supervision, corruption continues to be a persistent problem for Latin American law enforcement. Two trends are significant in this regard. Responding to public pressure, governments are prosecuting police and conducting campaigns to clean them up. For example, the government of President Salinas in Mexico has reorganized police forces, fired ministers and jailed high-level officials. However, while the government has acted swiftly, the prior history of anti-corruption campaigns does not augur well for future attempts. The officials brought in to clean up the federal police in the 1980s, for example, were themselves later implicated in the murder of DEA agent Enrique Camarena, while senior commanders who, in turn, helped solve that case were later revealed to have ties to a satanic drug cult.

A more positive sign is a change in public attitude and revulsion within the police over internal corruption. In Mexico, for example, police officers have started to speak out against corruption and given information to the legislature while also demonstrating against it. Meanwhile, emboldened by President Salinas' campaign against corruption, citizens have begun to file complaints. Residents of several provincial towns in Argentina have recently protested police corruption and abuses. Finally, citizen advocacy groups have emerged to target corruption and public safety as primary areas of concern.

D. Efficiency

It is very difficult to evaluate the efficiency of the system of justice in terms of costs and benefits. This is so because the system is a very complex one with goals and objectives of public interest, and deals with concepts that are difficult to evaluate

quantitatively, such as justice, equity, innocence, etc. In spite of this situation, certain parameters can be used to measure the efficiency of the system.

One of these parameters is the degree to which the system complies with leggally prescribed processing terms and the celerity of proceedings. As indicated herein, delay is the order of the day in the system with a high percentage of trials exceeding prescribed terms.

Another indicator of the efficiency of the system is the methods for selection of judicial personnel and their professional preparation. The criticisms of the system of selecting personnel have already been mentioned. There is also a lack of training programs for judges and support and subordinate personnel of the judicial branch.

Finally, the efficiency of the system can be judged by the degree of satisfaction those who work with and in the system feel with regard to the performance of each participant. In general, there is dissatisfaction with the performance of the justice system personnel.

1. Administration

Justice administration is a new concept for this sector. Efforts to modernize the judiciary are recent in the region. Although judiciaries have tended to establish administrative units they have been reluctant to delegate overall responsibility to them. Oftentimes, the judicial concept of modernization is relegated to requests for automated equipment and computers without a realization of their utility.

Common administrative problems are: a) unclear definition of the role and function of administrative units; b) confused lines of authority; c) noncompliance with chains of command; d) excessive centralization of authority; e) absence of inventories and a lack of planning for future needs; f) lack of reliable and useful statistics.

2. Coordination

While the justice sector is a system composed functionally of different parts (police, courts, prosecution, legal defense, corrections) regularly interacting, there is little coordination between the different components of the justice system and even between agencies within the same subsector. Coordination between these institutions is fundamental to a more efficient processing of cases and clearer definition of functions.

This problem is further aggravated since there are a number of diverse institutions, responding to different branches of government but performing different functions. While the court system appears to be centralized with power resting on the Supreme Court, there are a number of courts which exercise judicial authority outside of the court system. The most worrisome examples are the police courts which depend on

the executive and have the authority to carry out broad judicial functions in the criminal process, especially in the investigative stage.

3. Budgeting, Planning and Evaluation

A common characteristic of Latin American justice agencies is the absence of planning and evaluation. Every effort designed to improve the administration of justice should set forth clearly identifiable and measurable goals and define the means by which they are to be reached.

Preparation of the justice system budgets are not based on a rational planning process which evaluates needs and projects requirements. For example, the revenue generated by judicial deposits are not taken into account in the elaboration of the budget. Centralization of the budgetary and financial management in the capital isolates other units courts from the process.

There is a tendency to confuse sector planning with the process for budget approval. The process is further confused by the fact that most budgetary planning comes about after the public agency receives their budget allocation. The Judiciary is also a victim of these deficiencies. There has never been an adequate assignment of resources to carry out sector planning nor a definition of achievable goals and objectives.

Critical to the development of a planning and evaluation system is the existence of reliable information and statistical systems. There is generally confusion as to the meaning of information systems and the term is often used solely in reference to automation without taking into account that information flows through a variety of means only one of which is computerized.

4. Caseloads and Delays

One of the most serious problems facing the administration of justice is the rapid rise of caseloads. This problem is compounded by decreasing human and material resources leading to a saturation of the system as it becomes incapable to resolve the disputes before it. Nowhere is the increase in caseloads more palpable than in the criminal area. A result of judicial inefficiency and growing caseloads is processing delays, with an estimation that an average criminal case may take anywhere from six months to two-and-a-half years, even though the codes require much speedier processing. This is aggravated by the large number of people who are jailed for long periods of time awaiting sentence. In most countries pretrial jail populations have grown to be almost 80% of the inmates.

The severe case backlog not only creates a situation that violates the rights of prisoners, but it also threatens the effective administration of justice to other groups, and further erodes the legitimacy of the judicial system. Lower class groups never

believed that the judicial system dealt with them fairly; however, in the 1990s, as the court system became increasingly congested, even urban middle-class professionals, who usually expected the system to work for them, have learned that they can obtain a decision only if they are willing to pay to expedite their case. As a consequence, many individuals simply do not seek a solution to their legal problems through the courts. Up to a point, this "privatization" of the legal system may be desirable. However, the extreme disparities in income and wealth all too frequently ensure that those who seek to resolve their problems outside the courts find that wealth and power, not justice, decides their case.

The delay in deciding cases also influences the outcome of those cases that are brought before the courts. Particularly in the labor courts, despite legislation that is favorable to workers, the ability of employers to accommodate the costs of delay often results in out-of-court decisions unfavorable to workers. The solutions attempted to curb the growing number of pending cases and the resultant processing delays have been largely the creation of new courts or the adoption of emergency measures. However, studies have shown that simply increasing the number of judges or shifting their jurisdictions cannot solve the problem. It would take, for example, several times the number of current judges, working for a number of years to clear the dockets, assuming no growth in the number of cases filed annually.

Another mechanism designed to reduce delays and to improve the efficient local administration of courts is case flow management. The term case flow management is used to define the continuum of resources and processes necessary to move a case from filing to disposition. Case flow management suggests active attention by the judge to whom the case is assigned. It also suggests an oversight role for the higher courts. However, in most courts there is little commitment on the part of judges to control the movement of cases and avoid backlogs. Individual courts usually prepare statistical reports periodically. However, these reports do not provide information useful for controlling caseloads since they are aimed at generating the data necessary for the annual report rather than informing superior courts of backlogs. Oftentimes, secretaries falsify reports in order to meet criteria and these go unnoticed due to the lack of attention paid to them by their superior courts.

E. Fairness

The extent to which this principle is respected can be evaluated by considering certain parameters, among which the most important are: adherence to constitutionally mandated guarantees, celerity of the process, equality of access to the system, impartiality of the judges, and equity of judicial decisions.

With regard to equality of access to the system, as discussed earlier, there are many barriers access by citizens. Equality before the law is affected by discriminatory treatment based on economic, social, and political factors. As pointed out earlier, overpoliticization of the system, large ethnic minorities, and a large proportion of the

population in indigence point to unequal treatment. Almost all prison studies have confirmed that the overwhelming percentage of inmates belong to a disadvantaged class.

The principle that all proceedings will be conducted before an impartial magistrate is also violated by the existence of diverse jurisdictions outside the judiciary. The right to counsel is limited to indigents by the absence of a cadre of state supported defenders. Court appointed lawyers tend to provide a limited service and are notably absent during the process. The right is also limited due to the lateness in the process at which it may be claimed.

The general conclusion is that public defenders do not fulfill their role adequately. Their low number, given the caseloads and understanding that their responsibility extends to almost the entire gamut of legal services, is inadequate for the user population. Scarce resources, for example, prevents them from attending courts, jails, and other institutions relevant to their duties. Finally, in those few places in which a public defender has been assigned there are inadequate resources to assist them in their role.

While legal clinics are a praiseworthy effort by law schools, they suffer from many deficiencies: the elective character of the course, the low salaries paid to lawyer supervisors, poor working conditions, and the temptation facing many law students to bribe judicial officials to obtain the requisite number of cases in order to graduate.

Pretrial detention is the rule rather than the exception. This not only violates the basic principle of the presumption of innocence but leads to prison overcrowding. Assignment of an inordinate number of resources to the detention of pretrial detainees results in unavailability of resources for the rehabilitation of condemned prisoners, and a large economic and social cost to their families. Finally, in many countries, human rights violations are the norm rather than the exception. Thus, torture is prevalent in many police forces and prisons while the violators go unpunished.

F. Accountability

Public accountability (***transparencia***) is one of the primary themes currently in Latin American public administration. It rests on the premises that public officials have a duty to report to those who placed them in positions of power, that the work of government officials can and should be periodically evaluated and that it should be done in a public manner.

Evaluation of the executive and legislative branches takes place every election. Politicians, therefore, must communicate regularly with the electorate and convince them of the benefits to be derived from keeping them in office.

The judiciary, on the other hand, feels reluctant to render accounts of their work since many feel that they should only be responsible to a vague notion of the "Law." In addition they take refuge on principles of judicial independence and characterize their branch as apolitical. Police, on the other hand, adhere to concepts of state security as the justification for the secrecy of their activities.

Openness, not secrecy is at the center of the notion of public accountability. Unfortunately, the justice system is characterized by the former and not the latter. Indeed, personnel who provide ready access are viewed as dangers to the institution and are often punished. There are variety of mechanisms by which the justice system can submit itself to public review. Publication of periodic reports outlining the successes, failures and needs of the sector is one of the primary tools by which the other branches of government and the citizenry can be informed. However, periodic activity reports by any of the component agencies of the justice sector are rare. In most instances there is no such publication. Such is the case with almost every correctional system in the region. The little we know about their operation is gleamed from reviews conducted by outside agencies which focus on the most inhumane aspects of their work. Police, likewise, seldom issue reports and the few that are published are usually boring tomes with pictures of men marching in military regalia and speeches by their leaders. Judicial publications are also dense and uninformative. Statistics are notably absent from all such publications.

Relations with the press are usually strained or limited. A recent phenomena is the establishment of press offices whose function, unfortunately, appears to be to keep the press out rather than to facilitate access to information. A general perception persists that journalists are the enemy whose sole function is mudracking and whose goal is to demean the institution.

One of the primary areas in which there should be some public oversight is in the regulation of the conduct of justice officials. Rather than encouraging complaints and facilitating access to grievance mechanisms, the justice system tends to impede access by not informing the public about the place and manner in which complaints can be filed, simplifying the process, guaranteeing the safety of the complainant, and achieving satisfactory and speedy resolution of cases. The public does not feel that wrongs can be remedied and they feel that it is useless to complain.

One of the most important developments impacting on justice sector accountability has been the development of the field of human rights and the emergence of advocacy groups ready to investigate and denounce violations. While the human rights arena was dominated by U.S. (WOLA, Americas Watch, Lawyers Committee for Human Rights, etc.) and international groups (Amnesty International, for example), indigenous counterparts have now emerged. One of the most effective human rights local groups is the Mexican Commission for Human Rights created by presidential order in 1990, now constitutionally mandated. The commission has no legal authority to enforce its orders and relies on public pressure to insure that their

recommendations are carried out. Public confidence in the Commission grew rapidly as they saw the group achieve results. For example, during the first six months of 1992 the commission received 4,500 complaints most of which were made in person. Their denunciations have resulted in numerous arrests and the removal of justice officials. Most agree, however, that their major achievement has been to raise the public's consciousness of their rights and a renewed confidence in the system. Finally, there is a popular perception that justice officials are now accountable.

Glossary of Spanish Terms Used

abogado a lawyer, attorney

alcalde del crimen a criminal judge in the Spanish colonies. The term is still used today in some countries in reference to low level judges

allanamiento search of persons or property

administrative police (policía administrativa) law enforcement units which are assigned patrol and crime prevention duties

amparo Judicial remedy used to protect civil rights other than liberty.

apelación appeal

asamblea constituyente Constitutional Assembly called together to draft a new constitution

asesor advisor or counselor

audiencia high court of justice in the Spanish colonial period also exercising administrative and executive duties

casación Post Conviction remedy to correct specified errors of law or fact.

código code, unlike the U.S., Latin American legislation is grouped into codes according to subject matter and usually drafted in totality at the same time

confesión confession

congreso Congress

consejo council

consejo de la judicatura judicial council designed to oversee judicial actions, especially selection and promotion of judicial personnel

consejo de la magistratura another term for the consejo de la judicatura above

contencioso administrativo legal subject matter that regulates relationships between the State, its agencies, and its citizens.

contralor controller

contravención minor criminal offense, misdemeanor

corregimiento a colonial administrative or judicial district which is still used in some countries

corregidor the chief administrative or judicial officer in a corregimiento

crimen crime, used in some countries to denote the most serious criminal offenses

de oficio an action taken by a public official on his/her own volition, ***sua sponte***

defensa legal defense

defensor de oficio court appointed counsel

defensor público public defender

defensor del pueblo ombudsman appointed by the State

delito serious crime, felony

denuncia denunciation, complaint filed in a criminal case

derecho law, justice

detención preventiva preventive detention, usually denotes pretrial imprisonment

falta minor criminal offense, misdemeanor

fiscal State's attorney equivalent to a prosecutor

Gaceta The official government periodic publication in which laws, decrees and regulations are published

inspección judicial a system to oversee judicial behavior. Recommendations are made to the Supreme Court

instrucción investigative stage in a criminal process.

juicio trial stage in a criminal proceeding

jurado jury

medicina forense forensic medicine

médico forense coroner

ministerio público Public Ministry, the title given to entities which carry out criminal prosecution functions. This is a legal theoretical title since in few of the countries is their an agency which bears this name

oficio written order issued by a public official

oidor judge in an audiencia during the colonial period

mordida bite, term used to denote the bribe offered to the police, usually used in Mexico

plenario trial stage of a criminal proceeding

policía judicial judicial police, term usually denotes the detective force in the country which, though not attached to the judiciary is still called that way

policía preventiva the police force in the country which is responsible for patrolling the streets

policía represiva the police force which is charged with criminal investigations

procurador attorney representing the State in civil matters. Usually assigned to the Executive branch.

querella a civil complaint

reglamento administrative regulation, ordinance

relator relator, a judicial officer whose duty is to reduce oral proceedings to writing and acts as the secretary to the trial court

revisión revision, a postconviction remedy to review new circumstances unknown at the time of trial and sentencing

sentencia condenatoria a finding of guilt at the conclusion of a trial

sentencia absolutoria a finding of innocence at the conclusion of a trial

sobreseimiento dismissal of a case

sumario the investigative stage of a criminal proceeding, alternative term for instrucción

SUGGESTED READINGS

ABEL Richard L. and Philip S.C. Lewis, ***Lawyers in Society: The Civil Law World***, Los Angeles, Cal.: University of California Press, 1988.

BURKHOLDER Mark A. and Lyman L. Johnson, ***Colonial Latin America***, New York: Oxford University Press, 1990.

BURKHOLDER Mark A. and D.S. Chandler, ***From Impotence to Authority: The Spanish Crown and the American Audiencias, 1687-1808***, Columbia, Missouri: University of Missouri Press, 1977.

CARRANZA Elias et. al., ***El Preso sin Condena en América Latina y el Caribe***, San Jose, Costa Rica: ILANUD, 1983.

CLAGETT Helen, ***The Administration of Justice in Latin America***, Dobbs Ferry, New York: Oceana Publications, 1983.

CRUZ Fernando, ***La Función Acusadora en el Proceso Penal Moderno***, San Jose, Costa Rica: ILANUD, 1989.

GAMARRA Eduardo A., ***The System of Justice in Bolivia: An Institutional Analysis***, Miami, Fla.: Center for the Administration of Justice (FIU), 1991.

GARDNER James, ***Legal Imperialism: American Lawyers and Foreign Aid in Latin America***, Madison, Wisconsin: The University of Wisconsin Press, 1980.

GOLBERT Albert A. and Yenny Nun, ***Latin American Laws and Institutions***, New York: Praeger, 1982.

GUTIERREZ Carlos José, ***El Funcionamiento del Sistema Jurídico***, San Jose, Costa Rica: Editorial Juricentro, 1979.

ILANUD, ***El Ministerio Público en América Latina***, San Jose, Costa Rica: ILANUD, 1991.

ILANUD, ***La Defensa Pública en América Latina***, San Jose, Costa Rica: ILANUD, 1991.

INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, ***Sistemas penales y Derechos Humanos en América Latina***, Buenos Aires: Depalma, 1986.

JOHNSON Elmer H., ed., ***International Handbook of Contemporary Developments in Criminology: General Issues and the Americas***, Westport, Conn.: Greenwood Press, 1983.

KARST Kenneth L. ***Latin American Legal Institutions: Problems for Comparative Study***, Los Angeles, Cal.: U.C.L.A. Latin America Center, 1966.

KARST Kenneth L. and Keith S. Rosenn, ***Law and Development in Latin America: A Case Book***, Los Angeles, Cal.: University of California Press, 1975.

LYNCH Dennis O., ***Legal Roles in Colombia***, New York, International Center for Law in Development, 1981.

MERRYMAN John Henry, ***The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America***, 2nd. ed., Stanford California: Stanford University Press, 1985.

RICO Jose M., ***Crimen y Justicia en América Latina***, 3rd ed., Mexico: Siglo XXI, 1977.

RICO Jose M. and Luis Salas, ***Inseguridad Ciudadana y Policía***, Madrid: Tecnos, 1988.

RICO Jose M., Luis Salas, Enrique Gutierrez and Carlos Cruz, ***La Justicia Penal en Costa Rica***, San Jose, Costa Rica: EDUCA, 1988.

RICO Jose M. and Luis Salas, ed., ***Códigos Latinoamericanos de Procedimiento Penal***, Miami, Fla.: Center for the Administration of Justice (FIU), 1991.

RIVERA Bustamante Tirza, ed., ***Las Juezas en Centro América y Panamá: un enfoque ampliado con los casos de Chile y Estados Unidos***, Miami, Fla.: Center for the Administration of Justice (FIU), 1991.

ROSENN Keith, "The Protection of Judicial Independence in Latin America", ***Interamerican Law Review***, vol. 19, 1987.

SALAS Luis and Jose M. Rico, ***La Justicia Penal en Honduras***, San Jose, Costa Rica: EDUCA, 1989.

SALAS Luis and Jose M. Rico, ***La Justicia Penal en Guatemala***, San Jose, Costa Rica: EDUCA, 1989.

SNYDER Frederick E., ***Latin American Society and Legal Culture: A Bibliography***, Westport, Conn.: Greenwood Press, 1985.

SOLIS Luis G. and Richard Wilson J., ***Political Transition and the Administration of Justice in Nicaragua***, Miami, Fla.: Center for the Administration of Justice (FIU), 1991.

ZAFFARONI Eugenio Raul, ***Códigos Penales Latinoamericanos***, 4 vol., Buenos Aires: La Ley, 1978.

TRANSLATION OF JOSE MARIA'S CRIME SECTION

CRIME

Many Latin American countries lack a system of criminal justice statistics while in those that publish statistics, they tend to be unreliable and, often, outdated. These deficiencies prevent accurate determinations as to the nature and extent of crime in any one country or the region.

All of the countries which regularly publish crime statistics have reported significant growth in crime rates (for example, Argentina, Colombia, Costa Rica, and Venezuela). In Costa Rica, for example, crimes against persons rose 113% between 1981 and 1991 while property crimes only rose 11.5% during this same period. In Venezuela, however, rates for property crimes have remained fairly constant while the amount of crimes against persons have doubled during the period 1977-1990. Colombia claims one of the highest rates of violent crimes in the hemisphere with the rates of murders being seven times higher than those of the United States.

Public opinion polls measuring fear of crime support the conclusion that crime has been on the rise in Latin America. In Costa Rica, for example, in January 1993, 62% of persons classified drug usage as the primary social problem facing the nation, fear of crime and insecurity occupied the fourth place in the ranking of social problems, after the economic situation and poverty. In Venezuela, on the other hand, 84% of the population classified public safety as the primary social problem in 1990. While these polls only tend to measure perceptions they are a valuable gauge of the way in which citizens view crime and react to it.

Public and individual responses to the fear of crime vary: economic (increase in the costs of police forces as their numbers and budgets are augmented, growth of private security, and an increase in the percentage of income which citizens devote to improving their safety), social (a loss of public mobility, and a decrease in the quality of life as persons seeking greater security behind closed doors), and political (greater repression, calls for more severe penal sanctions, emergence of paramilitary groups).

Another result of the inability of the justice system to control crime has been a rise in mob violence as citizens take the law into their own hands. In Brazil, for example, officials claimed that some 500 persons would die as a result of lynchings in 1991. One such case gained national notoriety in 1991 when 5,000 residents of Matupa, a remote city in Brazil, kidnapped three suspects arrested for trying to rob a rancher's home and holding the family hostage, and burned them alive. The lynching was filmed and broadcast on national television. Meanwhile, citizens are supporting paramilitary groups who have engaged in "social clean up" campaigns. Most notable of these are the murders of street children in Brazil. A recent report by a Brazilian congressional committee investigating the killings of youths detailed the deaths of 4,611 minors in the

last three years. The congressional panel claims to have uncovered the existence of at least 15 organized groups in Rio de Janeiro involved in the killings, with a special emphasis on private security agencies.

Public dissatisfaction with rising crime rates also extends to crimes committed by public officials. For example, corruption is ranked close to crime in national polls measuring popular concerns. This has been used as justification for the auto coup by President Fujimori in Peru and also served as the rationale for the attempted coupes in Venezuela in 1992. Finally, attempts on the lives of allegedly corrupt officials have also been justified by the inability of the justice system to act. Thus, for example, in November of 1992 an attempt was made on the life of a former president of the Social Security Institute in Venezuela, a scandal ridden government agency. A communique by the attackers claimed that "we don't intend to replace the justice system. However, unless there is effective punishment, we will see ourselves forced to continue carrying out our dignified task. We urge the Justice System to act with urgency, making effective the extradition of fugitive officials and handing down sentences to the criminals." This was the second action by the group which also shot Antonio Rios, the president of the Confederation of Venezuelan Workers, who had been released on bail on corruption charges shortly before the attack.