# Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective

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**Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective**[1]

## I. Introduction[2]

The struggle for judicial independence in Latin America remains an ongoing process, but important developments have taken place in recent years. With the exception of Costa Rica, all the countries included in this study have recently undergone a process of democratic transition after the end of authoritarian rule or, in the case of El Salvador and Guatemala, following an internal armed conflict.[3] Not all of Latin America has moved in the same direction nor have all the steps taken yielded positive results. Moreover, new challenges to judicial independence have arisen in the form of massive crime waves, drug trafficking and the efforts to end it, and, in the case of Colombia, frequent threats against judges by the different parties to the armed conflict. Executive efforts to increase control over the judiciary have been undertaken in recent years in Argentina, Panama, and Peru, and concerns have been raised about potential executive intervention elsewhere. Despite the clouds on the horizon, there is substantial consensus that in many countries throughout the region, judiciaries now have a greater degree of external independence – most notably from the executive and the military -- than ever before.

### A. Historical Background

At the time of independence in Latin America, most countries chose European models for their Constitutions that reflected the authoritarian structures then prevalent on the Continent. Following revolutions, wars, and reforms in Europe, these authoritarian structures were substantially modified. Most of the Latin American countries, however,

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[1]Updated version of article that appeared in USAID Technical Publication, *Guidance for Promoting Judicial Independence and Impartiality* (November 2001).

[2] Most of the information about recent developments in different countries comes from the excellent papers prepared by the different country experts in response to a series of questions, prepared by USAID, IFES, and DPLF. The authors whose contributions are reflected in this paper are: Victor Abramovich (Argentina); Eduardo Rodríguez (Bolivia); Juan Enrique Vargas and Mauricio Duce (Chile); Fernando Cruz Castro (Costa Rica); Eduardo Jorge Prats, Francisco Alvarez Valdez, Félix Olivares, and Victor José Castellanos (Dominican Republic); Francisco Díaz Rodríguez and Carlos Rafael Urquilla (El Salvador); Yolanda Pérez and Eleazar López (Guatemala); Jesús Martínez (Honduras); Jorge Molina Mendoza (Panamá); and Jorge Bogarín (Paraguay). These reports are available on-line at www.dplf.org. The discussion was further enriched by the contributions of additional country experts who attended the July 2000 regional meeting in Guatemala.

[3] Argentina returned to civilian rule in 1983. Bolivia's military dictatorships ended in 1982 with the resumption of civilian rule. After 18 years of military rule, General Pinochet turned over the reins of government to his democratically elected successor, but only after making a series of constitutional changes designed to maintain his control over various aspects of government including the judiciary. Honduras ended a lengthy period of military domination in the early 1990s. The 1996 Guatemalan Peace Accords ended 36 years of armed conflict. The 1992 Salvadoran Peace Accords ended almost 12 years of armed conflict that followed decades of military rule. The December 1989 U.S. invasion of Panama ended 21 years of military rule. General Stroessner's 35-year rule in Paraguay ended in 1989.

did not follow this course. Instead, executive domination remained the rule; the judiciary was a subsidiary branch, often under the overt control of the executive branch and charged with ensuring that nothing would disturb those with political or economic power. Judges were underpaid and lacking in prestige. In many countries, corruption was also pervasive. As one Dominican leader said in 1988, "Justice is a market where sentences are sold."[4]

The period of dictatorship and brutal repression that took place in many countries during the 1970s and 1980s was followed by an unprecedented decision to examine the institutional failings that had permitted such atrocities. Thus, first in Argentina, followed by Chile, El Salvador, Honduras, Haiti and Guatemala, fact-finding bodies (usually known as "truth commissions") examined the history of human rights violations and the conduct of different state institutions and consistently found that the judiciary had failed to protect the citizenry from arbitrary detentions, torture, and official killings.

- Argentina's Truth Commission concluded that during the period when the military carried out massive disappearances "the judicial route became an almost non-operational recourse."

- According to Chile's Truth and Reconciliation Commission, in 1975, despite the notorious human rights situation then existing in Chile, the president of the Supreme Court attributed Chile's reputation for human rights abuses to "bad Chileans or foreigners with political interests."

- In El Salvador, the Truth Commission found that: "The judiciary was weakened as it fell victim to intimidation and the foundations were laid for its corruption; since it had never enjoyed genuine institutional independence from the legislative and executive branches, its ineffectiveness steadily increased until it became, through its inaction or its appalling submissiveness, a factor which contributed to the tragedy suffered by the country."

- The Honduran Commissioner for Human Rights found that during the 1980s the judiciary routinely failed to conduct investigations or process habeas corpus petitions in cases of forced disappearances.

- The Historical Clarification Commission for Guatemala concluded: "The justice system, non-existent in large areas of the country before the armed confrontation, was further weakened when the judicial branch submitted to the requirements of the dominant national security model. The CEH concludes that, by tolerating or participating directly in impunity, which concealed the most fundamental violations of human rights, the judiciary became functionally inoperative with respect to its role of protecting the individual from the State, and lost all credibility as guarantor of an effective legal system. This allowed impunity to become one of the most important

[4] Victor José Castellanos, report on judicial independence in the Dominican Republic, prepared for this study,July 2000, p. 5, citing a 1988 ILANUD study of the Administration of Criminal Justice in the D.R.

mechanisms for generating and maintaining a climate of terror." The Commission ascribed many of the shortcomings of the justice system to a lack of judicial independence.

The failure of the Central American judiciaries to protect human rights may have been less surprising than the abdication of the Argentine and Chilean courts, which were stronger institutions. Despite its corporate strength, a compromised judiciary that saw its role as defending the country from subversion and upholding national security did not – and in many cases could not – protect individuals from state abuses. The Chilean Supreme Court explicitly supported the military after its September 1973 coup against elected president Salvador Allende. Those judges who were identified with the Allende government, some 10% of the judiciary, were quickly purged.[5] Moreover, the highly authoritarian, vertical nature of Latin American judiciaries meant that the few judges who tried to exercise their independence and question state actions were quickly brought into line. This sorry history weakened whatever public legitimacy the judiciary might have enjoyed, regardless of its institutional strength.

In 1990, responding to the Supreme Court's role in permitting human rights violations under Pinochet's rule, Chile's new democratic government immediately sought to introduce reforms that would have created a National Justice Council and changed the composition and functioning of the Supreme Court. These proposals elicited a strong negative reaction from the judiciary as a whole, which saw them as a threat to its independence. The reforms were sharply criticized by the opposition: only the legislators from the governing party supported them. The second democratic government under President Eduardo Frei chose a different and far more successful strategy for justice sector reform. This renewed reform effort focused on criminal justice and sought consensus for reforms in the legal, judicial, and political spheres. The new strategy greatly increased the possibility for change, including for some reforms rejected earlier.[6]

### B. Overview of Principal Challenges to Judicial Independence and Impartiality

In recent years, as military leaders have for the most part receded from the scene, reforms have been introduced throughout the region to improve methods of judicial selection; enlarge and, in some cases, protect from political control the budget of the judiciary; increase judges' salaries; and establish or reform judicial career laws. In some countries, judicial councils have been formed or reformed to play a role in judicial selection and, to varying degrees, in judicial governance. Latin American countries are also facing the challenge of making judges accountable to ethical and professional standards without impinging on their independence.

These reform efforts have achieved some important advances, but they have also encountered a series of obstacles and limitations. Moreover, in a number of countries in the region, including Argentina, Guatemala and Honduras, judges still find that those

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[5] Juan EnriqueVargas and Mauricio Duce, report on judicial independence in Chile, prepared for this study, July 2000, p. 2

[6] Vargas and Duce, p. 7.

with political and economic power continue to wield or try to wield undue influence over their decisions. In Panama, despite the advances in judicial independence heralded by the end of military rule in 1989, a recent President sought to take control of the Supreme Court by creating a new Supreme Court Chamber, which then required the appointment of three new Supreme Court justices. His successor, from an opposition party, dissolved the newly created Chamber, thereby eliminating the positions of the three new justices. Even in El Salvador, which has significantly enhanced judicial independence in the wake of the peace accords, "the majority of the justices on the Supreme Court do not feel completely independent of political power, issuing sentences that in some cases limit the reach of law because of the possibility that the ruling might prove disturbing…"[7] Powerful political actors likewise expect that that the Supreme Court of Justice will not adopt resolutions contrary to their interests.

Judges in Colombia and Guatemala still face serious threats of violence. In 1999, Guatemalan NGOs convinced the UN Rapporteur on the Independence of Judges and Lawyers to visit Guatemala and investigate the threats to judicial independence reflected in the lack of progress in sensitive cases and the prevalence of threats against judges and prosecutors. Mr. Coomaraswamy found that concerns regarding threats, harassment and intimidation of judges "are real" and concluded that the Supreme Court "failed in its duty to the judges concerned," having "never made a public statement decrying the threats, harassment and intimidation."[8] He made a return visit to Guatemala in May 2001 because of escalating attacks and threats against judges. Colombia, currently the only country in the region with a recognized armed conflict, also faces the very serious challenge of providing security to judges, prosecutors and witnesses for crimes attributable to the military, paramilitary groups, drug traffickers, or guerrillas.

Judges do not enjoy job stability in many countries in the region, including some countries that claim to provide judicial tenure. While judicial salaries have improved markedly in most of the countries studied, they remain far too low to attract qualified professionals in others. In some countries, salaries have been greatly improved at the top of the judicial pyramid, but remain meager for lower court judges who carry out the bulk of the judiciary's work. Legal education is desperately in need of reform and, for the most part, has not kept pace with reform efforts. Donor coordination continues to pose problems. The press has little understanding of judicial independence and often undermines the judiciary by blaming it for the state's failure to control crime.

As Jorge Bogarín of Paraguay points out, the transition to democracy and the subsequent reforms in the justice sector are all very recent. Thus it is hardly surprising that no branch of government is yet able to meet citizens' expectations. A culture of corruption remains entrenched in the judiciary, among other institutions, and the judiciary is still seen as inefficient in a context of impunity. The Paraguayan judiciary, however,

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[7] Francisco Díaz Rodríguez and Carlos Rafael Urquilla, report on judicial independence in El Salvador, prepared for this study, July 2000, p. 2.

[8] Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Coomaraswamy, submitted in accordance with Commission resolution 1999/31, Addendum: Report on the Mission to Guatemala, E/CN.4/2000/61/Add.1, Jan. 6, 2000, par. 142.

now includes a number of highly respected law professors and, for the first time, powerful politicians and military officers have faced prosecution.[9]

Resistance to reform has come from many sectors that prefer an easily controlled judiciary. "The Supreme Court of Justice has become a favorite target of those who find the Rule of Law to be a threat to their private interests. The Dominican political class, and especially the conservative sectors, do not yet accept that the State's use of power is subject to obedience to the Constitution and the laws and that the Judiciary has the duty and the capacity to control it."[10]

Supreme Courts have themselves been reluctant to democratize the judiciary and recognize the need to allow each judge to decide the case before him or her based solely on his or her interpretation of the evidence and the applicable law. While Supreme Courts acknowledge that they are overburdened with administrative duties to the detriment of their adjudicative responsibilities, they have been resistant to reforms that would have them relinquish their administrative, disciplinary or appointment power over the rest of the judiciary. This paper looks at some of the reforms that have been undertaken to date in different countries in the region, how they came about, and –to the extent possible -- their results.

Although different reforms are necessarily listed individually, it is critically important to keep in mind the intimate relation among different reforms designed to strengthen judicial independence and to combine and sequence reforms in ways that will maximize their potential impact. Thus training will have little impact if those trained cannot put what they have learned into practice without running afoul of the dictates of their superiors in the judicial hierarchy. Changing the membership of the Supreme Court will not resolve the problems of internal independence if the lower courts remain completely subject to the Court's control. Similarly, at the same time that reforms are introduced to enhance judicial independence, judicial accountability must be kept in mind. Thus, if the judiciary is to have full control over its budget, mechanisms must be put into place to prevent waste and ensure transparency in the use of funds. As the country experts emphasized, ensuring judicial impartiality through, for example, criminal justice reforms that move toward a more adversarial system requires that prosecutors and defense counsel adequately fulfill their roles.

When considering the appropriateness of particular reforms, it is essential to remember that they cannot be considered in isolation and that, in all likelihood, additional reforms will be needed to make them effective. Because of the complexity of the reform process and the need to involve different justice sector institutions in developing and implementing reforms, it may be useful for donors to encourage the creation of inter-institutional judicial sector commissions with high-level representation from institutions such as the Supreme Court, the Judicial Council, the Public Ministry, the Public Defender's Office, the Human Rights Ombudsman, and the Ministry of Justice.

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[9] Jorge Bogarin, report on judicial independence in Paraguay, prepared for this study, Sept. 2000.

[10] Eduardo Jorge Prats, Francisco Alvarez Valdez, and Félix Olivares, report on judicial independence in the Dominican Republic, prepared for this study, July 2000, p. 6.

Coordinating commissions can help coordinate reform efforts and also assist in donor coordination.

## II. Judicial Selection and Security of Tenure

In recent years, most of the countries included in this study have developed new mechanisms for selecting Supreme Court justices and have lengthened their terms of appointment, also ensuring that their terms no longer coincide with presidential elections. Many countries have moved to develop or improve merit-based systems for selecting lower court judges and enhance their job stability.

### A. Judicial Councils

Efforts to improve judicial selection procedures have, in a number of cases, included the establishment of judicial councils or other entities charged with recruiting, screening, and/or nominating candidates for the Supreme Court, some or all of the lower courts, or both. Based on a European model designed to strengthen judicial independence, these institutions have widely varying compositions and mandates in different countries in the region. In terms of their role in the judicial selection process, the transparency with which they carry out their duties seems to be at least as important as the composition of the Council.

In some countries, judicial councils are completely subsidiary to the Supreme Court. In others, they are partially or completely independent entities, with representation from other branches of government and/or the legal and academic communities. [Table I shows the composition and function of judicial councils that have been established in the countries included in this study; Table II shows the selection procedures for Supreme Court and lower court judges in the different countries.] Some countries, such as Argentina, have both federal and provincial judicial councils. Some judicial councils, to varying degrees, play a role in judicial governance.

In practice, judicial councils have often reflected the same politicization they were designed to help reduce, created new bureaucracies, and generally failed to live up to expectations. Nonetheless, councils have helped to diversify the input into judicial selection and, in most cases, increased the likelihood that professional qualifications will be taken into account. While **Venezuela**'s Council has been abolished and there have been proposals to disband those in **Colombia** and **Ecuador**, other countries – including several of those examined in this study – are trying to establish or consolidate their councils and improve their effectiveness.

**Costa Rica** and, more recently, **Guatemala** have established councils that are simply administrative appendages of the Supreme Court. These bodies play an important role in judicial recruitment and screening, as well as carrying out other responsibilities related to the administration of the judicial career. Recent constitutional reforms call for

the creation of a judicial council in **Honduras**, the members of which will also be appointed by the Supreme Court.[11]

**El Salvador**'s Judicial Council, initially dominated by the Supreme Court, was given greater independence from the Court and increased responsibilities, based on constitutional reforms agreed to during the 1991 peace negotiations.[12] Under the most recent (1999) version of its law, the Council has six members, none of whom are drawn from the judiciary itself. Neither the Executive nor the Legislative branch is represented on the Council, which is now dominated by representatives of civil society (the academic community and the legal profession). The Council is involved in the selection process for both the Supreme Court and lower courts; it also carries out regular evaluations of judges and runs the Judicial Training School. While its independence may contribute to tensions with the judiciary, the current Council has moved to improve its technical capacity and enhance the transparency of its actions.

**Paraguay** offers a mixed model: its recently established Judicial Council includes representatives of all three branches of government, as well as two lawyers admitted to practice and two professors from law faculties. The Paraguayan Council is involved in the selection of Supreme Court justices and lower court judges. According to Jorge Bogarín, the new system represents a significant advance over the prior system of judicial appointment by the executive branch.

Other countries have established councils with a far more political composition. In the face of widespread criticism of the judiciary's lack of independence, the **Dominican Republic** established a Judicial Council headed by the country's President; its other members are the President of the Senate and another senator from an opposition political party; the President of the Chamber of Deputies and another deputy from a different political party; the President of the Supreme Court and another Supreme Court justice selected by the entire Court. Unlike the councils in the other countries included in this study, the Dominican Republic's Council both screens candidates and ultimately selects new Supreme Court justices; it has no other functions.

**Argentina**'s new Judicial Council appears to suffer from its highly political composition and bureaucratic structure. It has 20 members including the President of the Supreme Court, members of the federal judiciary, legislators, lawyers in federal practice, representatives of the scientific and academic communities, and one delegate of the Executive. The Judicial Council was created in the framework of Argentina's federal judiciary to assist in the appointment and removal of federal judges, but has been slow in carrying out these duties.

**Argentina** and **Bolivia** have enacted laws transferring judicial governance to their Judicial Councils. In Argentina, the Supreme Court rejected this reform as

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[11] INECIP, *Asociacionismo e Independencia Judicial en Centroamérica* (Guatemala, 2001), p. 53-54.

[12] The Salvadoran Judicial Council was first included in the 1983 Constitution, but implementing legislation was not enacted until 1989. The Council's implementing legislation has been rewritten twice since the peace accords, with the current law dating from January 1999.

unconstitutional. The Bolivian Council has assumed these responsibilities; the Council is seen, however, as a huge new bureaucracy that does not seem to be particularly efficient.

**B. Supreme Courts: Selection Procedures and Tenure**

*Because of the hierarchical structure of Latin American judiciaries and the Supreme Court's role in judicial selection in many countries, improving the mechanisms for Supreme Court selection may be essential to other reforms aimed at increasing judicial independence. Changing Supreme Court selection mechanisms usually implies constitutional reforms, which require a certain degree of societal consensus about the need for change. The experience of* ***El Salvador*** *and the* ***Dominican Republic*** *suggest, however, that the impact of such reforms can be relatively rapid and dramatic.*

*The procedures for selecting Supreme Court justices have improved markedly in a number of countries. Rather than an unfettered selection by the Congress or the Executive for short terms that virtually coincided with presidential periods, most countries have moved to make the appointment process more transparent and involve different sectors in it, whether through judicial councils or other mechanisms. Appointments are generally for longer terms, with some countries providing life tenure for Supreme Court justices..*

Countries that have adopted a permanent career system for the ordinary judiciary may still provide only renewable terms for the Supreme Court. Linn Hammergren ascribes this difference to the "overtly political nature of the Court's decisions and a consequent desire to keep it more in touch with changing values."[13] In some countries, such as **Ecuador**, vacancies on the Supreme Court are to be filled through "cooptation," with the Court itself selecting its new members. While protecting the process from the political branches of government, this practice may perpetuate a conservative corporate mentality as Supreme Court justices tend to select others who share their views.

During the negotiations to end **El Salvador**'s civil war, the parties to the negotiations – the Salvadoran government and the Farabundo Martí National Liberation Front (FMLN) guerrillas – included the justice system as one of the topics on the negotiating agenda. One of the achievements of the Salvadoran accords was an agreement to undertake constitutional reforms that changed the formula for electing Supreme Court justices, who formerly were elected for five-year terms by a simple majority of the legislature immediately after a new president took office. The new constitutional provisions called for nominations for Supreme Court justices to come from the newly reformed Judicial Council and from the results of an election carried out by the representative bar associations. Instead of five-year terms for the entire Supreme Court, justices now serve for staggered nine-year terms, with the election of one third of the Court (five magistrates) every three years. Since the reform went into effect in 1994, each time that the legislature has appointed magistrates, it has also selected the new

[13] Linn Hammergren, "The Judicial Career in Latin America: An Overview of Theory and Experience, (World Bank, LCSPR, June 1999); unpublished paper, on file with the author and with IFES.

Supreme Court president. Two thirds of the deputies in the Legislative Assembly must agree on the selection of each justice.

Although the judiciary in El Salvador was thoroughly discredited during the war years for its abject failure to protect human rights, this kind of substantive constitutional change was only possible because of the peace process carried out under UN auspices. The first Supreme Court selected under the new formula (in 1994, more than two years after the peace accords had been signed) was selected on a far more pluralistic basis with greater attention to professional qualifications. Still, several highly qualified candidates were effectively vetoed under the new voting formula because they were perceived as being too close to one of the leading political parties. Choosing a candidate who would be acceptable to a sufficient spectrum of political parties often seemed to be the key consideration. The post-war Supreme Courts, while still subject to a range of criticisms, have demonstrated greater independence than their predecessors, on occasion striking down legislation and executive actions as unconstitutional.

In **Paraguay** and **Bolivia**, judicial councils provide lists of candidates to the legislature for appointment to the Supreme Court.

A new requirement in **Chile** that at least five members of the 21-member Supreme Court must come from outside the judicial career has not succeeded in breathing fresh air into the judiciary, according to Vargas and Duce. They note that the reform has been completely undermined because the Supreme Court itself selects the candidates and looks for those with the most affinity to the existing Court. Large law firms now commonly become involved in the selection of judges and maintain close relations with judges or groups of judges. Based on slates of five candidates selected by the Supreme Court, the Ministry of Justice appoints Supreme Court justices, who must now also be confirmed by a two-thirds majority of the Chilean Senate. Chilean justices have permanent tenure, with mandatory retirement at the age of 75.

Until 1997, political parties and powerful economic interests in the **Dominican Republic** totally dominated the judiciary. Judges were designated by the Senate, which simply divided up these positions along party lines, selecting judges based on party loyalty rather than professional capacity. In the wake of the fraudulent elections of 1994 and the political crisis that ensued, negotiations led to a constitutional reform that included basic principles to permit the establishment of an independent judiciary. As in El Salvador, the political opportunity for substantive constitutional reforms paved the way for significant advances in achieving judicial independence, including the creation of a Judicial Council to appoint Supreme Court justices.

The Council in the D.R. is responsible both for screening and appointing new members of the Supreme Court. During the Council's first selection process in 1997, the country's president (who also presides over the Council) was the only member of his political party on the Council.[14] Because of his minority status, he opened up the process

[14] The seven members of the National Judiciary Council are: the President, who presides over the Council; the President of the Senate and another senator from an opposition political party; the President of the

and sought the support of civil society. The Council's implementing legislation established that any person or institution can propose candidates for positions on the Supreme Court and authorized the Council to undertake evaluations of the candidates, including in public hearings. The Council's first selection process was characterized by broad citizen participation in presenting and objecting to candidates who were interviewed in public sessions. According to the D.R. experts who contributed to this study, *"The active participation of civil society, proposing and objecting to candidates, and the unprecedented television broadcast of the evaluation and final selection to the entire country permitted a selection that, although not completely free of political influences, was quite good."*[15] Given the highly political composition of the Council, however, there is no guarantee that the next selection process will be as transparent.

In **Argentina**, despite reforms in the system of selecting other judges, Supreme Court justices are still proposed by the Executive to the Senate, which must approve their nominations. During President Menem's administration, the number of justices on the Supreme Court was increased and the majority of the Court's members had strong ties to the Government. Former partners of the President's law firm, his personal friends, and even the former Minister of Justice were appointed as Supreme Court justices. The Court, with this "automatic majority," could be relied on to validate controversial executive actions.[16]

In **Panama,** the selection process remains overtly political: the President nominates Supreme Court justices who must then be ratified by the legislature. In **Honduras**, criticism of the highly politicized judiciary has resulted in a constitutional amendment (ratified in April 2001) that requires the formation of a broad-based nominating board to propose candidates for the Supreme Court and lengthens justices terms from four to seven years so that they will no longer coincide with presidential and congressional terms.

In **Guatemala**, civil society organizations have sought to make the selection process more transparent. When the UN Special Rapporteur on the Independence of Judges and Lawyers visited Guatemala in 1999, he emphasized the urgency of improving the transparency of the selection process.[17] Guatemala relies on a Postulation Commission, comprised of a university rector, law school deans, representatives of the Lawyers Association and members of the judiciary. This Commission sends a list of 26 candidates to the Congress, which must appoint the 13 Supreme Court magistrates. A similar process is used in the selection of appellate magistrates. In late 1999, after the Special Rapporteur's visit and a civil society campaign setting forth criteria for the selection of justices, a Supreme Court selection process was undertaken for the first time since the 1996 peace accords and was carried out with a significantly greater degree of transparency and attention to professional qualifications.[18] Guatemala still limits the terms of all judges, including Supreme Court justices, to five years.[19] The UN Special Rapporteur concluded that five-year terms are too short to provide justices and judges

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Chamber of Deputies and another deputy from a different political party; the President of the Supreme Court and another Supreme Court justice selected by the entire Court.

[15] Prats, Alvarez, y Olivares, p. 3

with the requisite security of tenure and recommended that these be expanded to ten-year terms.

*As these examples illustrate, through varying formulas Latin Americas countries have sought to create more transparent systems for the nomination and appointment of Supreme Court justices. In most cases, the country experts consulted felt that these reforms had improved the transparency of the process, improved the quality of the Court, and increased political pluralism in the selection process. Impressed with the recent experience of the Dominican Republic, some advocated a similar public evaluation process, followed by an immediate selection in order to diminish the influence of political and other extraneous influences. Because Supreme Courts are inherently political, an objective, purely merit-based selection process is generally neither feasible nor desirable. Nonetheless, it is important that political and professional criteria be discussed openly and publicly and that there be clear political responsibility for the actual appointment. Regardless of the particular model involved, selection methods should be transparent and based on objective criteria, with opportunity for input and comment from the legal profession and civil society in general.*

### C: Lower Court Judges: Selection and Tenure

Traditionally in Latin America, the legislature, the executive or the higher courts have named lower court judges on a largely political basis. In **Paraguay**, for example, the Executive named judges for five-year periods, which coincided with presidential elections. Appointments and promotions depended entirely on the Executive. Even reforms designed to create a system less vulnerable to political manipulation frequently maintained the same problems, sometimes through informal rules that divided judgeships among parties or factions or gave appointing authorities (e.g., Venezuela's judicial council) the right to a certain number of lower level appointments. To move away from these arbitrary practices, countries have established judicial career structures in which judges are supposed to enter through a merit-based competitive process, often right out of law school, and work their way up, step by step, based on seniority and their relations with their superiors. The inherent drawback of this model is that, by promoting the development of a strong corporate identity, it breeds insularity and limits the independence of lower court judges, whose chances for promotion depend on their superiors.

The country experts who contributed to this study repeatedly emphasized the problems for judicial independence inherent in the continuing hierarchical control of lower court judges by the Supreme Court. With judges beholden to, and often in fear of, their superiors in the judicial hierarchy, true judicial independence cannot be achieved. This means moving away from a conception of judicial power as something delegated by Supreme Court justices to their colleagues in the lower judicial echelons. As the Chilean experts emphasized, some reform efforts may have inadvertently reinforced these vertical structures by further concentrating disciplinary and administrative authority in the Supreme Court.

Recent reforms throughout the region have sought to establish or reform judicial career laws to provide for more transparent, merit-based selection systems. In many countries, candidates to serve as judges are now recruited and screened by some kind of committee or Judicial Council. *The transparency of the selection process and the involvement of different sectors in it is more important than which entity is given appointment power.*

### 1. Procedures for Judicial Selection

*Efforts throughout the region to move away from judicial selection that depended on political contacts and cronyism remain very much a work in progress. However, as described below, experts involved in this study noted significant improvements in the judges selected through new procedures in several countries, including* ***Chile, El Salvador, and Paraguay****. Judicial councils introduced in* ***Argentina*** *and* ***Bolivia*** *have moved slowly to fill vacant positions. Other countries, including* ***Panama*** *and* ***Honduras****, have yet to undertake or implement reforms necessary to yield significant changes.*

#### a. Training programs for judicial candidates, merit-based selection, and transparent procedures

A 1994 reform in **Chile** created a sophisticated system for the selection of judges. The process now begins with a recruitment campaign to encourage candidacies for vacant positions. Candidates are then evaluated competitively based on their backgrounds, tests of their knowledge and abilities as well as psychological tests. Finally, they are interviewed. Those who complete this stage successfully enter a training course at the new Judicial Academy that lasts six months and is divided equally between seminars and temporary assignments to courts. The students receive scholarships for this program. The final stage is the actual selection of new judges by the Ministry of Justice. Those who have gone through the Academy receive preference over external competitors. Academy graduates are not obliged to seek judgeships, but if they do not, they must reimburse the value of their scholarship.

According to Vargas and Duce, this new process has been carried out with an unprecedented transparency that has yielded very positive results. Good candidates have come forward to participate in the selection process and those chosen appear objectively to be the best qualified. The training they have received in the courts has been eminently practical, but with sufficient time for reflection. Distinguished magistrates and academics have served in the training process. The vast majority of Academy graduates have gone on to enter the judicial career. *"Most important, they themselves say that they feel more independent, as they understand that their selection was based on their own merits, through a competitive process, and not on friends or contacts*."[20]

A somewhat similar process is followed in **Guatemala** based on a Judicial Career Law enacted in 1999 that requires the Judiciary's Institutional Training Unit to evaluate candidates with tests and personal interviews. Those who rank highest may take a six-

month training course. Successful completion of this course makes the candidate eligible to be named by the Supreme Court to positions in the judiciary. This training course has been criticized, however, for its methodological weaknesses, notably its attempt to overcome the deficiencies of five years of university training in six months, rather than focus on developing judicial aptitudes and capacity.[21]

The new Judicial Career Law in the **Dominican Republic** requires aspirants to successfully complete theoretical and practical training programs at the National Judiciary School. Those who have not completed the requisite training can only be named judges on a provisional basis. In November 2000, after considerable delay, the Supreme Court promulgated the required regulations for the judicial career and in April 2001, 454 judges were sworn in to the judicial career, having completed the requisite training and evaluation requirements.

**b. Nomination of candidates by independent judicial councils**

In some countries, judicial councils that are not subsidiary to the Supreme Court are tasked with nominating candidates for positions in the lower courts. Councils in **Argentina** and **Bolivia** have introduced merit-based recruitment and screening procedures. However, critics complain that, to date, the procedures have taken too long, leaving vacancies throughout the court systems.

The **Argentine** Federal Judicial Council assists in the appointment and removal of federal judges, preparing slates of three candidates to fill lower court judgeships. It selects new judges through public competitions, with juries designated to review the candidates for different openings and then send slates of three finalists to the Council's plenary. Juries consist of a judge, a lawyer and a law professor, all from different jurisdictions than the vacancy to be filled. This selection committee evaluates the candidate's background and reports the results of the personal interview and the written examination. The plenary can review this written material as well as assess the finalists in a public hearing to evaluate their appropriateness, aptitude and democratic vocation. Any modification of the selection commission's resolutions must be adequately explained and publicized. The plenary must adopt its decision by a two-thirds majority of the members present; there is no appeal from this decision. Judicial appointments are indefinite, subject only to the requirement of "good conduct." The names of the candidates are to be made public, so that any objections to their candidacy can also be raised. "The challenge for the new system of appointment is not only that it be less politicized and more independent, but also quicker and more efficient than the old system, avoiding prolonged vacancies in the courts."[22] When the Council began to function, 41 federal courts lacked judges; this number subsequently more than doubled. Faced with this growing number of vacancies, the government was considering the introduction of proposed legislation that would permit temporary appointments.

In **Bolivia**, it took more than two years after the Council's creation to fill the Supreme Court's vacancies and fill over two hundred vacant or expired judgeships.[23] By August 2000, only 50% of all judges had been named under the new provisions.[24]

Whenever a judicial vacancy arises in **El Salvador**, the Supreme Court asks the Council to provide slates of three candidates qualified for appointment. Until recently, however, the Supreme Court, without consulting with the Judicial Council, frequently transferred, promoted, or named to permanent positions judges who had temporary appointments. The Council has a Technical Selection Unit (UTS) which maintains a Register of Eligible Attorneys based on annual selection procedures, with continual updates. From this register, the UTS selects seven or eight of the best qualified candidates -- based on such factors as academic qualifications, seniority, merit rating, experience, vocation and aptitude -- and forwards the names to the Council as a whole, which applies the same factors to choose three from this group; this list is then forwarded to the Supreme Court for its selection In practice, the selection process has remained deficient. Until recently, inappropriate influence in the selection of candidates was common including a pre-selection of candidates who were then accompanied by two names designed to serve as "filling" and the suppression of negative information about candidates. Limited communication between the Council and the Court about selection criteria has hampered efforts to improve the process. According to Francisco Díaz, the current Council has taken steps to improve the selection process. [25]

**c. Transitional measures to replace politically appointed judges**

Recent constitutional reforms in the **Dominican Republic** gave the Supreme Court (instead of the Senate) authority to appoint judges. The reforms led to an attempt to replace most of the country's roughly 500 judges within a period of about one year. The Supreme Court justices chose to open the competition for these positions to all lawyers who met the statutory requirements, including sitting judges, and to submit all candidates to an evaluation before the entire Supreme Court in sessions open to the public. This system and the reality that some 3000 candidates participated resulted in a rather superficial evaluation that consisted of asking each candidate some three or four questions. Given the need to renew the entire judiciary in a relatively short time and the lack of an established system for vetting potential judges, this minimal form of evaluation may have been a reasonable measure under the circumstances.

**d. Judicial career laws subject to manipulation in practice**

The existence of laws that establish procedures for selecting judges may not be reflected in the realities of judicial selection. For instance, in **Honduras**, despite having a Judicial Career law in effect, judicial appointments and transfers have routinely depended on arbitrary, political factors. The former President of the Supreme Court, delegated by the entire Court, named, transferred and dismissed judges, taking into account the political affiliation of the judge and the proportion of power acquired by the different political parties in the presidential elections. Although judges were appointed for an indefinite period, in practice they remained in office as long as the President of the Supreme Court or a particular Supreme Court justice determined that they should stay.[26] Initiatives currently under way to improve the transparency of judicial selection include

the creation of a tribunal for selection of sentencing judges, made up of representatives of the (appellate) judiciary, the bar association, and the national university's law school.[27]

In **Panama**, judges are appointed by their immediate superior in the judicial hierarchy. Thus, the full Supreme Court names the District Judges who then name the Circuit Judges, who are charged with naming the municipal judges. Although candidates are selected through a competitive process, the naming bodies are presented with the entire list and are under no obligation to pick the best qualified, permitting an arbitrary selection process. The result is that the person chosen in Panama "owes and professes absolute and perpetual allegiance to the person or persons who selected him or her."[28]

Judges in **Costa Rica** are selected on a competitive merit basis. The Supreme Court must choose one of the three candidates who receive the highest ratings in the testing and evaluation process. Until last year (2000), the Supreme Court had expanded the size of the slates it received from the Judicial Council from three to as many as seven, thereby reserving itself a wider range of choice.[29] The Court also relied heavily on temporary judges, thus circumventing the statutory requirements and undercutting the notion of job stability. In 1999, more than 50% of the judges were reportedly appointed on a temporary basis.[30] This practice was ended in 2001; the Supreme Court now selects judges from the three most highly rated candidates.

### 2. Tenure

While in many countries, Supreme Court justices are appointed for specific terms, other judges are likely to be appointed for indefinite terms that are supposed to ensure job security as part of a judicial career. The reality is often quite different because higher courts have total disciplinary control that may be exercised for political or other arbitrary reasons. (See discussion in Section III, below.) In **Paraguay**, judges must be confirmed twice after five-year terms before they enjoy tenure. The Paraguayan Constitution establishes that judges cannot be removed from their positions, transferred or demoted during the period for which they were named; even promotions require their consent. The Constitution of **Guatemala**, however, still provides that judges are to be appointed for terms of only five years, which, in some cases, can be renewed.[31] The Latin American countries that provide secure tenure usually impose a mandatory retirement age for judges. For example, although the new career law in the **Dominican Republic** provides tenure for judges,[32] justices of the peace face mandatory retirement at 60, first instance judges at 65, appellate judges at 70, and Supreme Court justices at 75.

*Moving away from appointments for short terms that coincide with presidential and congressional elections is clearly desirable. If selection procedures have been improved sufficiently, permanent tenure may be appropriate. In any case, providing judges with job security and protection against arbitrary non-ratification and involuntary transfers are key elements for enhancing judicial independence.*

### 3. Conclusions and Recommendations

Purportedly objective, merit-based selection systems can, of course, be subject to manipulation. Some of the salient qualifications (e.g., integrity, dedication, willingness to work hard) are not easily measurable, and opportunities for exercising influence may still abound. Critics maintain that requiring the appointing entity to select judges based on slates of nominees chosen by other entities merely leads those interested in obtaining positions as judges to curry favor and pledge loyalty to those in charge of putting together the lists and making the final selection, particularly in cases where appointments are for limited terms and re-appointment will be necessary.[33] Increasing job security could diminish the tendency for judges to feel that they must remain loyal to those who selected them. Some critics recommend simply requiring that the highest-scoring candidate in a merit-based selection be appointed.

In any event, a transparent process, in which interested sectors have the opportunity to examine and comment on the qualifications of the candidates should increase the likelihood that professional qualifications will be considered. Appropriately designed mandatory training programs can be useful tools, although they may be prohibitively expensive. It is important to keep in mind that theoretically improved judicial selection methods do not always function optimally in practice, as they depend to a large extent on the willingness of the naming body to forsake purely political considerations and cronyism. While moving towards an objective, merit-based process is likely to constitute an improvement over the thoroughly arbitrary or politicized system it replaced, the results of initial reforms should be carefully monitored and greater efforts should be made to share experiences with different models in this area, both within the region and outside.

It may be useful for donors to encourage systematic and serious studies of the effectiveness, efficiency, and impact of new methods of judicial selection and judicial careers in general. National and regional studies are needed in order to better understand how specific judicial career models actually operate, their deficiencies or vulnerabilities and whether there are measures that could overcome these. Comparative studies could also explore different models for separating administrative responsibility for the judiciary from the jurisdictional role, to allow high courts to devote themselves to their judicial duties and to increase the internal independence of the judiciary.

## III. Evaluations, Promotions, Transfers and Discipline

Judicial evaluations may be carried out by the Supreme Court or its delegates, by a judge's immediate superior, or by a body independent of the judiciary such as a Judicial Council. Evaluations may be designed to monitor performance for disciplinary purposes or as an element in decisions about promotions. They can also be, but rarely are, used to detect weaknesses, promote improved performance, and provide incentives. The Supreme Court of the **Dominican Republic**, for example, has begun to maintain statistical information about the courts to design strategies to enhance court efficiency and evaluate judges. The Dominican experts suggest that it would be important also to review the number of decisions revoked by higher courts and the reasons for these revocations.

In most countries that seek to evaluate judicial performance, only quantitative factors are considered. It remains unclear whether qualitative evaluations are feasible or desirable. There is little consensus about how judges should be evaluated and by whom. Many countries do not have any systematic evaluation system. Reflecting their more political role and selection mechanisms, Supreme Courts are not included in evaluation systems and have separate disciplinary mechanisms.

International assistance can be helpful in the development or improvement of systems for monitoring and evaluating judicial performance and for disciplinary systems. Discussions aimed at clarifying the purposes of evaluations – *e.g.*, to identify problems and help set priorities for training, to contribute to decisions regarding promotions and discipline – may be helpful in determining the kind of monitoring and evaluations needed. Attention should also be given to determining who should carry out the evaluations and under what auspices.

## A. Promotions

Many of the problems that have plagued the processes for appointing lower court judges have also compromised promotion processes; thus, several of the reforms introduced into the selection process also apply, or should apply, to the process of promotion.

One common deficiency has been the lack of notice to sitting judges of opportunities for promotion. Some countries have sought to remedy this situation. For instance, in **Guatemala**, new regulations require the Council to (a) circulate a bulletin advising sitting judges of openings, (b) evaluate the professional accomplishments and conduct of those interested in promotions, and (c) determine their eligibility for a different level or category. Similarly, in the **Dominican Republic**, when a vacancy occurs in the judiciary, judges in positions immediately below are called on to compete for the position. Only when none of these judges is selected is the Supreme Court to turn to lawyers who meet the legal requirements for the position.

## B. Disciplinary Mechanisms and Due Process Guarantees

Judicial discipline is usually handled by a different institution than routine evaluations, although in some countries evaluations may serve as a basis for discipline. Decisions to remove judges generally are handled by the entity responsible for appointments, while lesser forms of discipline may be imposed by a different body.

Many disciplinary mechanisms violate judges' rights to due process or interfere with their independence. [34] Disciplinary systems have frequently been used for political reasons or to punish independent judges who issue decisions contrary to the views of their superiors in the judicial hierarchy. Involuntary transfers, often to remote parts of the country, or even promotions without consent can be forms of discipline and maintaining hierarchical control.

To improve due process protections, **Guatemala**'s new Judicial Career Law establishes that the Judicial Discipline Junta (under the Supreme Court) will be in charge of disciplinary actions, except for the removal of judges. The offenses that can lead to disciplinary action are now set forth in the law. The Junta's initial resolution should be based on a hearing at which the judge's representative can be present, as well as the complainant, witness and experts. This resolution can be appealed to the Judicial Council.

In **Bolivia**, responsibility for judicial oversight and discipline is now assigned to the independent Judicial Council, which does not provide due process guarantees to judges accused of malfeasance. According to Supreme Court justice Eduardo Rodriguez, the Council has failed to distinguish adequately between disciplinary and criminal proceedings. Without a system to resolve complaints against them quickly and effectively, judges become discouraged, sometimes deciding to leave their positions rather than defend themselves in prolonged disciplinary proceedings that can adversely affect their professional standing. Judges, particularly those in the district courts, have expressed concern about pressure from the Council either because of largely unfounded complaints from unhappy litigants or for excesses in disciplinary control that tend to invade the judge's jurisdictional ambit.

In the **Dominican Republic**, the new Supreme Court's eagerness in disciplinary matters and a lack of regulations for judicial inspections led to automatic suspensions of judges accused of corruption without any due process guarantees, raising concerns about the balance between independence and discipline. Indeed, the Dominican experts from the NGO sector note that many sanctions seem to be based on ideological criteria, with judges sanctioned who have granted provisional release on bond or writs of habeas corpus.[35] One positive step taken is that transfers and promotions now require the consent of the judge to avoid past practices of sending judges to faraway provinces as punishment.

**C. What Body Is Responsible for Judicial Evaluation and Discipline?**

The Constitution of **Paraguay** provides for a jury for Judicial Disciplinary Proceedings made up of two Supreme Court justices, two members of the Judicial Council, two Senators and two Deputies who must be lawyers. This recently formed entity has already received a substantial number of complaints that have led to the removal of judges found to have been involved in corruption, crimes or poor performance of their duties.

Reforms in **El Salvador** have sought to remove responsibility for evaluating judges from the Supreme Court. Under the current system, the Judicial Council carries out periodic evaluations of all judges' administration of their courts, including compliance with time limits, and can recommend the suspension or removal of those whose performance is found to be unsatisfactory. The Supreme Court retains the power to impose discipline, relying on its Judicial Investigation Unit, which does not necessarily

use the same criteria as the Council. This somewhat overlapping system has resulted in inefficiencies and has been the subject of significant criticism. The Supreme Court does not necessarily act on the Council's disciplinary recommendations; when it does, it initiates its own investigation and, depending on the results of this process, decides whether or not to impose a sanction. In an attempt to institute greater transparency, the most recent version of the Judicial Council's law requires that its evaluations be shown to the individuals evaluated.

In its first year (1999-2000), **Argentina**'s new Judicial Council carried out four impeachment proceedings, which led to the removal of two judges, the resignation of another during the proceedings, and the restoration of a fourth judge to his tribunal because the accusation could not be substantiated. In August 2000, 77 cases remained under investigation, 12 of which were considered extremely important, and 108 had been dismissed following preliminary studies.[36] Although the Council is still in its formative period, it has been criticized for moving slowly and because some members of the Council are not regarded as sufficiently independent. Two of the senators who serve on the Council are currently under investigation in a corruption scandal themselves. Council members have been inclined to protect judges loyal to the former government and, overall, little has been done to clean out the judiciary.[37]

**Chile** recently reformed its system for evaluating judges and judicial employees and developed a system that seems to address many key concerns. Previously, the Supreme Court had reserved the right to evaluate all judges, thereby accentuating its control over the entire judiciary. The reform established that the evaluation should be done by the immediate superior of a judge, as the person most familiar with the judge's actions. Criteria for evaluations have been specified and a file established for each judge so that his or her background can be taken into account during the annual evaluation. The views of those who use the system are now taken into consideration through mechanisms that allow them to reach the evaluating body in a timely fashion. The old system did not effectively distinguish among judges: more than 95% of them received top ratings. Instead, it served as a means to punish some judges through an expedited system with fewer guarantees than the disciplinary system. In addition to expanding the number of rankings and the different aspects to be evaluated, judges are now given information about their different rankings, the reasons for these, and aspects that need improvement in the eyes of the evaluators. The reforms also established a new right to appeal the findings of the evaluators. To give the evaluations more importance, a direct link was established between evaluations and promotions. Thus, a better-evaluated judge receives preference over a less-well evaluated one.

Despite all these well-intentioned reforms, the evaluation system remains arbitrary. Problems with the system have led to the growth of a movement that urges an end to the evaluation of judges. On the one hand, proponents of abolishing evaluations argue that the judicial role is not one that lends itself to objective evaluation. A more serious objection is that the evaluation system inevitably impinges on judicial independence. According to this view, the evaluations have no other goal than to reward

those individuals who identify with the organization's culture and redirect those who are not in line with it.[38]

Assistance should focus on making disciplinary systems more effective, fair, and transparent.[39] A key step is to remove the handling of complaints and discipline (though not necessarily evaluation) from immediate superiors. An operationally independent office should handle these matters, whether it is located within the judiciary, the judicial council or elsewhere. Citizen education about the role and responsibilities of judges should include information about how to lodge complaints when judges fail to fulfill their duties. At the same time, steps should be taken to ensure that judges are protected from frivolous or unfair attacks by unhappy litigants who seek to use the disciplinary system as an alternative appellate process or simply for revenge.

### D. Supreme Court Disciplinary Proceedings

Disciplinary proceedings against Supreme Court justices are usually carried out either by the Supreme Court itself, raising questions about the impartiality of the disciplinary body, or by the legislature in the form of impeachment proceedings.

The Supreme Court of **Costa Rica** itself investigates reported misdeeds by its members. The suspension or revocation of the appointment of a Supreme Court justice requires a two-thirds majority vote of the 22 members of the Court. The Supreme Court cannot directly revoke the appointment of a sitting justice, but can forward its findings to the Legislative Assembly. As Fernando Cruz points out, this self-evaluation by members of the same tribunal does little to ensure transparency, impartiality or accountability.

Like its Costa Rican counterpart, the **Dominican Republic**'s Supreme Court judges its own members when they are accused of misdeeds. The Dominican experts emphasized the need to create a more impartial system for judging Supreme Court justices, while avoiding the risk of subjecting them to political persecution for their actions.

**Chile's** legislature has the power to bring "constitutional accusations" or impeachment proceedings against members of the Supreme Court for serious dereliction of duties. Since the restoration of democracy, five impeachment proceedings have been brought, one of which was successful. While these cases have promoted discussion of the need for judicial independence, the quantity of cases also suggests that impeachment proceedings may be a recourse for sectors unhappy with judicial rulings.

## IV. Ethics

The experts involved in this study emphasized the need to find ways to instill and enforce judicial ethics. Many countries do not have a code of ethics for judges, although such codes are currently under consideration in a number of countries. Several of the experts suggested that donors should encourage the development of ethics codes for the judiciary. In this area, the U.S. can provide a number of useful examples. Experts at the

Guatemala meeting suggested that appropriate training on ethical issues could be very helpful.

In some countries, special bodies have been established to address alleged ethical violations. In **Panama**, an attempt to establish a special body for this purpose outside the judiciary was rejected as unconstitutional by the Supreme Court as an unjustified alteration of the constitutionally established vertical control by the hierarchical superiors of judges. This Council included the President of the Supreme Court, the presidents of the Supreme Court's different chambers, the Attorney General, the State Counsel (*Procurador de la Administración*), and the president of the National Lawyers' Association.

In **Chile**, where judicial corruption has reportedly increased in recent years, and a Supreme Court justice was removed from office after being accused of corruption, the Supreme Court decided to create a Commission of Ethics for the Judiciary, made up of five of its members. This Commission has imposed sanctions on judges involved in corruption cases and initiated the process that culminated in the recent removal of a well-respected judge on Santiago's appellate court. Referring to this case, the President of the Supreme Court has made it clear that corrupt practices will not be tolerated within the judiciary. It is too soon to say whether this public pronouncement of zero tolerance and the Court's action in this case will help to limit corruption. The Ethics Commission is also considering the creation of a Judicial Ethics Code, which would be important in clarifying the unacceptability of certain conduct (ranging from inappropriate, not transparent or actually corrupt) that has long been tolerated inside the judiciary. Vargas and Duce suggest that one problem with the Supreme Court's anti-corruption initiative is that, by not including any lower court judges, it reinforces the hierarchical control of the judiciary, even though corruption actually afflicts all levels of the judiciary.[40]

Some potential ethics problems can be avoided by improving the transparency and other aspects of the selection process. The **Dominican Republic**'s new Supreme Court made a notable effort to select judges whose career reflected moral and professional rectitude. The Court has also made it clear that it would not tolerate corrupt actions by judges or other personnel in their courts. An incipient but efficient system of judicial inspection has permitted the detection and sanction of occasional cases of corruption.

Requiring explicitly grounded judicial decisions is an important tool in avoiding corruption. Decisions that demonstrate the necessary correlation among the evidence, the arguments, the legal basis, and the ruling are less likely to be the product of outside influences.

Victor Abramovich, the Argentine contributor to this study, has suggested that knowing who the justices are and what they think about important societal issues, based on an analysis and statistical breakdown of their decisions, would contribute enormously to making the justices accountable for their decisions. He noted the positive precedent of U.S. press coverage of the Supreme Court, including stories about decisions and the

Court's composition (often warranting front page coverage), analyses about the significance of the Supreme Court's decisions, and statistics about the conformation of its majorities after each session. Well-respected NGOs should also be encouraged to monitor the actions of the judiciary and related institutions (e.g., judicial councils).

Other potential tools include public access to information about the judiciary, including judicial decisions (with appropriate exceptions to protect legitimate privacy interests), the judiciary's expenses, its use of its budget, the personal background of judges, statistical information, and sworn disclosures of judges' assets and incomes -- although the manner in which this is done needs to be balanced against concerns about the heightened risk of kidnapping or other criminal targeting of judges if full public disclosure is required. While some experts in Latin America maintain that delving into a judge's finances and personal life impinges on judicial independence, others believe that the U.S. system that requires judges to make full financial disclosures to avoid conflicts of interest or even the appearance of such conflicts -- is a necessary, if unpleasant, requirement.

## V. Training

*Lack of adequate training makes judges depend on their superiors, as they seek to avoid having their decisions overturned. Inadequate training produces insecurity, which leads to fear of public censure in the media and limits creativity. A number of experts emphasized that training should be – and rarely is -- designed to change the attitudes of judges. In large part, this means educating judges about the importance of their role in society.*

According to Honduran expert Jesús Martínez: "The most effective training to develop independent thinking in judges would be training that is not strictly academic or designed to consolidate their theoretical and practical knowledge -- although that is indispensable -- but training that is oriented towards the character, ethics, and conviction of a judge and the judicial role in society. This kind of program should precede any training programs to increase knowledge of the laws and their practical application, and before taking on judicial responsibilities."[41]

### A. Continuing Education

In **Chile**, the new Judicial Academy provides continuing education for judges. The workshops are carried out by different entities based on bids that set forth the content, methodology, materials and academic level of the instructors. The methodology must be an active one; lectures are not acceptable. Judges and judicial employees are encouraged to enroll in these workshops; to be placed on the annual honor roll, a key factor in determining promotions, a judge must have taken at least one of these courses. Although the Academy has received positive evaluations, its impact remains limited because there is little connection between its training activities and judicial policies.

In the **Dominican Republic**, the National Judiciary School's training programs have strengthened judicial independence by giving judges the necessary tools to analyze cases in depth from a legal and social perspective and to provide a basis for their decisions. The Judiciary School has sought to establish cooperative relations with other countries in Latin America. According to the Dominican experts, the School needs to promote training programs that help judges to resolve new issues and become sufficiently familiar with principles of law and human rights so that they can apply them in all the cases they face. Because of the inadequate system of legal education, the School also needs to help judges overcome the gaps in their education.

The experts involved in this study criticized training programs in a number of countries for their lack of impact on judicial practices, often because other reforms needed to be implemented to create the conditions in which the lessons of the training program could be applied. The results of training programs have been limited by turnover within the judiciary, failure to carry out essential reforms that would change judicial practices, and entrenched attitudes. Often those receiving training are unable to take advantage of what they have learned without institutional restructuring, access to information, appropriate equipment, etc. In some cases, donors have not maintained their training efforts for sufficient time or with sufficient continuity to achieve results. The judicial training schools that have been established throughout the region vary considerably in quality.[42]

*The experts concurred that training remains essential, but, in general, needs to be better designed and focused, realistically coordinated with other reforms and reinforced with more follow-up, policy reforms and incentives – and possibilities -- for applying lessons in practice. Moreover, training should explicitly address the role of judges and judicial ethics. The Guatemala regional meeting concluded that judicial independence should be the backbone of a strategic training plan. Participants emphasized that training should extend to all personnel (not just judges) at all levels. Training for those entering the judicial career should be designed differently from training for existing personnel. Adult education methods should be used: workshops, seminars, practical exercises, laboratories and clinics. The trainers should be carefully selected and training plans carefully designed based on realistic training goals.*

## B. Law School Education

A number of the experts involved in this study emphasized that deficient professional (law school) training is one of the most serious obstacles to creating a truly independent judiciary. Law schools should teach students about the role of judges. In his report on Guatemala, the UN Rapporteur on the Independence of Judges and Lawyers noted that "for the long-term well-being of an independent and impartial judiciary," it is essential to address the reform of university legal education and the training of lawyers.[43]

University legal education needs to be brought up to date and coordinated with judicial reform efforts. As countries go through accelerated processes of transformation, many universities have difficulty keeping themselves up to date with the reforms.

### C. Training in International Law and Dissemination of International Decisions

Increasingly, Latin American constitutions and jurisprudence rely on international human rights instruments and decisions interpreting them. In Argentina and Chile, for example, courts have become increasingly willing to rely on international jurisprudence, particularly from the Inter-American system. The Inter-American Court and Commission on Human Rights have issued a number of decisions that clarify the obligations of State parties to, *inter alia*, carry out serious investigations of human rights violations, prosecute and punish perpetrators, and provide reparations to victims. Focusing directly on the question of judicial independence, both the Inter-American Commission and Court have recently issued decisions calling for the award of damages and reinstatement of a Peruvian Supreme Court justice (as part of a purported purging of the other branches of government to overcome corruption) and three members of the Peruvian Constitutional Court (who ruled a law allowing Fujimori to run for president a third time to violate the Constitution). The Commission and Court found that their arbitrary removal, violated their rights to permanent tenure and due process.[44] In November 2000, shortly after President Fujimori's departure, the three Constitutional Court magistrates were reinstated. Under Peru's interim government, the Supreme Court justice was also reinstated in compliance with the Inter-American Commission's recommendation.[45]

Judges need to be aware of the provisions and relevance of international human rights instruments, both to their own rulings and to guaranteeing their independence. This requires education about relevant international human rights standards and jurisprudence and training in how to apply these in their decisions. Further incorporation of these standards into the jurisprudence and legal practice would contribute to strengthening due process guarantees, including the guarantee of independent and impartial judges. National and foreign universities can provide this kind of training. Human rights NGOs experienced in using international instruments and proceedings can be an invaluable resource in this area. Some of the Latin American experts noted that training programs in this area should give priority to judges outside the main urban centers.

Key decisions from the Inter-American Commission and Court on Human Rights should be better disseminated in countries, particularly to judges and lawyers. At the moment, it is often the executive branch that responds exclusively to the Inter-American Commission, so that even important resolutions may be virtually unknown to the domestic courts. Legal interpretations or reforms are also needed to facilitate the implementation of decisions from the Inter-American system. The judiciary, the legal community, and civil society as a whole also need to be familiarized with the recommendations of Truth Commissions, the UN Special Rapporteur on the Independence of Judges and Lawyers, and other national, regional, and international bodies that address issues related to judicial independence in their own countries. Systematic monitoring efforts could encourage compliance with key recommendations.

## VI. Budgets, Salaries and Court Management

*In almost all of the countries studied, the budget for the judiciary and judicial salaries have increased significantly in recent years. Some countries constitutionally guarantee their judiciaries a percentage of the national budget, which has strengthened their institutional independence from the other branches of government. However, larger budgets have not necessarily led to strengthening the independence or impartiality of individual judges.*

### A. Budgetary and Administrative Responsibilities

The budget for the entire **Argentine** judiciary – federal and provincial – increased more than 50% in the past six years, without any visible positive results. Justice sector officials suggest that reorganizing the system to improve its efficiency is more urgent than a budget increase for the judiciary.[46] In **Chile**, President Aylwin embarked on a five-year plan to double the judiciary's budget. The judiciary's budget has grown from $45 million in 1990 to $75 million in 1997.[47] These increases, however, have not been reflected in increased judicial productivity.

In **Central America**, the guarantee of a fixed amount of the national budget – six percent in the cases of **Costa Rica** and **El Salvador** – is seen as a key measure that has contributed to guaranteeing the judiciary's independence from the other branches of government. The Salvadoran peace negotiators introduced the constitutional reform that sets aside six percent of the national budget for the judiciary, equivalent to $101,628,701 for 2000. In **Guatemala**, a proposed constitutional amendment that would have set aside six percent of the budget for the judiciary was defeated along with the rest of the constitutional reforms presented in the May 1999 referendum. The Guatemalan Constitution entrusts the Supreme Court with formulating the judiciary's budget and establishes that at least two percent of the national budget should go to the judiciary. In 1999, four percent of the country's budget was actually allocated to the judiciary.

**Panama**'s Constitution mandates that the joint budget of the judiciary and the Public Ministry cannot be less than two percent of the Central Government's regular budget. In fact, the budget never exceeds that amount, and the judiciary depends largely on foreign assistance to carry out activities. **Paraguay**'s Constitution establishes that no less than three percent of the country's budget should go to the judiciary.

Chileans have resisted efforts to establish a constitutional requirement for the size of the judiciary's budget. Vargas and Duce suggest that guaranteeing this kind of absolute autonomy in the name of judicial independence overlooks the need to establish an adequate system of checks and balances. Economic independence frees the judiciary of its obligation to carry out its functions with transparency, including justifying publicly what it does and how it spends its funds. Funding for the judiciary, they argue, should be based on the adequacy and utility of its programs and not on a simple formula entrenched in law.

In most of these countries, the Supreme Court proposes and administers the judiciary's budget. In some, this still involves difficult negotiations with the other branches of government, even where the judiciary's budgetary allocation is constitutionally guaranteed. In the **Dominican Republic**, although constitutional reforms established the principle of administrative and budgetary autonomy for the judiciary and gave the Court the authority to name all administrative and other employees of the judiciary, budgetary independence remains illusory. The National Budget Office routinely modifies the budget prepared by the Supreme Court without consultation and without consideration of its actual needs and commitments. The budget proposed by the Supreme Court has been reduced by as much as 50% in the past three years and has constituted less than 1.47% of the country's annual budget.

In **Paraguay**, although the judiciary prepares its own budget and is "guaranteed" three percent of the national budget, the Supreme Court president must still "negotiate" with the Treasury Ministry before the budget's "approval" by Congress. In Congress, he must again lobby the Budget Commission. Budget items already approved are not released by the executive branch, which claims to have insufficient resources.

The Administrative Corporation of the Judicial Branch (CAPJ) was established to provide technical support to **Chile**'s Supreme Court in administering the judiciary's budget. It functions under a Board of Directors on which five of the 21 Supreme Court justices sit. Individual courts have very small funds for minor expenses. Recent reforms eliminated the Executive's involvement in the selection and promotion of judicial employees. The CAPJ now contracts support personnel and individual courts are responsible for supervising their work.

In **Bolivia**, the administration of financial and human resources is now the responsibility of the Judicial Council. The Judicial Council currently absorbs approximately 30% of the Judiciary's budget. Its administrative structure is complicated, centralized and its salary levels are higher than those of judges -- a situation that creates considerable friction.

Salvadoran participants in the regional meeting in Guatemala noted that judges face obstacles in removing court personnel who are not performing their duties properly or who may be engaged in corrupt practices. While the decision to contract non-judicial personnel is made by each judge or judges (in the case of multi-judge tribunals), once hired these individuals are subject to the Civil Service Law. In practice, this makes it very difficult for judges to exercise real administrative authority over their personnel. Thus, court staff may have greater job security and be subject to less oversight than the judges themselves.

*Ensuring increased budgets for the judiciary is generally seen as essential to enhancing judicial independence, although it is not sufficient to ensure independence and must be accompanied by measures to ensure transparency and accountability for the expenditure of resources. Likewise, enhancing the judiciary's control over its own budget is likely to protect it from outside political interference. However, restructuring*

*the judiciary may be more important than budget increases for improving productivity. To ensure that resources are distributed equitably, it may be helpful to decentralize the judiciary's budget so that resources are appropriately assigned, based on the amount proposed by a budgetary department at each level of the judicial structure. It is also important to ensure that courts outside the major urban centers receive necessary resources.*

**B. Salaries**

Increased salaries have made the judicial career more attractive in many countries. Since 1996, judicial salaries in the **Dominican Republic** have increased from 275% to 400%. In **Chile**, judicial salaries have increased significantly in recent years, particularly for Supreme Court justices. A new bonus system gives first instance judges and court employees the right to an annual bonus if their courts have met the annual performance standards set by the Supreme Court (the law emphasizes the objective measurement of timeliness and efficiency in carrying out jurisdictional duties), and they individually rank in the top 75% of personnel evaluated at their respective level of the judiciary. In **Costa Rica**, judicial salaries are attractive for young professionals, but much less so for judges with 15-20 years experience.

In **El Salvador**, judicial salaries have risen appreciably in the post-war period although they have not kept pace with the steep increase in the cost of living. Prosecutors' salaries are comparable to those of lower court judges while public defenders earn considerably less. Judges also receive other benefits such as an allowance for gasoline and many have a vehicle assigned to them. Retirement benefits are quite generous. Likewise, **Guatemala**'s new Judicial Career Law has greatly increased the salary of judges. However, the UN Special Rapporteur voiced concern about Guatemala's failure to provide life and health insurance to judges.

A 1995 salary increase in **Panama** made the Supreme Court justices the best paid public officials in the country. Nonetheless, the trial court judges continue to labor with inadequate salaries that make them vulnerable to corruption.[48]

## VII. The Effect of Criminal Procedure Reforms on Judicial Independence

Countries throughout Latin America are in the process of reforming their criminal procedure codes, moving away from a written, inquisitive system to an oral, adversarial process. The old systems were typically slow, with limited or no public access, and lacking in transparency. Under these systems, it was often unclear who was actually making decisions and on what basis. Typically, judges were never required to be in the presence of the parties involved in the case. The lack of transparency in judicial decisions and the delegation of responsibilities to judicial staff pose threats to judicial independence. Instead of decisions being made by judges, they could be made by judicial employees, who were likely to be more susceptible to outside influences. Moreover, in theory in many systems, the same judge could be nominally responsible for the initial investigation, the decision to prosecute, determining guilt, and imposing the sentence.

The new oral system has been introduced in criminal, family, and juvenile courts in **El Salvador**. According to the Salvadoran experts, "The positive lessons and experience are that the implementation of the principles of orality, immediacy and publicity are effective in strengthening judicial independence to the extent that they force the judge to make a resolution at a public hearing based on evidence legally introduced during the proceedings, and oblige the judge to make a convincing justification of the legal basis for the ruling."[49]

**Chile**'s written, inquisitive criminal justice system gives appellate judges an overly broad scope to review the actions of trial court judges. Appellate judges can review the lower court's application of the law and its evaluation of the facts. Moreover, the provision for automatic "consultations" permits the Appeals Courts on its own initiative, in most cases, to review the lower court's decision – on the law and the facts – without any appeal having been filed. Rather than serving as mechanisms to protect the rights of the parties, these review procedures allow the higher courts to maintain control over the lower courts. The first instance judges find their independence undermined because the system rewards those who apply the criteria they think the Appeals Court will apply, whether or not they find this to be the correct interpretation for the particular case.[50]

The new criminal procedure code will leave the determination of the facts to the trial court, limiting the appellate courts' authority to review lower court rulings to the application of law. The appellate courts will no longer have authority to review lower court decisions on their own initiative. This reflects an understanding that the right to appeal is a protection for the parties and not a means of hierarchic control within the judiciary. These reforms should give trial court judges greater independence (from their superiors) to decide the cases before them.

Reformed criminal procedure codes are already in effect in **El Salvador, Guatemala**, and **Costa Rica**. Similar reforms have been approved and have recently been or soon will be implemented in a number of countries, including **Bolivia, Chile, Ecuador, Honduras**, and **Paraguay**. These reforms imply major changes for judges that should contribute to strengthening judicial impartiality. The criminal justice reforms in the region are designed to improve efficiency, better protect the rights of suspects and victims, and ensure impartiality and accountability. The new oral proceedings are public, with the parties present and with all evidence presented before the judge, thus limiting opportunities for corruption and the delegation of judicial functions. A single judge is now limited to involvement in one phase of the proceedings. According to the reforms, judges are required to deliberate and render their decisions immediately following the concentrated presentation of evidence at trial. Judges are to provide a reasoned basis for their decisions, although this does not have to be fully articulated when the verdict is announced.

Reforms in criminal procedure codes free judges from the responsibility of directing criminal investigations. Under the old systems, public opinion and politicians

pressure judges, holding them responsible for maintaining public security and controlling crime. Thus, judges often made decisions about pretrial detention and release on bond based on public pressure rather than an independent application of relevant law. According to the Chilean experts, transferring responsibility for criminal investigation to prosecutors should free judges to act more independently.[51] However, experience in **El Salvador** and **Guatemala** suggests that judges under the new system may still be blamed for releasing criminals and failing to stop crime, and that the new laws will also be blamed.

In **Guatemala**, the lack of reasoned decisions by judges under the new system has resulted in the annulment of decisions in important cases, with a huge cost to the government. The trial in the Xamán massacre case will have to be repeated. The case against former civil patrol leader Cándido Noriega was retried three times. The concern about the lack of basis for judicial decisions is so great that a constitutional reform was proposed to include the obligation to provide a reasoned basis for judicial rulings.[52]

**El Salvador** was one of the first countries in the region to implement a new Criminal Procedure Code calling for the oral and concentrated presentation of evidence before judges. The new law, with its requirements for public hearings and transparency, has reduced opportunities for external pressure on judges. Salvadoran judge Sidney Blanco suggests that the new Code is contributing to cleaning out the judiciary: those judges unwilling or unable to adapt to the new procedures have tended to leave the judiciary on their own.[53]

## VIII. Building and Sustaining Strategic Alliances for Reform involving Civil Society, Reform-Minded Judges, Key Politicians, the Media and Academics

In most countries in the region, civil society organizations have not played a major role in promoting judicial independence. Nor have donors traditionally sought to work with civil society organizations on this issue. International assistance in this area has centered on projects with Supreme Courts and judicial councils.

In recent years, however, civil society groups have begun to play a growing role in promoting greater judicial independence by, for example, advocating key constitutional and legal reforms; more transparent procedures for judicial selection, evaluations, and promotions; and proposing oversight mechanisms for these processes. This involvement has ranged from critiques and single-issue campaigns to long-term strategic efforts involving multiple sectors.

The experts at the Guatemala meeting concluded that *efforts to promote judicial independence are most likely to be successful when they build upon strategic alliances among various interested groups, including civil society organizations (lawyers associations, advocacy NGOs, academics, business groups), reform-minded judges, politicians and the media.*

### A. Civil Society-Led Strategic Alliances

A review of some recent civil society strategies suggests ways in which civil society involvement can be useful, and in some cases decisive, to efforts to strengthen judicial independence.

The **Dominican Republic** offers an example of the significant contribution a strategic alliance of civil society, judges, key officials and politicians can make in assuring the adoption of necessary reforms and their adequate implementation. In 1990, lawyers and busines leaders founded the Institutionality and Justice Foundation (FINJUS) to help promote judicial independence, the establishment of a genuine rule of law, and the consolidation of democracy through the clear definition of rules and institutional roles. Between 1990 and 1994 the lawyers and business leaders involved in founding FINJUS sought to place the issue of judicial reform on the public agenda. An electoral crisis in 1994 led to a constitutional review, which created the opportunity to pass specific constitutional reforms designed to strengthen judicial independence. FINJUS spearheaded an alliance of civil society groups, politicians and judges committed to judicial independence and the reform process that played a key role in proposing and selecting Supreme Court justices, securing recognition of all judges' rights to job security, and establishing the jurisdiction of the courts in the sensitive area of constitutional control.

During its first selection process in 1997, the new Judicial Council initially declined to hold public hearings with the candidates for the Supreme Court. The civil society groups carried out their own televised interviews. Subsequently, the Council decided to televise its own public hearings and its actual selection process for the new members of the Supreme Court.

When the legislature passed a law that would have ended security of tenure for judges, civil society groups organized the "Week of Judicial Independence" and, with USAID's support, brought in foreign experts for a series of presentations on judicial independence.[54] International assistance has been key in helping to determine priorities and bring a regional vision, allowing Dominicans to learn about the experiences and achievements of neighbors in the region.

FINJUS and its allies have helped to build and maintain the momentum for reform through various means. They have used the mass media, their own publications, and seminars and other public for a to explain critical issues to the public such as the importance of strengthening the independence of judges. Temporary and permanent networks and alliances have given sustainability to the process; other sectors and organizations have been encouraged to support efforts to strengthen judicial independence. The National Judicial School and FINJUS have agreed to work together to promote analysis, discussion and proposals on issues related to the consolidation of judicial independence and democratization.

Diverse civil society organizations in **Guatemala** have grouped together as the Pro-Justice Movement and have played an important role in ensuring a more transparent

selection process for Supreme Court justices and for members of the Constitutional Court. This initiative has focused on promoting discussion of the qualifications that should be considered for nomination and selection as well as the transparency of the actual selection process. Guatemalan NGOs were also instrumental in bringing Mr. Coomaraswamy, the UN Special Rapporteur on the Independence of Judges and Lawyers, to Guatemala. He produced a comprehensive report, documenting the threats to judicial independence in Guatemala and making a series of recommendations. The Guatemalan government made a public commitment to work toward the implementation of these recommendations. Nine months later, however, a leading Guatemalan NGO found that very few of his recommendations had been even partially carried out.[55]

In **Argentina**, *Poder Ciudadano* spearheaded an effort to form a civil society commission to monitor the activities of the new Judiciary Council (established in 1999). The monitoring team seeks to detect weakness and strengths, detailing them in an annual report. It has also proposed mechanisms to increase the transparency of the Council's actions. Thus, when the Council was establishing its regulations, the monitoring group proposed eight basic principles, including guaranteeing access to information, implementing a system of judicial selection based on the capacity and credentials of the candidates, ensuring transparent administrative mechanisms, and guaranteeing citizen participation by making meetings public. The content of the regulations became a matter of public debate, and a coalition of NGOs presented a proposal for public hearings, which was ultimately accepted by the Council.

Participants in the Guatemala Regional Meeting agreed on several points:

- *Donors should try to identify a civil society organization that will be dedicated virtually full-time to designing and implementing a strategy to support the reforms and confront the opposition. This is an essential step. In their projects, donors need to include the time and money to identify an appropriate organization, or support the creation of an organization if none exists.* This entails ensuring necessary technical assistance, funding, and adequate staffing. Reform campaigns need sophisticated, experienced advocates who understand the issues and can credibly deal with opposition. Trying to carry out reform campaigns with people who are employed full-time elsewhere and who have limited time to devote to the reforms is simply not adequate to maintain momentum.

- *Donors need to allocate more time to the process of building support for reforms rather than expecting to achieve concrete results immediately* (roughly two years for creating understanding and building support). Otherwise, opposition results in delays, questions will arise in turn about the political will in the country, potentially undermining the whole process. This leads to reliance on ad hoc strategies to build support, rather than really well thought-out, effective ones. Even if the reforms pass, they may lack the local support and understanding to carry them through the implementation phase, which is always difficult, uneven, costly, and plagued by unanticipated consequences.

- *Coalition-building is crucial to support reforms and overcome opposition to them.* In particular, it is important to identify allies among politicians. It is also critically important to identify members of the judiciary, at all levels, who support the reforms and can be allies in reform efforts.

**B. Working with Judges at All Levels of the Judiciary**

The Latin American experts emphasized that not only the structure of the judiciary but also the reform process needs to be democratized. Reforms need to involve the judiciary as a whole, not just the top levels. To overcome judicial resistance to reforms that may be seen as a loss of judicial powers (e.g., reducing the hierarchical control over lower court judges, transferring the responsibility for criminal investigations to prosecutors under criminal procedures reforms), the best strategy may be to work closely and implement reform initiatives in collaboration with judges at all levels, particularly those most receptive to change, so that they do not see the reforms as something imposed from outside. If there is a civil society organization spearheading the reform effort, it should try to create an alliance with judges to jointly call for institutional reforms. In any case, it should avoid simply attacking the judiciary, so that judges do not feel personally attacked. Judges should be shown how the reforms are likely to improve their situation. Providing exposure to the experience of judges in countries that have already implemented changes may be illuminating in this respect.

Donors and the civil society groups they work with can encourage the formation or consolidation of pro-reform judges' associations. While traditional judges' associations have not tended to focus on promoting judicial independence, new groupings are increasingly taking on this issue. The Costa Rican Association of the Judiciary has already taken on a leading role in promoting and defending judicial independence. Its activities have included: bringing legal actions to defend judicial independence; organizing, in collaboration with international organizations, activities designed to critically evaluate judicial independence; and carrying out research and publishing an evaluation of the situation of judicial independence in Central America.

**C. Mass Media**

*A media strategy is also a vital component of any effort to build and sustain support for reforms*. If possible, a media outlet should become sufficiently interested in the process that it regards the reforms as a key issue, provides lots of publicity, promotes debate, and calls for transparency. The coalition in the Dominican Republic was successful in establishing this kind of relationship with the media.

However, in most countries included in this study, the media are seen as having been largely unhelpful to the cause of judicial independence, in part because of a lack of understanding of the role of judges. Often judges are blamed in the media for failing to stop crime, particularly when suspects are released for lack of evidence or deficiencies in the investigation. Recent criminal procedure reforms have emphasized due process guarantees, the presumption of innocence, and the notion that punishment is reserved for

proven criminal activity, not mere suspicion. Although pretrial detention is no longer to serve as advance punishment, the media has not adjusted to the new situation.

Moreover, *desacato* laws, which impose criminal penalties for publication of criticisms of public figures including judges, have limited the media's ability and/or inclination to play a watchdog role in many countries. For instance, in Chile, a recently published work of investigative journalism, *El Libro Negro de la Justicia*, which looked critically at the Supreme Court and some of its members, was the subject of a legal action by one of the criticized justices. As a result, all of the copies of the book were seized, the book was banned, and the author, charged with the crime of defamation, fled to the United States where she received political asylum. Despite these restrictions, one of the leading newspapers recently examined the conduct of some members of the higher courts, a focus that was instrumental in the unprecedented decision to remove a Santiago appellate court judge for irregularities and corruption.[56]

As the *desacato* laws are gradually being repealed, and investigative journalism begins to take root, the media are beginning to scrutinize the judiciary in some countries. Still, they could and should play a much more active role in promoting judicial independence and accountability.

In addition to monitoring the courts more closely, the media can and should play a more active role in publicizing the *benefits* of an independent and effective judiciary. To confront opposition to the reforms, the public not only needs to be provided with better information about the scope and advantages of the reforms, but it must be shown results in specific and well documented cases that illustrate the advantages of the reforms, in contrast to earlier practices. The best weapon to combat those who oppose reforms is a policy of publicizing "positive results" contrasted with the inefficient system being transformed.

The media also can sensitize public opinion and political players to the need to transform the structure of the judiciary not only in order to strengthen the independence of judges, but also as a strategy to prevent corruption.

### D. Involvement of Official Oversight Bodies

Many Latin American countries have created the office of human rights ombudsman to oversee official actions and guarantee citizens' human rights. In some countries, these officials have made judicial independence a focus of their work.

In **Honduras**, for example, the National Commissioner for Human Rights (or Ombudsman) has taken up the issue of judicial independence, issuing a critical report in 2000. The government subsequently formed a "Commission of Notables," including the Ombudsman, which developed and circulated a series of recommendations.

### E. Scholarly Scrutiny of the Courts

Latin American experts repeatedly stressed the need to create full-time positions for law professors and encourage independent research about the judiciary in the university context or in prestigious academic centers. Some urged that donors consider funding projects to undertake empirical and legal analyses of judicial independence in individual countries, the circumstances and processes that limit it; and the reform strategies that have helped or are likely to help to strengthen it.

| Table I: The Role and Composition of Judicial Councils In Various Latin American Countries | | | | | |
|---|---|---|---|---|---|
| **Country** | **Judicial Council Composition** | **Council selected by** | **Council's Role in Supreme Court Selection** | **Council's Role in Selection of Other Judges** | **Additional Council Responsibilities** |
| **Argentina*** | 19 members: S. Ct. pres.; 4 judges; 8 legislators (4 from each chamber; 2 from the majority party and 2 from the 2 leading minority parties); 4 lawyers in federal practice, chosen by election; 1 member of the academic community; 1 Executive delegate | Judicial representatives are elected by federal judges; legislators are selected by the presidents of the two chambers, based on proposals from the different chambers | none | Selection of candidates for judgeships through merit-based public competition; preparation of lists of three candidates for executive selection | Administer judiciary's budget,* discipline of judges, initiate proceedings to remove judges, issue regulations related to judicial organization and independence |
| **Bolivia** | S. Ct. pres. and 4 other members | Congress | Nominates candidates | Nominates candidates for lower courts | Administrative and disciplinary responsibility for the judiciary; runs training program |
| **Costa Rica Superior Judiciary Council** | 5 members: four from the judiciary and one outside lawyer; S. Ct. president presides | Supreme Court | None | Merit-based selection | An administrative council has delegated responsibility for various administrative and disciplinary matters |
| **Dominican Republic** | President, President of Senate and opposition party Senator; pres. of Chamber and opposition deputy; pres. of S. Ct. and another justice | | Recruits and screens candidates; appoints justices; can hold public hearings | None | |
| **El Salvador** | 3 lawyers; one professor from the law faculty of the Univ. of El Salvador and one from the private universities; one lawyer from the Public Ministry | Legislature chooses from lists of 3 nominated by each sector represented | Proposes candidates to the legislature, half of whom must come from an election organized by the country's lawyers'associations | Proposes candidates on a merit basis; provides the Supreme Court lists of 3 candidates for its selection | Periodic evaluations of judges; runs the Judicial Training School |
| **Guatemala** | Pres. of S. Ct., head of judiciary's Human Resources Unit, head of Training Unit, 1 rep. of judges; 1 rep. of appellate magistrates | Judge and magistrate to be elected in their respective assemblies | To advise Congress of need to convoke Postulation Comm'n for selection of Supreme Court and appellate magistrates | In charge of merit-based entry system; training unit evaluates candidates; successful completion of 6-mo. course makes candidates eligible to be named by Supreme Court | Names and removes head of inst'l training unit; evaluates performances of judges and magistrates; defines policies of training unit |
| **Paraguay** | 1 member of the Supreme Court; 1 representative of Executive; one member of each legislative chamber, 2 lawyers, one professor from the National University's Law Faculty, 1 from the private universities | | Proposes lists of 3 for Senate selection and appointment | Proposes lists of 3 for appointment as judges or prosecutors by Supreme Court | |

- This information refers to the Council for the federal judiciary; Argentine has other councils for the judiciaries at the provincial level. The Supreme Court has not permitted the Council to assume responsibility for budget administration.

| Table II: Responsibility for Nominating and Appointing Supreme Court and Lower Court Judges in 10 Latin American Countries | | | | |
|---|---|---|---|---|
| **Country** | **Nominations for Supreme Court Justices** | **Responsible for Appointing Supreme Court Justices** | **Nominations for lower court judges** | **Responsible for appointing lower court judges** |
| **Argentina** | Proposed by Executive | President, with agreement of Senate | Judicial Council; juries to review qualifications; public competition; prepare lists of 3 | President, with agreement of Senate |
| **Bolivia** | Judicial Council provides a list of candidates | Congress elects by 2/3 majority vote | Judicial Council | 2/3 vote of Supreme Court for Superior District Courts; Superior District Courts for lower court judges |
| **Chile** | Supreme Court prepares list of 5 candidates | Minister of Justice designates; Senate ratifies by 2/3 majority vote | Recruitment through Judicial Academy; lists of 3 candidates prepared by the immediate superior tribunal in judicial hierarchy | Ministry of Justice |
| **Costa Rica** | | Legislature | Judicial Council evaluates candidates and prepares list of 3 | Supreme Court |
| **Dominican Republic** | Anyone can propose; Judicial Council screens | Judicial Council | | Supreme Court |
| **El Salvador** | Judicial Council (half of list to come from lawyers' association election) | Legislature by 2/3 majority vote | Judicial Council prepares lists of 3 candidates | Supreme Court |
| **Guatemala** | Postulation commission prepares a list of 26 candidates | Legislature selects 13 | Judicial Council convokes competition; Training Unit evaluates; those who pass course are eligible for appointment | Supreme Court |
| **Honduras*** | | Legislature | | Supreme Court |
| **Panama** | President nominates | Ratified by legislature | | Immediate superior in judicial hierarchy |
| **Paraguay** | Judicial Council proposes 3-candidate slates | Senate | Judicial Council proposes 3-candidate slates | Supreme Court |

*A constitutional reform ratified in 2001 establishes that a nominating board comprised of seven sectors must present Congress with a list of 45 candidates for nine positions on the Supreme Court. The first selection process with this new mechanism took place in January 2002.