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Justice and Development: a Study -

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EXECUTIVE SUMMARY: JUSTICE AND DEVELOPMENT

This study examines the relationship between the presence or absence of justice, and a nation's chances to achieve sustainable development and democracy. Interviews in five nascent democracies indicate that the availability and quality of justice are among the most crucial elements in determining a nation's long term commitment to the democratic model, and its chances for achieving sustained political, economic and social development.

Notwithstanding the importance of the rule of law to everything the United States wishes to achieve through foreign assistance, our embassies and AID missions pay minimal attention to the judicial branch of government and its administration of justice. That has begun to change, but the effort to date - in terms of understanding how foreign legal systems work in practice (as opposed to what is said on paper) and the consequences of our assistance - has been on the margins.

We must do more. Our assistance must be better coordinated and provided within the framework of a comprehensive vision of what we and the recipient nation hope to accomplish. The time for individual American agencies working to achieve single agency objectives is past. All parts of a legal system must move forward at roughly the same pace. It does little good to have one component achieve professional competency if other parts of the system are inefficient, ineffective or corrupt. Greater attention must be paid to local conditions, sensitivities and priorities. More emphasis should be placed on stimulating a demand for justice. There are many impediments on the supply side, not the least of which is the tendency of those in a nation's political and economic elite to be satisfied with the status quo. Members of the establishment seldom recognize shortcomings in the system wherein they have emerged on top.

The process through which American legal assistance is provided is badly in need of a single, well prepared USG lead agency. Only USAID has the wherewithal to perform that function.

JUSTICE, THE RULE OF LAW, AND SUSTAINABLE DEVELOPMENT

INTRODUCTION AND BACKGROUND:

In mid-1992 I finished a three-and-a-half year tour as Ambassador to El Salvador. The decade-long civil war had just ended with a negotiated peace agreement, a resounding success for US foreign policy. The January 1992 peace accords contained many of the reforms - political, economic and social - which, combined with a string of increasingly fair elections, appeared to put another Latin American nation firmly on the path to functioning democratic practice.

I returned to Washington and joined those, first in the Bush and later in the Clinton administrations, who proudly proclaimed the Western Hemisphere to be, with two exceptions (in 1992 Cuba and Haiti), a hemisphere of democratic regimes. The era of military juntas, strongmen dictators and one-party rule was declared ended. Henceforth the peoples of North, Central and South America, and those of the Caribbean would choose their political leaders by democratic means. During 1992-3, I travelled the country predicting an optimistic future for democracy and development in Latin America.

This positive analysis was undermined when I learned that some policy makers were succumbing to an obvious temptation - declare victory and turn attention elsewhere. With many demands on scarce resources, did it not make sense to announce the achievement of democracy, curtail further assistance and shift focus to other more endangered areas of a crisis-ridden world?

Realizing that designating a country as "democratic" carried the risk of diminished interest and assistance, I began to examine the longer-term stability and sustainability of these "democratic" regimes. With extensive involvement in El Salvador (seven years during two different assignments), I concentrated first analysis there. I asked "Given the outcome of the war, the consensus among virtually all Salvadorans to build a democratic society, is that positive outcome sustainable over the long term? If not, wherein lie the threats?"

To predict what dangers the future might hold, one had only to examine past deficiencies. What had caused a tiny nation, with a tightly-packed but essentially homogeneous population, to collapse into civil war?

One answer was obvious. Among the more destabilizing elements in pre-war Salvadoran society was an absence of justice for the vast majority of its members. Injustice in all its forms was the rule, not the exception. Within the formal legal system disputes and problems of whatever sort - personal, commercial,

criminal - were consistently resolved in favor of the party with the political, economic or military power to impose their will on the instruments of justice. The Salvadoran conflict, as many wars, began when those seeking reform were unable to proceed through legal means. Attempting to achieve voice through the ballot, being cheated but having no recourse to the law, some saw no alternative but to try for power through the barrels of their guns. They almost succeeded.

Throughout the war American efforts to assist those seeking to bring representative democracy to El Salvador were repeatedly frustrated by inadequacies in the Salvadoran justice system. In every congressional debate on further assistance the critics' most effective argument focused on this issue. Opponents of the policy cited a litany of infamous "cases", crimes committed by one or the other side, outrages that shocked the world - the assassination of Catholic Archbishop Romero and the later rape and murder of four American nuns in 1980; the 1981 execution of two USAID-AIFLD reps and the president of the Agrarian Reform Institute in the Sheraton Hotel; the slaughter of Embassy Marines (and Salvadoran civilians) in 1985; the El Mozote, San Sebastian and other military "massacres" throughout the war; down to the 1989 murder of the Catholic University's Jesuit leadership during the FMLN's "Final Offensive." The question was repeatedly asked "Why haven't the guilty been identified, tried and punished?" The answer was equally consistent - one or another component of the justice system had bungled or failed. Either the police had not conducted a serious or professional investigation; the prosecutors had little will to pursue the truth; the criminal codes were inadequate; the courts were unable to withstand the pressures; or whatever. Not one of these high profile, politically critical cases achieved results satisfactory to those seeking justice.

Justice system failures were thus the most ominous threat to maintaining US assistance, to the American Government's ability to continue pursuit of a policy involving an investment of ten years, and over five billion dollars. I would argue, and did, that unless and until El Salvador enjoys commitment to the rule of law - fair and impartial justice for all - the stability of that nascent democratic system remains vulnerable to a recurrence of violence.

Carrying that deduction to other hemispheric nations I am familiar with - Brazil, Bolivia, Honduras, Peru, Nicaragua, Panama - I see the same threat: weak, underfunded, corruptible, executive-dominated, antiquated justice delivery systems in which the majority of those governed have scant if any confidence. Add the demands of citizens newly aware of their rights, their voice - and you have the ingredients that could produce unfulfilled expectations, and eventual rejection of the system. Those denied justice within any regime, especially one professing to be democratic, will eventually seek it by other means - thus are born vigilantism, death squads, personal vengeance, and other forms of taking

the law into one's own hands. In a word, serious threat to the stability, the sustainability of democratic practice.

This is the relationship explored by this study -- the importance of the rule of law, the availability of justice to continued progress towards sustainable development and mature democracy in a number of nascent democracies, recipients of American assistance.

WHAT THE STUDY IS; WHAT IT IS NOT:

The study had the following objectives, to:

- Examine the relationship between a nation's ability to provide equitable justice and its chances to achieve sustainable development and democracy. Do problems with the first produce problems with the latter?;
- Describe what the USG accomplishes with its present array of legal assistance programs, each designed to enhance the effectiveness of one or another component of the rule of law process;
- If possible, recommend more efficient and effective methods of strengthening the rule of law through improved application of US assistance.

The examination dealt with the rule of law in its broadest context. To divide a justice delivery process into component parts - law enforcement, courts, the bar - and examine each would require volumes. This was not that sort of study. Nor is it:

- A description or evaluation of individual agency programs or performance, most specifically USAID's Administration of Justice (AOJ) project;
- An effort to criticize past or present undertakings; the assumption being that all were well intentioned, properly executed, and produced the planned for benefits in terms of the goals of the US agency involved, and the needs of the recipient country.

METHODOLOGY;

The study was hardly scientific. I spent three weeks in each of five aid recipient nations - three in Latin America, one each in Africa and Eastern Europe. I sought out anyone purported to have an informed grasp of the provision of justice. I wanted opinions on how the justice system performs in practice, how it

is perceived by the public, in contrast to what the laws and regulations might describe.

While I touched base with those performing official functions - judges, prosecutors, police - far greater time was spent listening to those on the receiving end of justice, those trying to reform the system, and those analyzing from the sidelines. I sought out, at first on the basis of Embassy recommended contacts but later via suggestions by those spoken to: lawyers, bar association officers, law professors and other academics, opposition leaders, journalists, NGO representatives, and those in the business world. A few had no job or title indicating why they might have knowledgeable opinions, but who often were the most insightful in their comments and analysis.

Few discussions lasted less than two hours. I was looking for "gut feelings", informed comment and personal experience rather than statistical or written description.

WHY THESE FIVE COUNTRIES?

I originally proposed examining five Latin American nations. The AID front office suggested the addition of an African country, to determine whether what has been done in Latin America might have application in other environments. AID/A also requested that I examine one of the former captive nations of Eastern Europe, where it and other USG agencies are working for the first time. The final list became: Brazil, Guatemala, Chile, Kenya and Poland.

While the five were selected with some randomness, several characteristics emerged common to all:

- None were "failed states", or a hopeless case for the sustainability of development and the survival of democracy. On the contrary, each could be described as a regional "hopeful". Brazil, by size, geography and resources a regional power. Guatemala, the largest and traditionally most influential of the Central American mini-states. Chile, thought to be the most democratically mature in the Southern Cone. Kenya, in times past the jewel of East Africa. And Poland, the largest of the Eastern European states with an exceedingly rich intellectual and cultural history.
- Each has recently emerged from, or still suffers the effects of national trauma; i.e., military or one man/one party rule, colonial subjugation, or foreign occupation. Each inherited and suffers serious problems from that past.

- The list - I originally believed - represented a variety of ROL development stages, with Chile among the more advanced of the nascent democracies, the others trailing behind at different points on the justice spectrum.

COMMON THREADS FOUND IN ALL COUNTRIES:

Before advancing to country-specific situations, it might be useful to list threads that ran through virtually all of the interviews, regardless of on what continent, who spoken to. The following are themes that everyone subscribed to:

- Acceptance, often expressed in the strongest terms, of the critical correlation between a functioning justice system and the sustainability of development and democracy, since:
 - Democracy produces more open debate, greater emphasis on settling disputes within the legal framework - placing a level of demand on legal process not experienced under non-democratic regimes. Those demands must be met for public confidence in democratic practice to develop.
 - All that the US and recipient nation reformers are attempting to promote in the way of development - increased systems' transparency; enhanced conditions for trade and foreign investment; peaceful resolution of disputes; protection of the environment and conservation of non-renewable resources, among others - are heavily dependent on a justice system that works.
 - The absence of legally protected criticism - whether from the media, political opposition, or sectoral advocacy groups - over time leads to government ignorance and arrogance, a system devoid of critical feedback. The end product - increasingly irrational government decisionmaking.
 - On the economic side, monopolistic practices, sweetheart deals and other competitive market restraints, if unchallengeable through legal process, produce heavy drag on development.
 - In summary, a nation playing by universally accepted rules - consistently and impartially applied, which clearly describe limits on player behavior - offers the most hospitable environment for economic and political development to occur.

- **The national system under discussion is not working: justice is uneven, corrupt or corruptible, the State is the greatest violator of the law. Something must be done, and soon!**
 - With the exception of government interlocutors, those spoken to in all five countries described major and minor flaws throughout their respective legal systems.
 - Each system's shortcomings were easily arrived at. The difficulty was not in identifying what needs to be fixed, but rather in overcoming the inertia of the status quo, breaking "ricebowls", achieving the necessary political will to do the fixing.
 - The problem was seldom a lack of sound laws. More common was the complaint that "this is a country with more than enough laws, but insufficient law". Laws on the books, however well drafted, are useless absent honest application and enforcement.

- **Local conditions are unique.**
 - A society's legal system is perhaps the area of governance most sensitive to criticism; it is also the least tolerant of external pressures, especially from extra-national sources. A foreign system cannot be imported, implanted, imposed. Solutions are only possible if they appear to emanate from within.
 - External encouragement and assistance can help - but not imposition of the donor's priorities and preferences, which simply won't take.
 - Those trying to help from the outside must be conversant with local conditions, sensitivities - and flexible in the application of their's, the donors' priorities and suggestions.

- **Serious, well insulated Non-Governmental Organizations (NGOs) offer the greatest promise, from the demand side, in creating the conditions for reform, but:**
 - Such NGOs must be home grown, and demonstrate serious commitment. Donors must beware of wasting resources on "do-nothing" NGOs which in their rhetoric meet donor needs, but accomplish little, and drain resources and credibility from the more serious variety.

- Effective NGOs will, by definition, be a problem for the sitting government - at best seen as gadflies, at worst as "the enemy". An NGO's external connections are more important as protective cover than as a source of funds.

OBSTACLES TO REFORM, COMMON TO ALL:

The study exposed a number of impediments that stifle reform, even in the face of strong public demand. Most obstacles emanate from within. A few are problems for outsiders attempting to help, in this case the United States.

The following are significant internal impediments to change:

- Higher Priorities Elsewhere:

Setting priorities for the utilization of scarce resources is always a difficult task. Never more so than when emerging from national trauma. In the immediate aftermath of authoritarian rule, demand for improved services most often expands beyond the new regime's ability to respond. Hard choices must be made. Education, public health, housing, economic infrastructure are seen as of higher political impact and priority than the more difficult to remedy inadequacies of a troubled justice system.

Example: Chile

With the fall of Pinochet, virtually all Chilenos recognized the shortcomings of the legal system, and agreed that drastic reform was needed. Five years later, little has been done. One reason: Chile devotes a mere 1% of its national budget to its judiciary. Why so little when the consensus for reform is so great? The democratic regime of Aylwin felt resources were more urgently needed in projects of greater immediate impact.

Many Chilenos now believe greater attention should have been paid - from the beginning - to judicial reform. The transition to full democratic practice would have been smoother, they argue, had the legal system kept pace with and regulated reform and progress in other areas.

- Incumbent Regimes Are Comfortable With Status Quo:

Incumbent regimes - the executive branch, the party in power - usually and correctly perceive significant advantage in a tame, easily manipulated judiciary.

The ability to insure the correct outcome in cases which affect the well-being of the Government, the party, is not lightly surrendered. This appears to be the case whether the executive is weak itself, or overwhelmingly dominant. Nor does it appear to matter whether the incoming party was itself the victim, under the previous regime, of a politically manipulated judiciary. The temptation is almost irresistible to keep things as they are on the judicial side, so as not to lose advantage in what participants view as the zero sum game of politics.

Example: Kenya:

Kenya, at independence, inherited a British legal system. Not British law as practiced in London, but British colonial law designed specifically to enable the executive, i.e., the colonial power in the person of the Governor, to do as it pleased.

Colonial law was not the protector of individual rights, but rather an instrument of government repression and punishment to be used against those challenging the status quo.

At independence, the post-colonial government of Jomo Kenyatta quickly recognized advantage in the restrictive features of colonial law. It could be, and continues to be used to silence criticism, stifle political opposition, maintain a single person, party and tribe in power. His successor, lacking the charisma and anti-colonial credentials of Kenyatta, resorts to further dominance and manipulation of the judiciary to maintain himself, his clique, his tribe in power.

■ **Ditto the Economic and Social Elites:**

Similar to the political establishment, those in the economic and social elites are masters of using the in-place system to remain on top - that's how they got there, that's how they maintain their favored position.

For those in elite sectors, justice is seldom a concern. It is theirs when it matters.

One administration of justice problem does concern the establishment - public safety and street crime. This is where complaint of the venality and incompetence of judicial and law enforcement officials is concentrated. Many - not solely the privileged - view the advent of democracy and the apparent dramatic increase in crime as somehow related. If that perception gains favor, and the instruments of law enforcement are unable to cope with the threat, confidence in democratic practice erodes. One

solution, to pay higher taxes to professionalize the police, or make the judiciary a well-paid and independent check on executive power, seldom occurs to those demanding that "something be done". Reform in those directions could be threatening.

The preferred answer is a personal system of protection - private guards, technical devices, armored cars. While more expensive than paying for public police services, the private facility remains under the control of the person who foots the bill. A professional national police might arrest a member of your family. An independent, honest judge could pass sentence detrimental to your interests.

Example: Guatemala:

The perception of ever-increasing street crime, with greater violence and penetration into the "better neighborhoods", is a favorite subject among the well-off in Guatemala. Asked to pinpoint causes, most replies refer to police and judicial corruption, the incompetence and leniency of judges, the lack of sufficiently tough laws, and the coddling of criminals through unreasonable attention to their human rights. When one points out that virtually no one in Guatemala pays income taxes, that a government with greater revenues might be able to afford more professional police, courts, prosecutors, the reply is inevitably "Why should I pay taxes, when it will all be stolen by crooks in government?"

With no criminal penalty for non-payment of taxes, few Guatemalans see cause to contribute. The result - a policeman in Guatemala earns less than his counterpart in Honduras, the poorest country in Central America. A Guatemalan judge's pay is less than a Salvadoran's, notwithstanding Guatemala being a richer nation. But those complaining of law and order breakdown refuse to see the connection between their unwillingness to contribute and the woeful state of Guatemalan law enforcement.

■ The Demand for Justice, Who Wants It?

Given such attitudes among elites, the persons demanding justice system overhaul are invariably those least able to influence the rules of the game. Persons and organizations exposing deficiencies, inequalities, unjust acts committed in the name of the state are viewed as "troublemakers" and the "enemy" by those whose official acts are necessary for peaceful change. Officials most critical in enacting reform are those least aware of the need, and most the beneficiaries of the system as it stands.

■ Living Down the Past:

Most often one, many or all components of the justice system have been inherited from the non-democratic predecessor regime. Too often the police, the prosecutors, the courts were instruments of that previous administration's proclivity for violence, repression - and are discredited and feared as a result.

In such countries the comment often will be made that "the greatest violator and perverter of the rule of law has been the government, the state". The courts are seen to sanction, and thereby declare legitimate, the most outrageous and illegal government act. Courts with this historical reputation and behavior have a lot to live down.

Example: Chile:

In pre-Pinochet Chile, the major law enforcement instruments - the Carabineros, the courts - were relatively well respected for professionalism and non-corruptibility. During the Pinochet years, the Carabineros were repeatedly used by the military regime in acts of repression. The courts and judges, excessively legalistic in approach, appeared to take as much pride in administering the "bad laws" of Pinochet as they had the "good laws" of the past. The courts were seen to justify unjustifiable acts committed by a brutal authoritarian government. The Carabineros and the courts will have a difficult time recapturing the respect and public confidence they once enjoyed.

And then there are obstacles that emanate from the donor side:

■ Justice System Ignorance:

Given the sensitivities, complexities and tediousness involved in following foreign legal process, American embassies normally pay minimal attention to what's happening in the host justice arena.

Embassy officers involved in reporting and program direction, those with responsibility for following the workings of the host government, give highest priority to interaction with and analysis of the executive branch - that's where traditional diplomacy is practiced, where bilateral issues are dealt with. The Ambassador, political and economic sections, the AID mission - and virtually every other embassy player - are in daily contact with the host government via cabinet ministers and ministries, the office of the President.

Of less importance, but covered, is the political decision making process - i.e., the Congress, the political parties. Issues here are politically interesting, often changing character from day to day. The opportunity for timely, sexy reporting and analysis lies here. A political officer makes his/her name by accurate prediction of what the President, the Congress, the electorate will do tomorrow, next week.

Whatever resources remain after the executive and legislative branches have been covered is invested in analysis of non-governmental players - economic and social elites, the NGOs, and others in the diplomatic community.

Events in the judicial sector are condemned to a distant last place in embassy attention. Courts deal with lengthy, difficult to follow, excessively legalistic issues. Embassy officers, transferred every two-three years, seldom can follow a legal process, however important, from start to finish. At the same time, judges and other judicial actors do not welcome anyone, but most decidedly foreign officials, poking around in their deliberations.

The result, embassy unfamiliarity with the workings of the judicial branch, and a tendency to underestimate the importance of what occurs there.

In talks with State and AID officers, I was struck by the lack of basic knowledge of the host judicial system. While virtually all expressed awareness of the importance of the rule of law to what they were doing, few had answers to elementary queries - What's the composition of the Supreme Court?, How are they nominated?, How many levels of appeal are there?, etc. The most often heard reply - "I should know that, but don't. Why don't you ask so-and-so?" So-and-so seldom had the answer either!

Looking back on my experience as a political officer and in embassy front offices, I realize that I paid no more attention to judicial affairs than do officers encountered in this study.

The day-to-day workings of a judicial system are arcane, the overwhelming majority of cases have little to do with international relations, or pertain to matters of direct USG interest. And yet the accumulated affect of these thousands and thousands of individual decisions profoundly affect how the sitting system of government is viewed, particularly in terms of its commitment to democratic practice.

■ **Washington Bureaucratic Practice:**

Washington bureaucratic games often cripple the ability of the USG to assist foreign judicial reform efforts. If it is accurate to say that all elements of the ROL matrix must be at roughly the same level of development for the overall system to perform effectively, then coordination and cooperation among the American agencies that proffer assistance to individual parts are vital. A US agency's assistance which moves a foreign counterpart towards greater professionalism is wasted if the rest of the participants in the process remain incapable of playing their assigned roles. Among the problems:

- **USG assistance to foreign law enforcement and judicial entities began and grew in piecemeal fashion. Each US agency entering the field did so from the perspective of its limited mandate. In the beginning, coordination was minimal. DEA was conducting its War on Drugs. The FBI confined itself to police-to-police cooperation. INM worked to provide resources and advice to foreign narcotics interdiction and eradication efforts. AID worked to improve the courts, the codes, via its AOJ programs. What coincidence of effort there was resulted from Country Team discussion, not mandate from Washington.**
- **As USG effort expanded some coordination occurred - primarily in the field. An embassy Country Team resembles King Arthur and his Round Table. The Ambassador, as the king, can insist on coordination, cooperation among the barons around the table. In Washington there are only barons, no King Arthur. Agency heads are equals. Absent extraordinary effort and elevating inter-agency dispute to the White House, headquarters decisions involving more than one agency must be by consensus. Every Washington player has a variety of tools and motives to impede action; few to make things happen.**
- **A further impediment - few headquarters participants have hands-on experience working program implementation beyond the nation's borders. Most come to the table armed solely with their agency perspective. Few realize that the very words being used can mean something quite different in the recipient country - in linguistic terms the problem of "false cognates". A cop is not always a cop, a prosecutor a prosecutor - the same term can stand for a variety of meanings as you move from country to country. That is often not understood by those working Stateside where everyone knows perfectly well what a cop, a judge, a prosecutor is. Misunderstandings abound.**

Example:

In Latin American countries where we are attempting to professionalize the police, we most often do so via ICITAP training courses which provide instruction in such "police functions" as the proper collection and presentation of evidence, examination of the crime scene, etc. This is based on the assumption that a policeman is the primary initial investigator of criminal acts.

While this is assuredly a police function in the United States, the same is not the case in many areas of the world. In much of Latin America, a policeman is traditionally a poorly educated, lowly paid public servant who performs the simple functions of vigilante, that is a neighborhood watchman. Attempt to bring those whose professional experience is dictated by the Latin American role up to the level of those recruited and trained for the more sophisticated world of US policing, will encounter problems if the false cognate problem is ignored.

■ **Misreading Who, What We Dealing With:**

Too often USG players allow themselves to be fooled, manipulated into working with the wrong crowd. This propensity for self-deception and gullibility - especially among neophytes to the game - can be a significant factor for things not working out as originally proposed.

Example: Brazilian Federal Police:

By Brazilian Government dictate, external assistance to the police must be funneled through the Brazilian Federal Police. Thus DEA and INM provide training and resources exclusively to units within that force. Direct contact with other levels of police - the various state and municipal forces - is prohibited. From afar, say Washington, this makes a certain sense. The Federal Police bear superficial resemblance to the FBI, that is an elite national law enforcement agency. We let ourselves be deluded into believing that this appearance represents reality. Knowledgeable observers view the Brazilian National Police as among the least effective, most pampered and corrupt of the various law enforcement agencies. Our assistance to it strikes the average Brazilian as, at best, misguided.

When I was in Brazil the Federal Police had been on strike for sixty days. Hardly anyone noticed. For better or worse, it is the state police forces who do policing in Brazil. Asking the question "If our assistance were withdrawn, would the Federal Police maintain the units fielded under DEA and INM

auspices?", the answer - even from those most insistent on the importance of the Feds - was a resounding "no"!

Thus we allow ourselves to be restricted to working with a relatively minor player in the police scheme of things. The Brazilian Government fully understands what is happening. By forcing us - and other donors - to work with the Feds, it appears to be cooperating in efforts to modernize and sanitize the much-criticized Brazilian police. It also minimizes foreign involvement with the other police forces - giving the appearance of Brazilian Government effort and commitment, without the reality.

This might make sense in terms of strengthening the bilateral relationship. If it does, fine. But we should not deceive ourselves and believe that our assistance is having serious impact on the professionalism of the Brazilian police who count.

■ Overselling the Program:

Our assistance programs too often are oversold, to ourselves and to the recipients. We are dealing with problems of complexity, and solutions that will require years of sustained effort. Faced with the need to "sell" Congress, the parent agency or the foreign government, we tend to exaggerate what realistically can be accomplished during the life of the program. Too often we announce huge program commitments, work at implementation in a limited fashion, get discouraged, pick up and go home - only to repeat the process in selling the next idea.

Example:

Read the cables which initially propose major programs; then examine the results - the gaps are often staggering.

■ Other Bureaucratic Snarls:

Of the foreign affairs agencies in the legal assistance field - State, USIS, AID, DOJ, DEA - only AID has the infrastructure in place, in the field, to keep those handling program funds out of trouble. Any AID mission worth mentioning has a lawyer or two, several comptrollers on its rolls. Officers of other agencies, especially those new to the international arena, have to acquire many critical skills before they are operational or fully comfortable dispersing appropriated funds. Few State FSOs working INM accounts come to the job with the training, the experience needed to handle program

implementation. Players from American law enforcement agencies, plucked from domestic assignments and experience, often have to acquire the linguistic, cultural and contact skills on the job - before they stand any chance of imparting their professional skills to others.

The newcomer agencies most often field one-two person offices. The first six months of the officers' tours are spent adapting to the local scene; the remainder to the paperwork, the mechanics rather than the substance of what they are about. Such offices check with the home office they are familiar with for guidance and protective cover, rather than to their other-agency colleagues at post. They tend to pay less attention to ambassadorial instructions, especially those at variance with home office mandate. By the time such officers recognize the importance of Country Team cooperative effort, they are ready for transfer and the process repeats itself.

PRESSURES BUILDING FOR REFORM

The above are a few of the generic obstacles to reform. There are also, thankfully, a number of pressures and trends pushing in the other direction. The following are some:

■ Increasing Global Interdependence and Integration:

Expanding economic integration efforts - MERCOSUR, NAFTA and a host of others - have more and more nations involving themselves in international arrangements. Such agreements imply that increasing attention will be paid to the quality, the availability, the fairness of the signatories' national judicial processes.

The approach of a world marketplace, with economic well-being dependent on ability to compete for international trade and commerce, to attract foreign investment, favors those nations having a legal environment perceived by the international community as fair and impartial. Foreign investors in for the long haul have learned the bitter lessons of legal systems that rely on the word of the strongman, the general, for adjudication of commercial dispute.

There is also increasing global awareness that a number of transnational problems - organized crime is a good example - mandate international cooperation. Fighting the international drug traffickers, terrorism, white collar crime - all require greater cross-border police and judicial cooperation. External attention and criticism will increasingly focus on those national systems which profess but are incapable of cooperation. The

shortcomings of the corrupt, the inefficient, the unwilling are all too apparent.

■ Growth of the NGO Phenomenon:

The recent appearance, in all except the most closed societies, of advocacy non-governmental organizations (NGOs), and their expansion into new areas of operation, creates growing pressure - on the demand side - for justice.

Influenced by the lightening speed with which data crosses frontiers, the immediacy with which CNN and other distribution networks move news to the furthest corners of the world - there is hardly a population on earth isolated from knowledge of the rights, the protections offered by systems other than their own. Publics are increasingly aware of and less tolerant of injustice. NGO demand for reform is increasingly more difficult to ignore for governments that wish to survive.

■ Need to Fight Domestic Crime:

The open society that democracy represents is believed to bring with it the affliction of a higher incidence of crime. This is particularly true in the immediate aftermath and confusion of authoritarian collapse. Whether the result of greater freedom, more attention to individual rights, or merely a reflection of a free press able to print negative news for the first time, concern with street violence and crime appear on all national problems lists, whoever crafts the list.

Societal fear of crime generates public demand for better law enforcement, more efficient and effective police, prosecutors and courts.

Trying to cope with crime, and doing so with proper regard for justice for the victims as well as those accused of committing criminal acts, is a delicate balance to achieve. Crime that goes unpunished is unjust, both for the victim and society as a whole. Crime wrongly dealt with by a justice system that relies on wrongful detention, repressive police methods is equally to be criticized as injustice in the name of the state, abuse of authority at its worse. Excessive zeal in capturing and imprisoning criminals, reliance on torture and forced confessions, is the antithesis of a just system. Yet these and other "shortcuts" are often common practice in nascent democracies with inadequate administration of justice.

Open discussion and debate dealing with the crime issue can lead to greater public awareness of how a legal system should function, and how

it does in practice. That can lead to exposure of what's wrong and right with prevailing practice, and stimulate demand for reform.

PRECONDITIONS FOR ENTRY:

The United States cannot and should not become involved in every attempt by a foreign nation to improve its justice delivery system. It has neither the resources, the responsibility, nor the invitation to do so. If, however, the rule of law is as critical to the success of democratic experiment as this study indicates, and we provide assistance to create the conditions necessary for sustained democratic and economic development, then the USG must determine - for every aid recipient - when and where such assistance is needed, and whether or not external support will make a difference.

Others have examined criteria that should be applied before the US intervenes. Several by-the-number lists, such as one prepared by CDIE in an excellent 1993 six-country assessment, are circulating which indicate when to enter, when to desist. I only add the following:

- **If the assistance is to flow via the government:**
 - There must be incontrovertible evidence that the government in question - all three branches since all will be involved if reform is to occur - has the will to affect serious change. To accept the words of the executive, and ignore the critical role of the legislature, the Supreme Court, is to invite excuses when reform is not forthcoming.
 - Such evidence could consist of commitment of host government resources, and a lack of defensiveness when faced with criticism by the press, NGOs, and foreign observers.
 - The accumulated evidence must be consistent with a regime that accepts openness and transparency in its actions, and that is moving towards democratic practice.

If these conditions are not present, or in doubt, assistance channeled via the government should be kept to a minimum. Other delivery modes should be explored.

- **There are also pre-conditions that must be present on the donor side:**
 - A policy decision must be in hand that the target country effort to develop/democratize is of such interest that it deserves serious, long-

term US commitment. If we're not in for the long haul, we shouldn't bother!

- Willingness to support the placement of a dedicated in-country project director would be concrete evidence of appropriate USG commitment. If the Ambassador, the State Department, the home offices of participating agencies do not agree on the need for such a position, the necessary seriousness is probably missing.

Example: Guatemala:

Guatemalan recipients of ICITAP program support expressed appreciation for the assistance. At the same time they pointed to what they considered a basic weakness - the lack of a resident ICITAP presence to monitor day to day activities, make mid-course corrections, insure proper follow through. Several pointed to a similar police assistance program run out of the German embassy - with far less resource input, but an on-site German police advisor. The results were judged far better tailored to the local situation, not off-the-shelf courses designed and run out of a foreign capital.

Once the decision to engage has been made, and the program is underway, the donor should look for indicators of meaningful progress. A few might include:

- Continued resource input by the host government;
- Examination of how the donor/counterpart resources are being spent illustrates serious purpose, i.e., the recipients don't waste scarce funds on frivolous expenses and acquisitions - fancy buildings, luxurious furniture, excessive travel, etc.
- The government loses court cases in which it is a party to dispute;
- Coordination and cooperation exists among the involved host government agencies and players.

Perhaps the most important question to ask is "Will the host government continue the project if the donor drops out?" If the response is "not likely", withdrawing donor participation is probably indicated.

CONCLUSIONS:

The study produced the following conclusions:

- Establishment of the rule of law in aid recipient countries is of critical importance to virtually everything the United States is attempting to accomplish with its foreign assistance programs. Whatever progress is made in terms of democratic practice, environmental safeguards, drug interdiction, protection of intellectual property rights, et al, is of little value absent law enforcement mechanisms that work as they should.
- Few countries outside of the United States and Western Europe have legal systems that consistently provide a semblance of impartial justice. Some that are thought to, a Chile for example, exhibit shortcomings when subjected to pressure and scrutiny. The inadequacies of the Salvadoran legal instruments were only apparent - and ripe for reform - when the focus of world attention was placed on them, when decisions that would have otherwise gone unnoticed were scrutinized on the front page of the New York Times and the Washington Post. Few if any legal systems in Latin America or the rest of the Third World would stand up any better under similar examination.
- Donors cannot ignore the fact that most persons and institutions that fare well under the current system will oppose change. The President who has to propose, the legislators who have to vote for, and the judiciary who have to implement might well verbally support reform, but few among them will possess the vision to see their best interests served by tinkering with the system they know, and have prospered under.
- Given supply side obstacles, the potential to move things is greater on the demand side, where the pressures and the will for reform are more believable and growing. This is where outside assistance is most needed and appreciated. Assistance to serious NGOs can accelerate what they, the media and other demand stimulators are doing.
- Everything the USG has engaged in to date in providing assistance to foreign legal systems has been a learning experience. The results have been considerably less than expected, and on the margins. But that is not reason to desist - just the opposite. The issues are far too important.

- One cannot, and should not cut the administration of justice pie into slices, and work on one or another segment in isolation. For example, breaking out law enforcement and dealing with it as a stand-alone component is a mistake.
- Given the difficulties, the impossibility of replacing the existing system with an imported substitute, it is imperative that involved outsiders be literate in the host country situation - culturally, linguistically, and historically.
- There is too little host country input in initial articulation of the problems to be solved, the design of programs to deal with them, and implementation. Too much is in the hands of decision makers thousands of miles away, relatively ignorant of conditions on the ground.

RECOMMENDATIONS:

■ ■ Recommendation #1: Enhanced USG Intra-Agency Cooperation:

Everything involving the provision of American assistance to foreign justice systems should be brought under the direction, in Washington and the field, of a single lead agency. It is not essential that the designated agency be a repository of legal knowledge or experience.

Factors to consider when naming the lead agency would be: institutional experience in the design and implementation of assistance programs in a foreign environment; a sizable pool of in-house professionals with overseas work experience, including the broadest possible range of linguistic and cultural talents; back-up technical support, in the field, for those disbursing the funds; familiarity with the ambassador/country team context; institutional commitment to the primacy of long term, sustainable development over the quick-fix approach to assistance.

Recommendation:

USAID be designated Lead Agency to act as coordinator for all US assistance programs that deal with the provision of justice in aid recipient nations.

■ ■ Recommendation #2: Certainty of USG Commitment:

No ROL assistance program should be undertaken absent serious, long-term USG commitment. A good indicator of commitment, as well as the best

insurance of program success, would be the presence of a full-time, in-country ROL Coordinator. If the legal assistance effort does not warrant such a position, the project should be re-examined.

Embassy ROL Coordinators should be selected with maximum attention on the job's country specific requirements, and a candidate's previous exposure to overseas program direction.

Recommendation:

A full-time ROL Coordinator position be established in every Embassy involved in administration of justice and law enforcement assistance. The selection of officers to fill such slots to be directed by USAID. The ROL Coordinator to be a Country Team member.

■ ■ **Recommendation #3: Recipient Nation's Involvement:**

Players from the receiving nation must be included in project design from the beginning, with maximum attention paid to their suggestions, priorities and sensitivities. A bi-national exploratory committee, composed of embassy officers and representatives of host government and non-governmental sectors, should overcome the perception, and the reality of the USG pushing its objectives and priorities down others throats.

Recommendation:

Every Embassy contemplating ROL assistance should establish a bilateral committee composed of relevant Country Team members, and representatives of host entities dispensing and receiving justice. The Committee initially to decide whether there is sufficient match between the recipient's needs, priorities and will, and the USG's ability to help.

■ ■ **Recommendation #4: Tighter Donor Supervision:**

Lax administration of donor assistance can contribute to public perception that a recipient regime is corrupt. Insufficient donor attention to the appearance of illegalities in the award of contracts, the disbursal of commodities can badly tarnish the project, and respect for the foreign donor. More intensive on-site donor oversight would curtail the more blatant corrupt practices. Awareness of and ability to combat the more insidious forms of malfeasance come with experience, and exchange of information among donors.

Recommendation:

USAID to actively promote greater donor community attention to corruption in the administration of assistance programs. Explore the possibilities of a donor committee in each country receiving significant external assistance which would exchange information, design defensive counter-measures, and put the national regime on notice that official corruption is unacceptable.

■ ■ Recommendation #5: Alternative Dispute Resolution Mechanisms:

Many nations' legal systems, especially in societies experimenting with democratic practice after years of authoritarianism, are clogged with mountains of cases, struggling with bureaucratic confusion. Final resolution of the simplest dispute can be a matter of years. Such cumbersome procedure provides justice only to those with the patience and resources to endure.

Some advocate extracting disputes that can be more expeditiously resolved by alternative settlement mechanisms, freeing the formal process from the clutter of minor disagreements. Chile is an excellent example. Virtually every commercial contract written today in Chile contains a clause mandating arbitration should dispute arise, with a stipulated arbiter. The alternative, taking the problem to court, has the potential to tie up company resource and attention for years. In a competitive business world, that is the least desirable alternative.

Recommendation:

USAID to encourage and fund exploration of alternative dispute settlement methods, and proselytize their use where indicated.

■ ■ Recommendation #6: Cross-Fertilization:

LAC is far ahead of the other AID geographic bureaus in terms of awareness of and experience with the issues involved in ROL. The same is true of ARA at State. The other geographic bureaus are slowly becoming involved in what in ARA/LA are called AOJ programs, and other aspects of law enforcement enhancement. In too many cases the late-comers have to re-invent the wheel. Bureau cross-fertilization is badly needed.

Recommendation:

LAC to devise and formalize a method of sharing its ideas, experiences, and relevant personnel with other AID geographic bureaus. Immediate effort be made by STATE/AID to increase all Country Teams awareness of the importance of ROL.

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SUMMARY OF INDIVIDUAL COUNTRY SITUATIONS

Each of the visited countries presented unique circumstances bearing on the availability and quality of justice, and chances for development and democracy to take hold. The following, in summary, are the most critical elements in each:

BRAZIL

Brazil is an excellent example of a society wherein deteriorating confidence in the formal instruments of justice undermines public commitment to democracy. As frustration with the law's all-too-obvious shortcomings increases, the conviction that democracy is best for Brazil declines in proportion. The public appears increasingly impatient with democratic governance as crime, corruption and injustice appear out of control.

A snapshot of the Brazilian situation:

- All interviews painted variations of the same general picture - every element in the justice arena is inefficient, ineffective, corrupted - and the situation is getting worse. What disagreement there was centered on whether or not there was hope in the near term for recovery. While a few pointed to faint "positive signs" for future improvement, the majority expressed little near-term hope.
- As in many countries, the formal Brazilian system of law as described in the Constitution and implementing legislation bears only superficial resemblance to how things work in practice. The 1988 Constitution was repeatedly described a disaster. Written in the aftermath of the military's fall, it is an overly long, excessively detailed attempt to provide remedies for every social problem. Without the resources to pay for promised services, with weak and corrupt institutions expected to provide them, the Constitution is

at best a hollow document, at worse an instrument of manipulation by lawyers, the State.

- Also common to many failing legal systems, each component points to others as being to blame for failure. The courts decry the corruption, lack of civil education, and ineffectiveness of the police. The cops in turn claim judges are the corrupted ones, too lenient with criminals, and point to politicians for a lack of adequate legal instruments. Politicians denounce the executive branch, the courts, the police, everyone except themselves.
- Repeatedly mentioned was the opinion that the Federal Government is the principal impediment to modernization. Brazil is a federation of extremely divergent states - and has never resolved state vs federal relationship issues.

The police function is illustrative. There are three major law enforcement forces - the Federal Police, state civilian police, and state military police - as well as municipal police units. There were differences of opinion relative to the competencies of the various state police, with some claiming all are corrupt and incompetent, and others stating that a few, Sao Paulo being the best example, are relatively professional. There was no disagreement as to the Feds. With the exception of one embassy officer who felt that members of the Federal Police with whom she works are "increasingly motivated and professional", all others - Embassy officers who also work with them, and every Brazilian spoken to - described a weak, corrupt, useless if not negative force.

But the Brazilian Government (GOB) insists that all donor police assistance go exclusively to the Feds. (see above, Misreading Who We Dealing With). DEA and INM must deal only with a Federal Police unit specializing in narcotics interdiction, notwithstanding that many of the state police have anti-narcotics units where the majority of anti-drug activities are carried out. Many observers believe that the Federal Police, some 6000 strong and responsible for customs, immigration and other matters throughout this huge nation, is a make-believe organization, funded almost in its entirety by donor contributions. They state categorically that the Federal Police would disappear should external funding be withdrawn.

There is evidence this is the case. In spite of the many functions it is expected to perform, the federal force has not recruited new agents in the last four years. The public's impression is of a small, pampered and corrupt clique, with control over several money-making machines (customs, immigration, drugs), being unwilling to expand the number of participants on the take.

- A major problem at the federal level repeatedly mentioned is the quality of civilian political leadership. The majority of those who presently run the executive branch, the Congress, the political parties rose to leadership during decades of military rule. What sort of civilian leader was permitted to prosper under the military? To survive from 1964-87 a civilian with political ambitions had to be a sycophant, an incompetent, a not-too-forceful proponent of democratic practice - or a combination of all three.

This should be a transition problem, but one that will impede modernization until a new generation and style of leadership comes to the fore.

- The Courts and Justice: There was general agreement that:
 - What little justice there is exists for a tiny portion of the population. There is virtually no justice for the poor, those in rural areas, favela dwellers, anyone without a friend in high place.
 - Differing treatment before the law is written into legislation. One example - anyone with a college degree receives, by law, special treatment. The result, in a nation of 150 million, with tens of thousands of the poorest in jail, there are less than a dozen college graduates imprisoned. And half of them are "under house arrest".
 - Judges are not held in high esteem. The title conveys an aura of corruption, of arrogance and incompetence. Many judges are considered to be for sale. Among those who are not, cowardness in the face of authority, the military, the mafia is endemic. Many courts are politicized, for example the specialized labor courts are said to have never decided in favor of the employer in a labor dispute.

In Rio I met the single judge who is perceived as honest and courageous - a woman jurist who had the temerity to order the arrest and detention of a half dozen bicheiros, the mafia chiefs who control the numbers and drug rackets in the favelas. This was seen to be such a rare and heroic judicial act that several claimed that this judge, despite her sex, would win a presidential election hands down. This judge travels with heavy security.

Asked if judges are frightened because they have been threatened with physical harm, the reply was "no". There is no need to resort to violence when money or a phone call from anyone with clout does the trick.

■ **The Police:**

- Held in very low esteem, the police with few exceptions deserve their abysmal reputation for incompetence, brutality, venality. There is considerable evidence of the police being in bed with those they are out to catch. While some of those interviewed claimed that there are differences among the various state forces, the overall popular impression of the police is negative in the extreme.

■ **The Laws:**

- Too many laws, too often contradictory. But even if the laws were all letter perfect, as environmental law is becoming, the state of enforcement - especially in remote areas - is such that nothing is accomplished, except demonstration that any law can be ignored with impunity.

■ **The Bar:**

- The legal profession is perceived as another obstacle to reform. Lawyers brag that they have never opened a law book after graduation from law school. Successful lawyers don't have to know the law, they claim, only how to manipulate a corrupt system.
- With a large proportion of the political leadership being lawyers, this bodes poorly for the chances of serious reform passing the Congress.

■ **A Few Hopeful Signs:** What few there are would include:

- Brazil is slowly being pulled into any number of international arrangements which, over time, might compel a more modern, transparent and just legal system.
- While businessmen are critical of the problems of delay, corruption and incompetence within all phases of the administration of justice, they do not believe this a serious drag on investment, either domestic or foreign. The Brazilian market is too large, they aver, potentially too lucrative for investors to shy away. Rationalization of the national economy, some profess, will in time force rationalization of the legal environment in which business is conducted.
- A few elements of the justice system have demonstrated capacity to function. A Rio Bar Association project to bring dispute resolution mechanisms to the favelas and break the stranglehold of the mafia

godfathers who administer their own brand of justice, was producing results - at least until the Inter-American Foundation funding lasted. When that ended so did the project!

- The prosecutor function is seen to be in somewhat better shape than the police, the courts. A few young prosecutors are said to be determined to affect change.

USAID BRAZIL AND ROL:

AID is a minuscule presence in Brazil. Working mainly through PVOs it is attempting to improve women's reproductive health, combat AIDS and deforestation of the Amazon basin. Narcotics awareness is another area of involvement.

At the present USAID/Brazil is not directly involved in ROL projects. ICITAP is not working in Brazil; a pilot study of possible ICITAP involvement in a Rio street kids project did not lead to implementation. Nevertheless, all AID persons spoken to - direct hire and contractors - recognized the critical importance of a functioning legal system to whatever issue they were dealing with. All the environmental law that has been passed, and more that is expected, is of minimal value if those who will administer the new laws are as poorly prepared and as susceptible to corruption as this study would indicate.

GUATEMALA:

Guatemala, the largest and most culturally diverse of the Central American republics, has had serious past problems with repressive military regimes, corrupt and ineffective civilian leadership, reactionary political and economic elites - all with little respect for the rights, the dignity of the rest of the population, especially the indian and mestizo majority.

The demise of military domination was thought to have come with a relatively clean election in 1985. The Christian Democratic candidate, a slightly left-of-center politician who promised political, social and economic reform, gained the presidency.

Nine years and two elected presidents later, with a former national Human Rights Ombudsman in the presidency, the cause of justice, the rule of law appear to have progressed little under the democratic banner. Many Guatemalans interviewed felt the situation had in fact deteriorated.

I left Guatemala without having heard a single prediction that things might improve. This as a new penal code containing many of the reforms that we and others have been pushing was to go into effect on July 1, 1994. Guatemala was the most discouraging of the five country experiences.

In a nutshell:

- With only minor variation and emphasis, all Guatemalans (and most Country Team members) agreed that Guatemalan justice is the least just in Central America and headed in the wrong direction. Reasons given were many - poorly paid administrators of justice turning to systemic corruption at all levels; a malleable and ineffectual civilian presidency that forfeited public confidence under a playboy, an egomaniac, and which now suffers a non-politician with little popular support; the militarization of the security services and other civilian sectors during the forty years of military dominated regimes, a process which hasn't ended despite the facade of civilian rule; and a monumental lack of will to enact reform.
- The most depressing interview was a three-hour monologue by the outgoing President of the Supreme Court. This the official who dominates and controls the national judicial system as chief jurist and administrator. He described the administration of justice as a "system that doesn't work, and never has." Guatemalan justice, he said, is one of observing the formalities, but ignoring the substance. He painted a picture of a thoroughly corrupted police and judiciary; lawyers who brag of having mastered the practice of law as they describe it - bribery, influence and threat. The biggest lawbreaker, the Supreme Court President insisted, is the State, on both its civilian and military sides.

Asked if the new penal procedures would make for improvement, Rodil stated that things were bound to get worse! Despite adequate time to prepare for the new system, to teach radically new procedures to the bar, judges, and the public - nothing was done. The Government withheld resources, according to Rodil, making preparation impossible. The result, he predicted, would be such chaos at implementation that public confidence in the law, and in democracy, would drop further.

- To be fair, other Guatemalans place much of the blame for the predicted failure of the new procedures on the shoulders of the President of the Supreme Court. He, many say, has deliberately torpedoed what little effort the Government made to prepare the

country for the new system. Why? Because Rodil has his own political agenda, and wants to embarrass the President - in other words, is using his position for political ends, without concern for justice.

- One of AID's principal ROL advisors summed up the situation by saying "the entire legal system is corrupt, and has no redeeming features". She placed most of the blame on the militarization of the police function, the control the military maintains on the President and civilian side, and the resource "starvation" of the police and courts imposed by a military that fears threat to its dominance.
- The theme that the military leadership will not permit the police to professionalize was repeated over and over again. By withholding resources - pay, equipment, professional training - the military limit the police (in the words of the AID consultant) to chasing traffic violators, engaging in corrupt practices to augment minuscule pay, while the military can devote itself to running the country, and doing whatever else it pleases.
- A judge, said by many to be the "only honest judge in the country", summed up Guatemalan justice by saying "the system isn't in crisis, it's moribund"! She stated that "the people have no confidence in any part of it, nor should they"! As a judge who has tried to impose sanctions on military officers accused of illegal acts, she referred to the "total militarization of the Guatemalan police function, and of the office of the presidency".
- Speaking to Guatemalan NGOs working in the field of human rights and judicial reform, the story was the same. Anyone attempting to use the law to hold the military or powerful civilians accountable is subjected to threat, harassment, disappearance and death. Even one of the more powerful political figures in the country - publisher of a leading newspaper and former presidential candidate - can be assassinated, possibly with military collusion, and nothing is done. As his widow expressed it "If a family with our political and economic influence cannot get justice, what chance has the ordinary citizen"?
- Foreign Assistance: Those Guatemalans interviewed were unanimous in saying outside assistance is helpful, but not a critical ingredient. Foreign aid obviously strengthens those who receive it as evidence of external support. Such an indicator can be of life-saving value to those trying to bring about change under pressure and threat.

Aid channelled through the government however, whatever the terms and conditions, is inevitably interpreted as validating the regime. Donors must understand that the GOG - as any regime - is always willing to accept outside assistance, since it can portray such help as a Goodhousekeeping Seal of Approval. But donors cannot and should not accept GOG verbal assurances of its will to reform. Only concrete deeds prove commitment.

- The ICITAP program was mentioned often as "well intentioned", and "heavily resourced" but lacking a fundamental ingredient - in-country monitoring and follow-through. Several who had either participated in or observed the results of ICITAP training programs complimented the USG for the effort, but not the results.

In summary, the evidence in Guatemala is of a thoroughly ineffective administration of justice system - one that excludes the majority of the population from meaningful participation; is corrupted by money, influence, and politics; offers immunity to those who have the means to impose their will and authority; and appears unlikely to change. All this despite:

- The USG having three ambassadors in a row with deep and demonstrated commitment to ROL issues, including Ambassador James Michel who many consider the "father of AOJ";
- USG agency heads who aware of the Guatemalan system's shortcomings, and the importance of ROL to everything they trying to accomplish; the ingredients of an excellent Country Team approach;
- Identification of the problems to be solved, and reforms that needed;
- Some six-seven years of constant, hard push by the US Embassy and the USG to achieve those reforms.

Despite all effort, the consensus is that reform is either standing still or receding. Problems lie ahead on all fronts. This lack of progress indicates that the GOG, the military, as well as all who benefit from the current situation are united in their opposition to change.

CHILE:

Chile was the most difficult to analyze of the five subject countries. First, there was considerable disparity between expectation prior to arrival and what examination on the ground revealed. Second, nowhere was there greater disagreement among those spoken to as to the strengths and weaknesses of the current system. And thirdly, in none of the other countries was it necessary to delve into the minutia of legal process to determine how justice fared at the macro level. There are two prisms through which one can examine a legal system. Through one you want to determine what a society expects in the way of justice; where justice fits as a component of collective activity - the "why" behind the justice system. Alternatively, you can examine at the micro, or procedural level. Here you are asking "how" questions. How is justice administered? What are the procedures? How might they be improved? In discussing justice with Chileans, the two levels were not as easy to separate as elsewhere.

The Alwyn government came to office in 1989 determined to remedy perversions of justice that had occurred under the military regime of General Pinochet. It accepted the need for rapid modification. With encouragement from USAID and other donors, all anxious that public confidence in the instruments of justice be reestablished, Alwyn moved quickly. Perhaps too quickly. Insufficient attention was paid to the wishes, the warnings, the influence of the Supreme Court and the judicial profession. The result was failure. Since then discussion has not centered on the need for reform - that remains a given - but on whether to address the problem with a single all-inclusive reform package, or fix some things now and leave others for later. Many believe it was adherence to the first approach that doomed Alwyn's initial attempt.

Unlike in most countries with ROL problems, maintaining judicial independence is not a problem in Chile. If anything the opposite is the case. The judiciary is seen by many observers as too independent, too isolated from the society it serves. The Supreme Court's adamant declaration that nobody from outside the judiciary has any business discussing, much less imposing reform on legal procedure, was the hurdle that Alwyn's reform efforts were unable to clear. More about this "judicial culture" later.

A related complaint about Chilean justice has to do with excessive judicial emphasis on procedural form, at the expense of substance. One interlocutor described it thus "Chilean judges take great pride in applying the most pristine form of Napoleonic Code process, disregarding that the world and the means to justice have changed in the last two hundred years." It was this emphasis on form over substance that brought discredit to many who served as judges during the Pinochet regime.

Chile continues to struggle with what took place between 1973-89. The distortions and events of that period are still being examined, defended by some, but denounced by those who view the law as a protective rather than restrictive force. The military remains adamant that it did nothing wrong or that anything bad happened during its years in power. Some who served as judges during the Pinochet years make the same claim.

The public knows better. The military did nasty things, had bad laws passed; and the courts upheld those actions, those laws. The judiciary fell into discredit through reliance on the excuse that judges are merely administrators of laws the political class enacts. By tolerance for even the most repressive acts, the courts were seen to put legal imprimatur on whatever the Pinochet regime chose to do. The public views the courts as having failed to protect the populace from the Pinochet regime's massive abuse of authority.

■ **The Alwyn Reform Effort:**

On assuming power, the Alwyn government saw the need for reform of a badly out of date justice system, further contaminated by what had occurred under Pinochet. USAID reopened a Chile operation in 1989 after a fifteen year absence. It quickly began working with the GOC to promote judicial reform. With total support from the President and executive branch, those working the issue were optimistic that they could cleanse and modernize the system. They were wrong. The reform push faltered when:

- The Government combined discussion of legal reform with partisan political themes, the most prominent being human rights. This polarized the legal reform debate;
- The opposition bloc in the Congress, overwhelmingly conservative and resistant to criticism of the Pinochet years, was unwilling to connect human rights problems with inadequacies in the legal system. Congressional conservatives stonewalled the reform effort.
- The President of the Supreme Court refused to countenance criticism of the system he presided over, especially by "outsiders."

Facing Supreme Court and congressional opposition, with urgent call for action on other issues, the Alwyn government decided to stand down. The global reform package was dead. Those championing reform interpreted the failure as one of tactics. Changing course, they decided to break the problem into smaller pieces, and over time bring forward those that would cause the fewest problems for the fewest people. This process is underway:

- A National Juridical Council was formed, with participation by the Supreme Court, the Bar Association, and law schools to study the problems and make reform recommendations. This approach is seen to have greater chance of success, albeit over a much longer time frame.

■ The Judicial Culture:

Many Chilenos referred to the existence of a "judicial culture" as a major impediment to change. Asked to explain, they speak of an inbred and closed profession which has become insulated from and unresponsive to the society it serves.

Critics spoke of a "corporative mindset" that stifles examination of the problems, the weaknesses, the need for change. This culture begins in the law schools and only intensifies as one works slowly up the judicial career ladder. With increasing tendency the higher one moves, emphasis is on administering the letter of the law and advancing the argument that "the Congress makes the law, we only administer - thus any injustice is the fault of the Congress, the Executive, assuredly not the judicial." Judicial isolation occurs when:

- Senior judges warn young judges going to a first assignment, often far removed from the capital, to "beware of being co-opted" by local influences. The new appointee is instructed to maintain objectivity and independence at all costs. Given his meager salary and social background, the young judge is seldom able to keep up with the local elites' lifestyle.
- Judges normally begin their careers in the less desirable locations. Most can't wait for promotion which implies transfer to a more attractive location. The more ambitious, the more promotable the young jurist, the more often he/she moves, the less likely he/she is to put down roots and interact with the local community.
- Over time, the judge becomes increasingly and consciously wrapped in his/her cocoon of "judicial objectivity." By the time a position on the Supreme Court is reached, the judge has lost meaningful contact with society as a whole. With seniority, judicial arrogance becomes increasingly more pronounced. The President of the Supreme Court's posture towards criticism and unsolicited advice from external sources is the epitome of this attitude.

■ The Police:

The consensus would be that while the Chilean police - the Carabineros and Investigaciones - are better paid, more professional, and less corrupted than other Latin American police forces, the compliments can be overdone. Neither is comparable to American or the better European units.

The Carabineros are by far the more professional and honest of the two. Investigaciones is viewed as corrupt, far less efficient, and heavily politicized. It is led by political appointees. Mistreatment of those who fall into the hands of police authority - especially the poor routinely rounded up when a crime has been committed - is common practice.

By Latin American standards Chilean police are relatively well paid. But there is increasing evidence that the monies involved in the drug trade - which flourishes in Chile's neighbors - will eventually overcome the adage that "the Chilean policeman is incorruptible." Although Chile enjoys a reputation of being relatively free of drug cartel presence, there is a history of Chilean citizen participation in the traffic going back many years. A sizable number of the technical experts in cocaine production, for example the chemists, have traditionally been Chileans. Sources described chunks of Northern Chile, the cities of Arica and Iquique were mentioned, as totally contaminated by drug cartel influence.

■ The laws, the system:

While the nations of Europe and the United States underwent basic judicial reforms in the 1870s, and others did so in the 1900s, for one or another reason the modernization process pertaining to legal process missed Latin America. Although all Latin American nations suffer the consequences, some recognize the need to catch up, others do not. Thankfully Chile is among the former.

A number of donors, among them USAID, are contributing to analysis of the Chilean administration of justice system. The IDB financed a global study, resulting in a detailed analysis of the problems, and what should be done to fix them. Despite general consensus on strategic objectives, disagreement and controversy remain when it comes to implementation of specific recommendations. The more radical suggestions run into bitter opposition within the judiciary.

As described by the IDB and other studies, the current system has many defects. The one most often mentioned refers to inefficiency and delay - with even the simplest case taken to court requiring three to five years for

final judgment. Corporate lawyers advise clients to avoid if at all possible going to court - its terribly burdensome in terms of time, money and patience. If true for the well-resourced corporation, how much more so for the common citizen?

To recap, Chilean justice looks relatively acceptable in comparison with that of its hemispheric neighbors. That appearance is deceptive. The system has been badly in need of modernization and structural overhaul for years. Further deficiencies were exposed by abuse and manipulation during the Pinochet years. Initial efforts at global reform by the Allwyn regime failed, mostly due to the independence and opposition of the legal fraternity. Nevertheless, a process of gradual rationalization is underway, with contribution by the Chilean government, USAID and the donor community. All those interviewed agreed that this process must succeed for Chile to achieve success as a stable democratic society.

KENYA:

Kenya offers excellent example of a nation which, despite an educated and articulate political class, and earlier promise, finds itself under the domination of a tiny and ruthless ruling clique - the President and his executive branch cronies. While Kenya has many democratic trappings - three branches of government, laws which describe checks and balances on each - the reality bears little resemblance to participatory democracy. A legislature, press, political opposition, and spokespersons for advocacy groups are all in place. But their ability to offer critical or contradictory opinion is totally circumscribed by the all-intrusive executive. Nowhere is the President's desire for control more evident than in his manipulation and domination of the administration of justice system.

Kenya is an exceedingly complex society. With divisions based on race (European, African and Asian), ethnicity (tribal affiliation), economic and social class, the need for a system to adjudicate dispute is obvious. The rules are there, codified in the national constitution and derivative law. There is also legal practice based on tribal usage - so-called "customary law." Unfortunately the law, the courts, and other instruments of justice are manipulated by, and subservient to the executive. To every Kenyan spoken to the rule of law, as it applies to Kenya, is a bad joke. In summary:

■ **The laws themselves:**

Are outdated, repressive, a legacy from the executive-enhancing British colonial system (see above: under "Obstacles to Reform"), and employed by the Moi Government to maintain absolute control, to

legitimize illegal acts, to survive. Today's laws perform the same functions as they did under colonial executive domination; if anything they have been made harsher.

The courts and the law are used to stifle dissent, to intimidate opposition voices, to incarcerate and humiliate political foes, to demonstrate dominance.

■ **Executive Dominance:**

The President of Kenya has all the tools he needs, and relentlessly uses them to control all aspects of governance. The justice system is fully subservient to the Chief-of-State's wishes. This subservience is maintained through:

- **Judicial Selection and Promotion System:** Judges are not selected nor promoted based on merit or independence. On the contrary. The present system is virtual guarantee that the process will produce docile, incompetent and/or corrupt judges. It is remarkable that not all judges fit these categories, though most do.

Kenyan judges fall into two categories, local hire and contract. The latter, a holdover from the emergence from colonial rule and a scarcity of trained native judges, are foreigners - mostly recruited from within the Commonwealth - employed under contract for a specified period of service.

The contract judge concept is controversial. Many Kenyans resent the presence of expatriates administering justice. Others claim that a foreign jurist who's any good would not accept the uncertainties of contract employment, and that only incompetents apply. A contract judge is also susceptible to intimidation since the Government can terminate the contract when it pleases.

A countervailing argument holds that the contract judge enjoys greater independence to challenge the system, i.e., with no permanent stake in Kenya, he/she can render decisions based on the law, not the President's wishes. While theoretically the case, this freedom of action has not been evident in practice. While one or two judgements have gone against the GOK, and the judges in those cases were contract, the decisions were reversed on appeal by the compliant Court of Appeals, and

the expatriate judges' contracts were allowed to expire. I spoke to one of these on his last day in Kenya. His description of the system was of a totally corrupted and subservient judiciary, native or contract.

- **The Attorney General:** Although theoretically a position independent of the executive, and presently filled by someone with an international reputation in the field of human rights, that independence is a mirage. Presidential tools to maintain control of the AG are at hand. As a result, the present occupant has been unable, and ultimately unwilling to act in any way detrimental to the sitting government's wishes.
- **The Court of Appeals (The Supreme Court):** The adjectives most consistently applied to the present Court of Appeals were "famed", "incompetent", "corrupted". The Chief Justice is a contract judge, a Ghanaian - believed to be the only case in the world of a foreigner performing the role of chief judicial authority in a national court system. This is not a supreme court that challenges the Chief-of-State!

- **The Police:** Once reasonably professional and respected, the Kenyan constabulary is a discredited instrument. The police are increasingly perceived as venal, and getting worse. Lacking the necessary training, equipment and leadership of a truly professional force, manipulated and pressured for political ends, they resort to beatings, torture and other illegal acts to maintain control. The Special Branch, responsible for internal security and political crimes, has a particularly nasty reputation.

Police corruption is relatively petty, but endemic. The saying repeated over and over was that "a Kenyan can buy his way out of any offense, with the exception of 'political crimes' as defined by the regime."

- **The Penitentiary System:** Given Kenya's law enforcement practices, in which one can buy one's way out of virtually any infraction and easily avoid prosecution, one might expect empty jails. Instead, the penitentiaries are full, with the poor and politically incorrect living in horrible conditions. The prisons are another government instrument to instill fear in those perceived as "enemies." Few who are brutalized by prison guards and conditions are thought likely to challenge authority again.

■ **In Summary:**

The Kenyan justice system produces little justice. Accountability, transparency and fairness are all missing. The result - limited if any respect for the judiciary, the courts, and the police, which in turn undermines respect for democratic leadership and practice.

All spoken to agreed that to challenge the system via the courts is to risk one's fortune, profession, freedom and very life. One lawyer described it thus "Given how the law is administered as an instrument of a single man, a party, a tribe, few Kenyans realize how precarious their property, their lives really are".

The above describes the shortcomings of the current system. Those interviewed were unanimous in describing the situation as heading in the wrong direction. This would not appear to bode well for the future. Nevertheless, Kenya enjoys a number of positive attributes:

- **The Press:** Though subject to severe restriction and intimidation, the print media occasionally demonstrate a willingness to expose government folly. Their ability to do so vacillates with the regime's mood and self-confidence. An excellent example: the Goldenberg scandal. In an all-too-short period of government tolerance, the press broke the story of a monumental scheme of government corruption and fraud. No less than \$250 million, representing one half the national budget, allegedly was diverted to government insiders and party coffers. The national press exposed the scheme, naming names. Despite the magnitude of the theft, nothing has been done to substantiate or repudiate the allegations. The Attorney General professes that he has "not been officially notified", so he can't investigate.

- **Non-Governmental Organizations (NGOs) and the Fight for Reform:** I encountered a number of impressive, professional NGO spokespersons - world-class in their training and abilities, dedicated to the cause of justice reform.

Those spoken to, while adamant in their opposition to the present system, were not preaching overthrow. On the contrary, violent solutions were rejected. Unlike in other countries, in Kenya the law profession is leading the struggle for reform. And the general population, especially the better educated, increasingly recognizes

the imperative need for change. Several of those spoken to mentioned the recent strike by the nation's doctors and university lecturers as evidence that even those most affluent and previously content with the status quo now see their interests not served by the present regime.

- **The Donor Community:** The Kenya case demonstrates that the donor community counts, and can be a catalyst for change. Events in 1992, when a united donor community threatened assistance withdrawal if certain conditions were not met, moved the Moi government towards greater freedom, openness, and tolerance of opposition. This donor pressure led to multi-party elections. Unfortunately, with elections the donor community appeared satisfied and unwilling to push for greater substance. Sensing this, the Moi regime has reverted to kind. But the importance of external pressure had been demonstrated.

- **What the USG has been doing:** In my opinion, and that of Kenyans interviewed, not enough! We have only recently paid serious attention to ROL issues. We have on occasion used leverage and conditionality to affect reform and change in the right direction. But the effort has been inconsistent, with too many stops and starts. Effort to co-opt the sitting government, President Moi himself, with aid and gentle prodding have not only failed, but have been manipulated by Moi to demonstrate USG acceptance of his methods and policies.

Kenya is a clear example of the futility of working with players in a government that is the problem, not the solution.

On balance the picture gathered from one month in Kenya is a decidedly negative one. While some of those interviewed expressed hope that things might improve, few deemed that possible under the Moi regime. Many pointed to the President as the major obstacle to overcome, while a few said the system itself was the culprit. Those arguing the Moi-to-blame theory point to his background, age, lack of education, and personal insecurities - and conclude that the chances of change while he remains in office are slim. Those faulting the system point to the complexities of Kenyan society, the zero-sum nature of politics, and the history of the country since independence.

While there were differences of opinion as to the causes, the villains, there was consensus that absent significant reform in its administration of justice Kenya will continue to slide into factionalism, regional and tribal conflict, and economic decline - with some predicting an outcome not unlike Rwanda, Somalia.

POLAND:

Poland only emerged from under strict authoritarian government in 1989, after fifty years of first Nazi, later Soviet occupation. With the exception of a dozen years or so between the two World Wars, Poland has had no democratic experience during the last three centuries. And yet, examining where it is in relation to establishing the rule of law - coincident with laying the foundation of functioning democracy - Poland provides evidence that it will enter the twenty-first century committed, as a people and a nation, to the rule of law and justice.

This is not to deny that serious problems exist, nor that things might go wrong. The Polish people are used to a legal system that habitually sought and was given instructions by the executive, the party, in all but the most routine matters. It remains to be seen whether the senior levels of the nation's judges, schooled and experienced under the old system, can make the transition to independent interpretation of the law. Clearing the legal underbrush of antiquated, contradictory and repressive laws will not be easy. This is a country attempting to turn its political and economic systems around 180 degrees - as well as crafting a legal framework within which it can all take place - and do it all at the same time.

In the initial post-communism years (1989-94), maximum effort has gone into converting a closed single-party political system to one of pluralistic democracy; and to transforming a centrally managed economy to a competitive free marketplace. Reform on the legal side was put off; being more complex, more difficult to fix in the short term, and thought to be of less immediate concern.

Further explanation resides in the perception that the judicial branch was perhaps the least damaged government branch, the least in need of immediate overhaul. Many believed the judiciary had emerged less affected and perverted from the nazi-Soviet occupations, and would hold until attention could be paid.

As in the case of Chile, first priority and resource went to areas of most severe public concern - the availability of jobs and food, inflation, education, health and housing.

Only now is it beginning to be appreciated that the absence of clear, accepted rules of the game, the ambiguous and contradictory application of laws and regulations from a past no longer relevant -- are major impediments to consolidation of the gains of the last five years, and a drain on public appreciation of the democratic, free enterprize system.

Among the concerns, positive indicators and conclusions re justice in Poland:

- **Judges and the Courts:** On the one hand, Polish judges enjoy a number of favorable attributes:
 - They traditionally have been perceived as uncorrupted, except in politically sensitive cases;
 - Today they have life tenure, are promoted on merit, and have a career path to follow;
 - They no longer are subjected to outside pressure, and can adjudicate with independence;
 - Public respect, tarnished as a result of questionable performance under the previous regimes, is slowly starting to climb.
 - There are no signs that Polish judges treat foreigners or multi-nationals differently than Polish subjects.

But on the other hand:

- Judges are sorely underpaid, most notably in terms of what lawyers can earn in private practice, or similarly educated persons make in the corporate world.
- Judges, along with everybody else, are having to learn to deal with issues never faced before - commercial law, human rights issues, re-privatization of property, etc.
- Judges are provided virtually no administrative support, legal clerks or researchers for example, and must do everything administratively for themselves. Two years ago, the system almost collapsed for want of paper, typewriters. The situation is only slightly better today.
- The judicial ranks were not cleansed of those 30-40 senior judges who followed party dictates under the old system. These "wait for instructions" judges appear incapable of dealing with politically sensitive cases.
- Given the low pay, ever heavier caseload, lack of administrative support, not to mention private sector temptation, it is increasingly

difficult to recruit and retain the best and the brightest for judicial careers. The quality of the pool is in decline.

- While corruption is not currently a problem, the monies involved in some of the newer crime categories - drugs, white collar fraud, organized criminal conspiracies - coupled with judges' low pay, will assuredly lead to greater temptation.

For all the problems, the Polish public and the Polish government appear genuinely aware that reform must come to the judicial sector, and soon, if the democratic experiment is to succeed. A new constitution is being crafted - unfortunately with some seven different drafts in play. Everyone agrees a constitutional framework is needed, but the going is slow.

■ The Police:

All elements of the Polish administration of justice system enjoy the public's general confidence, including the police. They are viewed as:

- Relatively honest and incorruptible;
- Not engaged in repressive practices;
- Doing the best they can while dealing with insufficient resources, uncertainties as to the rules, and a perceived explosion of ever more violent crime.

At the same time, there are concerns:

- The police appear increasingly unable to cope with spiraling violence and street crime, the newer forms of white collar mischief, while facing better armed and smarter criminals;
- The poorly paid policeman faces increasing temptation derivative from criminal enterprises producing enormous profits - drugs being only the most obvious example;

In summary:

Poland would appear to offer fertile ground for American and other donor assistance to make a difference. The indicators point to a government, a people, and many in the legal profession desirous of immediate reform. The all-important will is there. So too are the human resources, in terms of education, experience and, of greatest importance, attitude. Acceptance of the need for outside

assistance is also present. The missing elements are resources, and practical experience with crafting and enforcing the rules of the game in a democratic framework. These are exactly what US assistance offers.