

SUCCESS OF JUSTICE REFORM

By Ben Firschein (*)

Some of the goals of justice reform are promoting law and order, developing markets, creating economic growth, and reducing poverty (World Bank, 131). However, a recent study by the Inter-American Development Bank (IDB) suggests that programs may not work as well as could be hoped.

Among the conclusions of the IDB study are the following:

- Fifteen years of significant reform have not yet produced greater confidence in the criminal justice system, nor reduced rates of crime (IDB, 9).
- The homicide rate in Latin America followed an almost exponential pattern of growth between the early 1970s and the early 1990s, and is considerably higher in Latin America than in either the OECD countries or other developing countries. Latin America leads most other global regions in terms of crime in general (IDB, i).
- Over half of the IDB's justice loans are considered to be a "problem project" or "at risk." While that is roughly the same percentage as education loans, it is considerably higher than that of the overall Bank loan portfolio (IDB, ii).

The authors conclude from these statistics, "clearly the reform process is not yet complete. It must be continued, and perhaps altered and deepened, if it is to achieve the goals set for it" (IDB, 9).

However, one might wonder after 15 years of justice reform if the goal has become an unattainable "holy grail," an article of faith that defies statistics. Perhaps it is not that the effort needs to be deepened, but that there are other problems standing in the way of victory, for example, poverty and inequities in wealth distribution.

In fairness to the authors, they seem to recognize that deeper reforms are necessary to achieve their goals. They draw a distinction between the work of others and that of the IDB: "The aim of many projects to reform civil law systems is to improve the functioning of market economies. The IDB portfolio of justice projects extends beyond such market-driven reforms to encompass projects aimed at increasing access to justice by the disenfranchised, at building consensus about the need for greater judicial independence in a democratic system, and at building the justice system's ability to respond to crime and violence" (IDB, i).

For example, IDB sponsors projects in areas such as access to justice, property dispute mediation, criminal justice, and violence prevention at the community level. Other development banks have aimed their judicial reform programs primarily at the civil (as opposed to criminal) system, and particularly at commercial law reform (IDB, i, ii).

The authors write, “Growing citizen demands for fairness, transparency, and access; rising criminality and violence; lack of legal unpredictability in economic transactions; and the frequent denial of justice because of backlogs and delays in the court system, among other factors, are focusing attention on the need for justice system reform (IDB, 1).

They conclude: “the central characteristics of a justice system that is able to perform its functions effectively are fairness and impartiality, sound decisions, accessibility, efficiency, independence and accountability, and credibility” (IDB, 4). For example, unpredictability of the judiciary can harm business operations when business executives distrust the independence and impartiality of the judiciary (IDB, i).

However, one wonders how successful mediation, violence prevention efforts or efficiency projects will be if there is an underlying public perception that while the justice system is fair, there is no way one can advance in society.

One can conceive of a system that is absolutely fair and uncorrupt, in which the outcome is predictable victory for those with property rights, and defeat for the disenfranchised. This will occur if courts simply apply the law, with its associated property rights, as it is typically their job to do. This suggests that development funds need to be spent not just making the justice system more efficient, but also lifting people from poverty and providing them the means obtain property and other aspects of wealth.

It is possible that a property-owning middle class (conspicuously absent in many countries) may do more to lower crime rates and violence than an efficient court system that protects property rights. Commentators such as Owen Fiss, of the Yale Law School, have observed that the justice reform paradigm embraced by Washington is more concerned with such property rights than with underlying justice. In their criticism, justice is impossible to achieve if the goal is advancing free market reforms and rule of law, because markets are not concerned with people or democracy, only with property rights (Fiss Interview).

It may be that the IDB will need to shift its paradigm to address these inequities of capitalism if it is to be successful. Improving courts or tinkering at the margins with violence prevention and mediation programs may not be enough. This is not a criticism of capitalism or the suggestion that it be replaced with some alternative system, simply an observation that some capitalist societies, for example, the United States, seem to have less social ills than others, because they have less social inequality. That is not to say that such societies do not have poor people (they do) but they also have a large, and comfortable, middle class.

A review of statistics in the IDB report shows the urgency of paying attention to social and economic factors and their possible link to crime and other social ills. For example, the report contains a table, “Figure 2. Intentional Homicides in the 1970s and 1990s,” (IDB, 50), which shows that Guatemala has among the most homicides in Latin America, while Costa Rica and Uruguay have among the least. Comparing this data with poverty statistics from the World Bank (circa 1989), one might not be surprised to learn that Guatemala is among the leading countries in terms of poverty, with 67% of its

population living on less than \$60 per month, while Costa Rica and Uruguay have the least poverty (3.4% and 5.3%, respectively)(World Bank). This would suggest that there is at least as much of a correlation between violent crime and wealth as there is between violent crime and inefficient justice systems.

The problem is not just poverty; it is inequality. Latin America has a high degree of income inequality relative to other regions of the world. In the Latin American countries examined by the World Bank in the above report, the poorest 20 percent of the population received only 4 percent of total income. Guatemala (with many homicides) was among the worst in terms of income inequality, while Uruguay (with few homicides) had among the least degree of inequality (World Bank).

Given the high degree of poverty and social inequality in Latin America compared to other regions, one might not be surprised to learn that homicides per 100,000 people in Latin America were substantially higher than in OECD countries or the rest of the world. (IDB, Figure 1, page 50), or that Latin America had the highest percentage of the public victimized by crime and violent crime in urban areas – higher even than in Africa or other developing regions. (IDB, Figure 3, page 51). There simply may be little incentive for people to pay attention to criminal sanctions if they are poor and marginalized. This is not to excuse criminal acts, but to explain why there might be such a large amount of crime in Latin America, despite efforts to reform justice systems.

Also troubling for those concerned with justice reform is that statistics in Latin America may be based as much on anecdote as fact. The authors observe that “evaluating the quality and effectiveness of a justice system is a very difficult enterprise. Evaluations based on perceptions are just that. They are not objective measures of the performance of the justice system, although they may have some relation to those measures.” For example, criminal justice institutions in Latin America have been unable to produce statistical data that makes direct, cross-country comparisons possible (IDB, 5). Clearly, more of an effort will have to be made to generate useful court statistics in Latin America. Otherwise, it will be difficult to evaluate the effectiveness of justice reform projects.

Another concern is that assistance is often structured as loans, not grants. Unless a project generates revenue (or saves money), this means that in 20 to 40 years, many countries will have liabilities for which they will have no more money to pay than they do today. However, given that many of these projects appear not to perform, and crime is not going down, it is questionable whether countries will enjoy such cost savings. One might ask if the practice of providing loans is advisable, without reforms in these programs.

The above comments are not meant to disparage justice reform. There is much good that can also be seen in these programs. For example, many countries (e.g. Argentina, Bolivia, Chile, Colombia, El Salvador, Honduras, Guatemala, Uruguay, and Venezuela) are implementing major reforms in their criminal procedure (IDB, 9), making systems fairer, more efficient, more professional, and more transparent to the public. But to support an endeavor is also occasionally to play the critic, and hopefully these comments will be helpful in reforming such efforts.

References:

The World Bank, "Building Institutions for Markets, World Development Report, 2002."

"IDB Experience in Justice Reform, Lessons Learned and Elements for Policy Formulation," Christina Biebesheimer and J. Mark Payne, Inter-American Development Bank, Washington, DC, November 2001.

"LA JUSTICIA NO PUEDE ACTUAR COMO SIRVIENTE DEL MERCADO," Interview with Owen Fiss published in the Argentine periodical Clarín, June 2002 (Spanish).

The World Bank, "Poverty and Income Distribution in Latin America, HRO Dissemination Notes, Human Resources Development and Operations Policy, Number 3, March 29, 1993." Available at:
<http://www.worldbank.org/html/extdr/hnp/hddflash/hcnote/hrn003.html>.

(*) Ben Firschein is a graduate of the Columbia University School of Law and is currently a candidate in the LLM Program in Law and Government at the American University Washington College of Law.