

# **INSTITUTIONAL STRENGTHENING AND JUSTICE REFORM**

**August 1998**

**by Linn Hammergren  
Democracy Fellow**

**Center for Democracy and Governance  
Bureau for Global Programs, Field Support, and Research  
U.S. Agency for International Development**

**PN-ACD-020**



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## **ABOUT THIS SERIES**

This study is part of a series of four papers dealing with practical lessons from USAID's experience with justice reform projects in Latin America. These papers are intended to assist with strategic design and, in particular, with the integration of specific activities that most reforms involve. As such, they are directed at reform managers, evaluators, and other participants. The other three papers in this series are: *Judicial Training and Justice Reform* (PN-ACD-021), *Code Reform and Law Revision* (PN-ACD-022), and *Political Will, Constituency-Building, and Public Support in Rule of Law Programs* (PN-ACD-023). These documents can be ordered from USAID's Development Experience Clearinghouse (e-mail: [docorder@dec.cdie.org](mailto:docorder@dec.cdie.org) or fax: 703/351-4039).

## **ABOUT THIS PUBLICATION**

The term "institutional strengthening" encompasses a variety of activities aimed at reorganizing or reorienting institutions to enable them to function more effectively. Contrary to conventional wisdom, this paper recommends that institutional questions be addressed throughout the reform process. Answering these questions is essential to the mobilization and orientation of other inputs—political will, law revision, and access—and to the ultimate success of those inputs. USAID's experience with institutional strengthening is too limited to provide clear-cut best models. Even in the simplest cases, change requires a series of mutually reinforcing interventions. While improved performance ultimately depends on what individual actors do, institutional strengthening requires attention to the organization as well as to the skills and attitudes of its members.

The views expressed in this document are those of the author and do not necessarily reflect U.S. Government policies. Comments regarding this study should be directed to:

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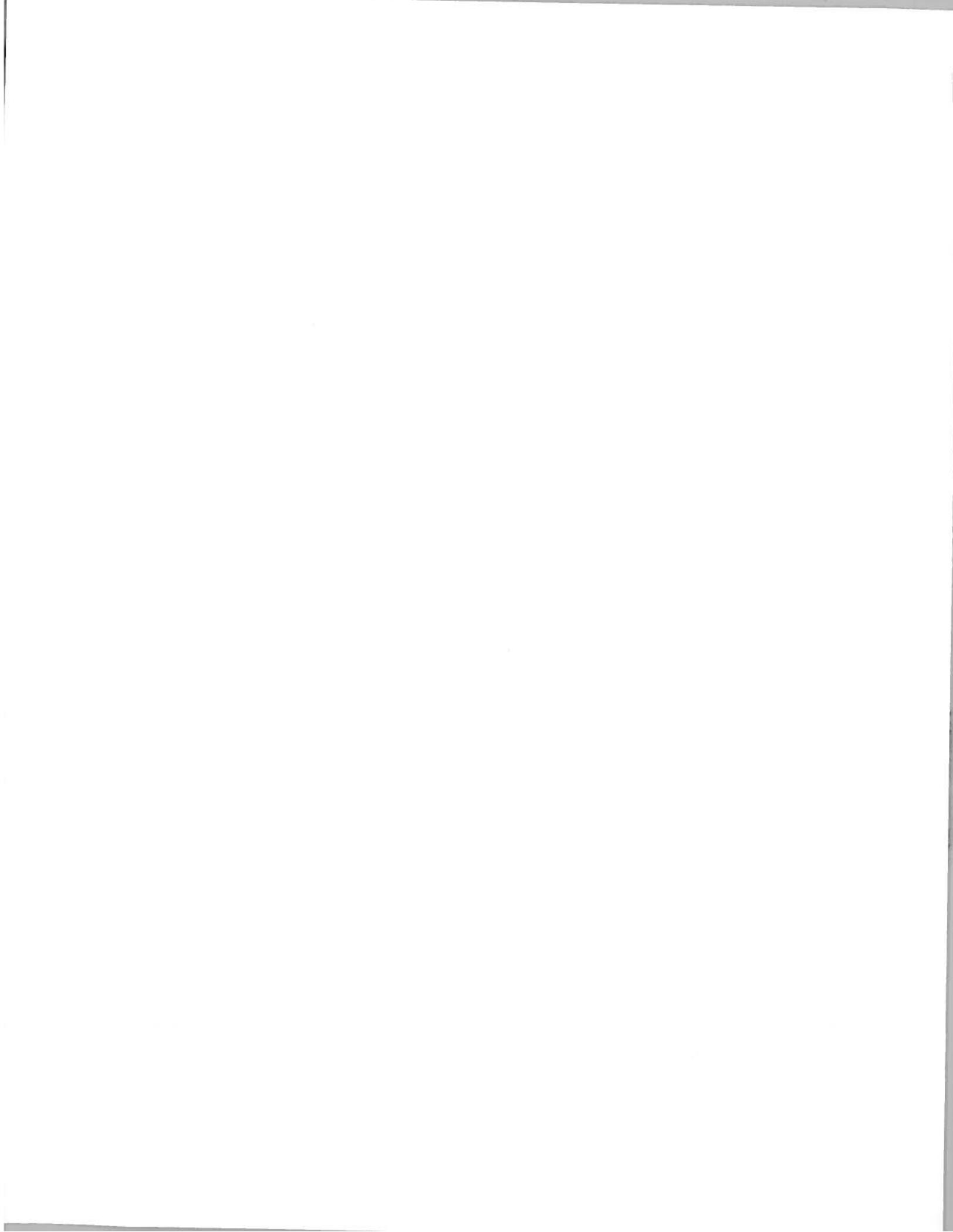
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## **ABOUT THE DEMOCRACY FELLOWS PROGRAM**

Since 1996, USAID's Center for Democracy and Governance has provided funding to World Learning, Inc., to implement the Democracy Fellows Program. To date, Democracy Fellows have been placed in a variety of locations including the U.S., Indonesia, Chile, Eritrea, the Czech Republic, and South Africa. Objectives of the program include (1) providing field experience to individuals committed to careers in international democracy and governance, and (2) promoting the development of democratic institutions and practices in developing countries and transitional or emerging democracies.



## SERIES PREFACE

This volume is one of a series dealing with practical lessons derived from USAID's experience with justice reform<sup>1</sup> projects in Latin America. The works were originally called "manuals," but I suspect that is a misleading title. They are not intended as blueprints or guides for designing or implementing projects. They offer some of that, but will be a distinct disappointment to anyone expecting step-by-step instructions for setting up a judicial school or revising a procedural code. I think of them more along the lines of those self-help books, often entitled something like "So you're thinking of (buying a car, becoming a veterinarian, or moving to Alaska)." As such they begin with basic questions like why one would want to undertake an activity, what objectives have most often been pursued, and what major problems and obstacles most often encountered, and proceed to a discussion of major variations in interventions and their planned and unplanned results. Although the series is organized by types of activities, paralleling those laid out in USAID's strategic paper,<sup>2</sup> a principal theme in all of them is the necessity of embedding each activity in an overall reform strategy. If these works serve no other purpose, they may reverse a recent tendency to think that code reform or judicial training is *the* answer.

The papers' intended audience is project<sup>3</sup> designers, managers, evaluators and other reform participants. They are directed at those with little or no experience in justice reform, but it is hoped they will also be helpful to individuals who have worked in reform projects in one or two countries, or whose participation or background is limited to a more specialized aspect of reform. Justice reform is an expertise learned through experience; there is no single discipline or

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<sup>1</sup>The agency's preferred term for these reforms has changed over time. In Latin America they were called "Administration of Justice" projects. In the early 1990s, the term "Rule of Law" was introduced; more recently, those working in other regions have suggested "legal reform" as a more appropriate title. Although the shifts are intended to denote different emphases, I believe these are vastly overrated. All "justice reforms" target the same set of institutions and utilize similar mechanisms regardless of the specific problem (e.g. increasing access, reducing impunity, curbing human rights violations, or handling commercial disputes more efficiently) addressed. Furthermore, wherever they started, reform objectives have converged over time; Latin American projects which began with criminal justice have expanded into commercial and administrative law, while those in the ENI countries have moved from commercial into criminal areas. Whatever the political utility of the constant relabeling, it has tended to exaggerate methodological and technical differences and discouraged the exchange and accumulation of knowledge.

<sup>2</sup>Blair and Hansen.

<sup>3</sup>Because these are also intended for an audience beyond USAID, I will speak of projects and programs, not results packages and strategic objectives, on the assumption that the former terms are more widely understood.

profession that covers all the angles. Moreover, each legal tradition or individual country always poses new problems and challenges. Undoubtedly some of the generalizations offered here are already being disproved, perhaps even in the countries used as examples. The lessons, it should be stressed, are generalizations. They are not intended to make novices into experts in any of the areas covered, but rather to make them more educated consumers of expertise. USAID staff, and most contracted project managers (myself included) are not expert court administrators, prosecutors, or code drafters. However, they must oversee projects where these and many other expertises must be selected and coordinated. I believe they can only do their job well if they have an understanding of how all the pieces fit together, and the part played and limitations and problems posed by each one. In this sense, project managers are like a motion picture producers; they can't act, direct, do stunts, design costumes, or feed the crew, but they have to ensure that those who can are the best available and that they perform to their maximum abilities without interfering with each other.

As a final note, I would offer a brief explanation of the methodology used. The basic framework is institutional analysis, not as USAID understands it, but as more commonly used in the social sciences. This is an approach where one gets inside an organization (or a project) to understand how and why it functions as it does.<sup>4</sup> Getting inside, it should be stressed, also means understanding the influence of external constraints and pressures, the environment in which the organization operates. Although only one of the papers deals with institutional strengthening, this institutional approach informs all of them. In as much as justice reform or even justice systems are not yet a hot topic for academic research, there is little else in the way of scholarly theory to guide the analysis.

In collecting the data and case studies, I have relied on observation, informant interviews, USAID documents, and general academic studies of justice sectors (but not of their reform). Thanks to a fellowship from the Global Center for Democracy and Governance, I have been able to enrich my own on-the-job experience with field visits to almost every USAID project in Latin America. I have also benefitted from continued contacts with many participants, some of whom also made available their own published and unpublished work. Except for those who probably would prefer to remain anonymous I have tried to cite all contributors in the footnotes. If justice

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<sup>4</sup>The term first originated in economics where its proponents offered an alternative to the mainstream "predictive" approaches, emphasizing understanding and "storytelling" instead. Its emphasis on low level generalizations which are difficult if not impossible to falsify made it unpopular there, but in the softer social sciences it may well be the most appropriate approach. See Blaug, pp 126-7 and Mercurio and Medema, Chapter 4 for discussions. More recently, the institutional approach (what Mercurio and Medema call neo-institutionalism) has had a comeback in economics thanks to the work of Douglass North and others. It should be noted that all these approaches differentiate "institutions" (the rules of the game) from organizations (groups of actors pursuing a common objective), a conceptual distinction I flagrantly violate, as does USAID.

reform is learned on the job, it is also a discipline that requires continual education and evaluation. Many informants have been particularly generous in offering criticisms of their own past work. We are all learning together and I hope that these volumes, rather than being accepted as an attempted final word on the subject, are the beginning of a longer discussion and debate.



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## EXECUTIVE SUMMARY

**Introduction:** The term institutional strengthening encompasses a variety of activities included in USAID's Latin American Administration of Justice projects. Common to all of them is the effort to reorganize or reorient institutions to enable them to carry out their functions more effectively. The concept has a checkered career in USAID's programs. The first Latin American projects utilized elements of institutional strengthening but without an overall institutional strategy. A later emphasis on reducing human rights abuses and rewriting basic legal codes diverted attention from institutions. However, once codes entered effect, institutional weaknesses were identified as a major obstacle to their effective implementation. USAID's strategic approach document identifies institutional strengthening as the last stage in the justice reform sequence. The present paper recommends that institutional questions be addressed throughout the reform process. They are essential in mobilizing and orienting the other inputs -- political will, law revision, and access -- and will determine their ultimate success.

Although the present paper focuses on individual institutions, justice reform is sectoral and thus multi-institutional. In setting out a strategy for strengthening a single institution, its interactions with the rest of the sector must be taken into account. Otherwise, reform may produce new and still less desirable imbalances. USAID's distinction between supply and demand driven approaches is relevant here. However, to the extent it arises in a fear of over strengthening the state, it overlooks divisions within the public sector, and the possibility of reorienting public institutions toward greater accountability and sensitivity to client demands.

Institutional strengthening requires decisions as to what institutions should do. Such determinations are political and contextual, and in Latin America were based on a westernized vision of how the justice system works. In other cultural contexts, or where there is a less homogeneous vision, these decisions will be more difficult. Programs to reorient institutions also take time, and will incur frustration on the part of those who don't want to wait. While the final objectives may take years to realize, advances are measurable in intermediate benchmarks or results (steps or preconditions for change). These should be laid out in the project strategy.

**Legal Assistance and Public Defense:** Of the three major institutions in USAID's criminal justice repertoire, legal assistance has been the easiest to work with and provides the clearest model of how to proceed. In Latin America, most assistance to legal services has been to public defense. However, the model is also adaptable to noncriminal areas. For defense the greatest problem is sustainability. Recent increases in sectoral budgets have created a false optimism, and diverted attention from the fact that justice, and defense, have costs, and thus must be provided within budgetary limits.

Costa Rica's public defense program has provided the dominant regional model. While it may be hard to separate from its historical context, the following summarize its basic elements:

1. A government financed program of full-time defenders who may not charge fees and may not take outside work.
2. Merit based, competitive appointments and fixed tenure with renewals based on performance
3. Salaries and terms of employment commensurate with those of other judicial officials
4. Sufficient organizational autonomy to give leaders ample control of factors like appointments, placements, internal procedures, and evaluation and disciplinary systems
5. A fairly flat organization composed of a service head, local supervisors, and ordinary defenders. All members should be engaged in providing legal assistance whatever their other responsibilities. (This will not be possible where leadership is initially provided by a foreign consultant, but the latter should at least be involved in providing assistance on cases, not just in organizational work)
6. Internal organization featuring more experienced defenders supervising groups of less experienced ones; supervisory responsibilities include in-service training
7. Defenders have responsibility for their own cases, but the preferred organization is a work unit, not assignment of single individuals to outlying courts.
8. Internal standards for workloads and performance clearly and unambiguously established and used for evaluations, promotion and retention.
9. Assignment of cases by supervisors. Except in one person offices, defenders do not select their own cases.
10. Cases handled by the same defender(s) throughout the entire trial and appeals process

Other Latin American experience demonstrates the utility of this model, its variations, and limitations. Organizational location does matter, but must be judged on a case by case basis. Sometimes the logically ideal placement -- within an organization with a similar mission -- does not work because it competes for the same resources or imposes inappropriate practices and structure. Unlike the rest of the sector, defense can often start small, develop a good model and gradually expand it; this seems preferable to beginning with a nationwide service that is born flawed. While the general preference has been for state supported services, NGOs can also be effective. However, for them, long run sustainability is still more of an issue.

Operating rules and standards are important, but may be resisted. Especially under new procedural systems, it is difficult to predict reasonable caseloads or other performance indicators. Even if revised frequently, they are a way of ensuring quality and combating many typical vices.

Because defenders do much of their work independently, monitoring and evaluation are critical. This is one reason why the traditional reliance on contracted lawyers, law students, or pro bono services is usually unsatisfactory. However, to meet the demand in large countries with dispersed populations, some of these alternatives may have to be incorporated. Finally, technical assistance should focus on the organization as well as its members. At least some of the advisors must have managerial skills as well as being good defenders.

**Prosecution:** Here USAID projects have developed interesting techniques and methodologies, but have not produced a universal approach. One problem is that in Latin America, prosecution is usually a new function, and what it builds on varies from country to country. The new procedural codes differ in how they describe the function, and quite probably have not done so adequately. Finally, the source of technical assistance is an important influence on the choice of approach.

The three fundamental choices are: a top-down macro institutional reengineering, a bottom-up focus on pilot work units, and the mass-based reorientation of individual members. El Salvador is the best example of the top down approach. The principal advisor worked for over a year developing and selling the leadership and rank and file on a massive reorganization, which was then tested in field offices. In Panama, Guatemala, and Haiti, the new organization was first developed at the field unit level. In Panama the macro organizational situation required little work; in the other countries it has not yet been attempted. In Colombia, attention went immediately to changing the outlooks and orientations of the mass membership, who were then encouraged to apply the new principles at the work site. Significantly, the final target of all these efforts looks very similar -- a much flattened organizational structure which emphasizes the performance of field units as the principle "product." Macro organizational change, where it has been attempted, is intended to facilitate field unit performance. In effect, all three elements are necessary, and which goes first may be dictated by the contextual situation and the advisors' own skills. Shifting among the elements is difficult and usually requires additional technical assistance.

Macro organization is more complicated for prosecution than defense because of the need for *organizational* policies and targets. Defenders may be judged by the sheer number of individuals they help; prosecution is also judged on its ability to combat crime, reduce impunity, and serve other socio-political goals. This requires a more sophisticated organizational mission and strategy, not just the cumulative efforts of the individual members. Although some of the factors affecting success -- quality of leadership, operating rules and standards, salaries and terms of employment, and budgets and equipment -- are comparable to those in defense, coordination with other agencies, ability to guide and monitor field performance, and global policy making are more important. Among the lessons from USAID experience are the following:

1. Where one begins working with a complex organization will be determined by local conditions. Effective interventions can begin from the bottom up or the top down, but must move to incorporate both levels if they are to be successful.

2. All approaches coincide in emphasizing closer cooperation between police investigators and prosecutors, debureaucratization, more effective use of administrative staff, rationalization and systematization of intake procedures, and introduction of case tracking and management systems whether manual and rudimentary (Haiti) or automated and relatively sophisticated (Panama, Colombia, El Salvador).

3. A focus on the work unit provides the most visible, but localized impact on performance. Overall institutional restructuring and mass-based training are vital to replication and sustainability of what are essentially pilot field efforts, especially in countries with a large number of field units and/or a very weak parent agency.

4. Strategies for improving coordination with the police vary widely (as they do in the United States and Europe).

5. The more complex pre-existing and recommended organization for the Public Ministry, the dual nature of the prosecutors role (investigation and prosecution), its greater political sensitivity, and the need for coordination with the police make the institutional strengthening process harder to conceptualize and implement. The ministry cannot be implemented as a pilot. It either already has, or must be introduced with national coverage.

6. Public Ministries have proved more receptive to external assistance than have many courts. As opposed to defense, they are more likely to get favorable budgetary treatment from cooperating governments. If a donor can find a satisfactory strategy, they may represent the most cost-effective means of leveraging broader change in an entire criminal justice system.

7. The background of technical advisors has a great impact on the choice of strategy and on its efficacy in a given situation. However, here even less than in defense can it be expected that one outlook, or one advisor, will be sufficient.

8. The strengthening of a prosecutorial organization takes more time and is liable to more setbacks than that of defense. Because an organization already exists, the strategy requires its transformation, not its creation. Good practices will coexist with bad ones for some time.

**The Judiciary:** Although the judiciary is the core sector institution and was targeted for change from the start, USAID projects have yet to evolve a concerted methodology for its strengthening. A principal reason is that the judiciary is more difficult to work with than either defense or prosecution. As a consequence, external assistance programs have tended less to offer a model for its restructuring and reorientation (as in the case of defense and prosecution) than to provide tools which will help it to achieve this on its own. Principal among these are programs in training, administrative systems, and court administration. Less frequent, but arguably still more critical is assistance to improve the selection and monitoring of professional staff. Indirectly, assistance in rewriting laws, especially procedural and organic codes, is also relevant. However, except for the emphasis on accusatory, oral criminal justice, the direction of legal change has

been left to the judiciaries themselves. Among the principal lessons are the following:

1. USAID projects have developed a series of approaches and techniques for strengthening aspects of judicial performance. Their impact has been constrained by the judiciary's own weaknesses as an institution.
2. Among the initial impediments to change are a traditional culture which resists many kinds of innovations and undervalues those in nonlegal areas, a collegial structure which discourages dynamic leadership, leadership further weakened by decades of external intervention in appointments, and a goal of judicial independence which as most commonly interpreted encourages isolation and discourages accountability. Emerging impediments include an unresolved debate over the political role of the judiciary and innovations like judicial councils and separate constitutional courts which, whatever their benefits, further confuse that discussion.
3. Improved judicial performance can be defined in quantitative and qualitative terms similar to those used for defenders and prosecutors. However, it is often difficult for the judiciary to accept that they provide a public service and thus make concessions to increased demand and the need to change work habits to accommodate it. Unfortunately, in most reform projects the establishment of work standards is done behind closed doors and is frequently arbitrary.
4. The judiciary is more than a public service provider. It is a branch of government and a political actor. Here the disagreements are most intense and the goals of institutional strengthening most controversial.
5. Throughout the region, the last decade has seen marked improvements in judicial salaries, recruitment systems, and conditions of employment. Improvements in performance have been less marked.
6. It appears that the institutional strengthening of the judiciary will be a much longer term process than that of defense and prosecution, and one whose final objective may not yet be clear. Since most of the region's judiciaries have received higher budgets, failure to adopt new programs cannot be blamed on financial constraints.
7. Assistance projects can contribute to immediate improvements in aspects of judicial performance and a furtherance of the larger debate by combined programs of training, procedural simplification and rationalization in administrative areas, law reform, and assistance in planning the better use of resources allowed by increased budgets. Cross national exchanges and conferences focusing on common problems like governance, careers, burgeoning demand for services, and community relations may also foment more fundamental institutional change.
8. Programs can and have produced improvements in more discrete areas like caseload management, delay reduction, control of human rights abuses, and more consistent decision making. Efforts to improve planning and macro administrative systems have had less positive

results. This may be because they were beyond the capabilities of the target judiciaries, or because insufficient effort was put into committing leadership to and preparing them for their adoption.

9. Court administration projects have been dismissed as nonreforms, equipment drops, or technical solutions to nontechnical problems. While they certainly are not *the* solution, the same can also be said of any one-dimensional remedy, be it new laws, training, higher budgets, or the replacement of incompetent or corrupt personnel. In fact, unlike many of these alternatives, improvement court administration is often a necessary (but not sufficient) condition for broader improvements.

10. Indigenous experiments with new forms of judicial governance (e.g. judicial councils) have had mixed results, sometimes inviting more rather than less political interference by other branches of government. USAID programs have so far done little with them and should probably expand any engagement (even in the form of conditionality) with extreme caution. Unfortunately, it is easier to create new mechanisms than to anticipate their impact.

11. Because it is often easier to work with defense and prosecution, some projects have adopted a strategy of using these institutions to pressure the judiciary to change. It is not yet evident that such a strategy can work, and if so, under what conditions.

12. Although not yet a major problem in Latin America, work with judiciaries does raise legitimate concerns about strengthening the hand of a regime with little interest in fomenting judicial independence. The question is whether such work can create a demand for independence among the judges themselves and thus succeed over the wishes of the political elite.

13. Where either the Court or political elites seem less than fully committed to reform, change is not impossible. However, the costs and risks should be weighed carefully and progress closely monitored. Where the problem is lack of interest, it may be more easily overcome than those situations where a government seeks to use reform to expand its own control. In Latin America, the most common initial problem was lack of interest. Over time, governmental and other elites may be shifting to the second position as they come to appreciate the potential for furthering their respective political projects.

**Conclusions:** USAID's experience with institutional strengthening is too limited to provide clear-cut best models. Even in the simplest cases, change requires a series of mutually reinforcing interventions. Any mechanism is only as appropriate as its detailed design, sensitivity to changing circumstances, and the tactics used to introduce it.

While improved performance ultimately depends on what individual actors do, institutional strengthening requires attention to the organization as well as to the skills and attitudes of its members. At a minimum, the organization must facilitate its members' actions. It also must set policies to direct their actions into the most productive areas, provide leadership to protect and

motivate them, and set and monitor performance guidelines. For the judiciary, the situation is complicated by the simultaneous goals of judicial independence and juridic security (i.e. predictability of decisions in accord with the law) and its status as a political power.

Reform strategies must work at the institutional and individual levels. Pilot projects can be locally successful and a means of developing broader interest in reform where leaders are openly resistant. Replication remains a problem, especially because of costs. Institutional strengthening and institutional creation are separate endeavors. For some institutions, creation is immediately systemwide. . It remains debatable whether the risks are greater in reforming an existing bad system or introducing a wholly new one.

Writ large, institutional strengthening and reorientation is really the essence of reform. While it may be achieved last, it must be incorporated from the start. Institutional strengthening is best accomplished over the entire course of a reform so that by the time the other elements are in place, the institutions will be ready to comply with the new rules and meet the new demands.

## 1. INTRODUCTION

The term institutional strengthening encompasses a variety of activities included in USAID's Latin American Administration of Justice<sup>5</sup> programs. Common to all of them is the effort to restructure and reorient organizations<sup>6</sup> to enable them to better carry out their functions. Although any institutional strengthening program necessarily includes training and law revision, these will not be treated in detail; they are covered in separate papers. To make the topic more manageable, the present discussion is limited to three governmental institutions -- the courts, prosecution, and public defense -- which are also those most often addressed.

Institutional strengthening has a checkered career in USAID's justice programs. Many of the activities figuring in the earliest Latin American projects (e.g., creation of forensics labs, introduction of computer technology, administrative programs, creation of judicial schools) are elements of institutional strengthening. However, they were most often conducted without an overall institutional strategy, and thus, their impact was limited. The increasing emphasis on reducing human rights abuses and rewriting basic legal codes soon shifted attention from institutions to the overarching legal framework. It was only as the first codes entered effect that concern with institutional capabilities to enact them redirected interest and resources to the issue. For many it is the essence of reform. Revised codes instruct officials to behave differently, but they will not do so until their institutions are correspondingly changed. New laws may leverage reform, but they have increasingly been seen as inadequate to produce and orient it.

USAID's strategic approach document<sup>7</sup> places institutional strengthening as the last stage in the justice reform sequence, something to be attended to once political will and constituencies are created, laws are changed, and access expanded to a wide variety of groups. Its emphasis on these political elements of reform is useful, but implies that institutional capabilities can be ignored until a reform is well underway. This message, whether or not intended, understates their role throughout the planning and implementation process. Although it is true that no reform can go far without local allies, political will may itself be a product of institutional

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<sup>5</sup>The use of the terms Administration of Justice or Rule of Law is not meant to limit applications to criminal justice, the focus of the Latin American projects. Institutional strengthening is a part of all justice reforms, and lessons drawn from criminal prosecution or defense have more general relevance.

<sup>6</sup>Here for once I am sticking to USAID's usage. This runs counter to purists who reserve the term "institution" for the set of formal and informal rules shaping individual behavior, distinguishing them from organizations, "groups of individuals bound by some common purpose to achieve objectives" (North, p. 5). I will use the two terms interchangeably in the latter sense.

<sup>7</sup>Blair and Hansen.

strengthening,<sup>8</sup> and must always be calculated against the difficulties of institutional change. As regards the other elements, if institutional change does not accompany, even precede legal reforms and increased access, the latter will produce only frustration and cynicism. Furthermore, legal reforms must be planned with an eye to existing institutional capabilities, their capacity for transformation, and the strategies to effect it. In this sense, reform and the political will to produce it are moving targets, their objectives and definitions varying over time as initial advances are consolidated and problems emerge or are better understood. As others have noted,<sup>9</sup> it is on the issue of institutional change that reforms most frequently founder, as initially enthusiastic leaders begin to appreciate the complexities and costs, as well as the vested interests (some of them their own) to be confronted. Reform is an educational process, and a good part of that education has to do with learning to look beyond the purely legal changes and rhetorical promises to the hard task of making institutions operate differently. Although the Latin American projects hardly provide all the answers, they are a source of important lessons and techniques for accomplishing that goal in the context of a number of key sectoral organizations.

### **Strategies and Activities: the Choice of Institutional Targets**

The bulk of this paper deals with strategies for reorienting and strengthening individual institutions. Before such activities are undertaken, a higher level strategic choice is in order. The justice system, and particularly the criminal justice arena, houses a variety of organizational actors. Overall system performance depends on their individual and collective actions. This is true whether one is looking only at governmental actors, or at both the public and private sector. Behind the USAID strategy paper's deemphasis on institutional strengthening is a fear that governmental actors will become too strong vis-a-vis their nongovernmental counterparts, and that as a result justice will serve them rather than the public. The fear should not be dismissed. Latin American observers<sup>10</sup> have in fact noted that many judicial reforms are guild (*gremio*) reforms, responding only to the needs and perspectives of judges and other institutional actors. Fortunately, this is not inevitable. Institutional strengthening activities can be mounted to enhance public accountability and a public service orientation. In this sense, the term institutional strengthening may have unfortunate connotations, suggesting a balance in favor of the state.<sup>11</sup> Strengthening *and reorientation* more adequately describe the goals.

Nonetheless, there is an underlying and largely unanswered question as to how far one can or

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<sup>8</sup>Institutional strengthening can create constituencies and will *within institutions*. It can create extra-institutional constituencies and reshape the understandings of those that already exist.

<sup>9</sup>Vargas makes this point in the context of Latin American efforts to reform criminal justice procedures via law reform.

<sup>10</sup>Pérez Perdomo.

<sup>11</sup>Thus, in earlier versions of the USAID paper, it was called "state building."

should go in strengthening state institutions without a comparable attention to their users and clientele, and especially to those traditionally excluded from the services offered. USAID has treated this as the difference between demand and supply driven strategies, and since the introduction of the terms has consistently cautioned against an excessive emphasis on the latter. The point is well taken, but the problem lies in defining excessive. It also lies in designing real demand driven strategies, especially as regards "civil society groups." Many of these groups have their own vested interests to advance which may have little if anything to do with those of the society they purport to represent<sup>12</sup>. The present work will not address the supply-demand dilemma any further. In one form or another, it has been debated by developmentalists for at least forty years and I do not pretend to offer new insights.<sup>13</sup> Its more modest contribution is in noting that institutional strengthening must take clients into consideration, designing reforms to address their interests, making them aware of new rules and services, and providing ways to make institutions more sensitive to their needs and desires.

The supply/demand metaphor as most commonly expressed overlooks another factor. Demand can be generated by enlisting institutional members as a reform constituency and by taking advantage of the normal division of interests within the sector to use advances in one institution to force changes in another. This suggests another critical balance, that among the sectoral institutions. Generally a reform program aims not only at a different performance from individual institutions, but also at a different interaction among them. Effecting the required changes in only a part of them brings less than optimal results. It may in fact exaggerate certain problems -- for example, increased court congestion if a more active bar or prosecution files more cases which the judiciary is unprepared to handle, or an imbalance toward prosecution or defense if only one or the other is strengthened. Reform strategies can utilize these imbalances to leverage change -- recalcitrant institutional leadership may be embarrassed into reform where appeals to their good will alone failed. However, the disequilibria can cause considerable injustices before that end is achieved or generate counterproductive backlashes. In several Latin American countries, a perception that strengthened due process guarantees were letting "criminals" out on the street has inspired efforts to reverse those guarantees and so undermine the thrust of reform laws.

On the whole, USAID projects have tended to work with windows of opportunity or the tools at hand rather than attempting to define multi-institutional strategies. Admittedly, there may be

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<sup>12</sup>This point has been made informally by many observers, but is only beginning to make it into print. See Macdonald for a discussion in the context of development projects in general.

<sup>13</sup>In the 1960s, this was often couched as the choice between increasing participation and enhancing administrative capabilities. Thus it was not limited to justice but rather took in the entire state/civil society spectrum.

little choice. If only the Public Ministry<sup>14</sup> wants to cooperate, one supports prosecution and hopes that the others will see the light. If the available allies are human rights NGOs, one aims reforms at strengthening advocacy and due process goals, hoping that prosecution and the courts will catch up later. However, the vices of necessity can become de facto strategies with too little thought to their long term consequences. Thus, while the bulk of this paper examines strategies in the context of individual institutions, a first caution is that reform is always sectoral and thus multi-institutional. Work with any single institution should always be undertaken from this broader perspective with an eye to the longer term issues of balance and countervailing powers.

This does not mean that only balanced approaches will work. They may be impossible and they could be less effective. However, a decision to work on partial fronts should be recognized for what it is -- an effort to force a new equilibrium by creating temporary imbalances. Furthermore, certain opportunities are better left unrealized -- because they tip the scales too far in one direction. Where several institutions are vying for assistance, it is not unusual for the least needful to be best prepared to accept it. Acceding to their demands can widen the capabilities gap.<sup>15</sup> Producing a new equilibrium may require opening a new front where it does not occur naturally. Faced by escalating criticism an institution may respond proactively, or simply dig in its collective heels unless provided with hints as to how to proceed.

A final general consideration is the question of how one decides to what ends institutions are being strengthened, in other words, what they are supposed to do better. Normally, these goals are determined by the overall reform strategy and are a consequence of political decisions and more fundamental societal expectations. In Latin America this was usually not a problem; escalating complaints about sector performance, ranging from corruption, inequitable service, and abuse of legal rights to excessive delays and general incompetence provided an ample set of targets for improvement. Over time, and as initial progress has been made, some of the early consensus has begun to break down as groups find their interests are served differently by institutions that function in new ways. This has most particularly been a problem in the case of the judiciary because of its political as well as public service function. Still, expectations about

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<sup>14</sup>In the civil code tradition, the Public Ministry is usually charged with the criminal action -- prosecution. Investigation was initially left to the investigating judge, although this is gradually changing. In many Latin American countries, the Public Ministry had virtually disappeared and is only now being recreated. This led to a bastardized inquisitorial system where the same judge might investigate, "prosecute," and try a case.

<sup>15</sup>This was arguably the situation in USAID's second Salvadoran justice reform project. The Salvadoran Court which receives six percent of the national budget was objectively far less needy than the impoverished Fiscalía (prosecution) and Procuraduría (legal defense), but it also had more activist leaders who made constant demands on USAID resources. The rational response might have been to give the courts limited technical assistance and focus most resources on the other two institutions. Politically this proved untenable.

institutional performance have been more uniform in Latin America than they may be in other cultural traditions, and despite the different legal frameworks, do not deviate much from those of USAID advisors and staff from a common law background.<sup>16</sup> Where the definition of justice is less westernized or just less homogenous, would-be reformers may face obstacles for which the Latin American experience provides little guidance.

### Timing

From USAID's first entrance into justice reform projects, participants have stressed that change, and especially institutional change will come slowly.<sup>17</sup> Accumulated experience supports this view. It has also produced considerable frustration on the part of observers, higher level policy makers, and a variety of stakeholders who want to see evidence of progress being made. This occasionally leads to wholly unrealistic promises on the part of project personnel -- that they can visibly decrease delay, eliminate impunity, or make dramatic reductions in the percentage of unsentenced prisoners or case backlog in a year or two. Some of these targets could be met individually, but only by directing all resources to them and probably at the cost of real reform. Nonetheless, the fact that it may take a decade to make detectable impacts on the ultimate goals does not mean waiting that long for any signs of progress. Over the shorter run, change may not be measurable at this level, but it should be detectable in intermediate benchmarks. These in turn should be clearly identified in the project strategy.

Establishing benchmarks or indicators of progress requires two elements. The first is a strategy identifying an anticipated sequence of events, interventions, or necessary conditions. The sequence is not inflexible nor is it universal. It often happens that a law seen as critical to certain types of institutional change is delayed in its passage; when this happens, more effort may turn to preparing the institution before the fact. Since any institutional change strategy is multifaceted, implementers can shift emphases or change the anticipated sequence as obstacles emerge. Each partial intervention will have its own indicators of progress -- of themselves they may not alter the end goal, but they mark steps to that end. The Panama "integration" project (discussed in the section on prosecution) provides examples. Its final objective is to speed the process and increase the quality of investigation and prosecution. Over the shorter run, indicators of

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<sup>16</sup>This can also be a disadvantage in that it encourages a tendency to overlook important differences of detail. Even in the Latin American countries that have effected the greatest transformation toward an accusatory system, the roles of prosecutor and the judge are not identical to those of their common law counterparts. Advisors who do not recognize this may teach skills and attitudes which are inappropriate, and in some cases, illegal. This has not been a major problem, but it was an observation made by some Latin Americans who had participated in USAID projects. It bears noting that the same can be said of advisors from other Latin American countries or from European civil law systems.

<sup>17</sup>See Alvarez for a discussion of the early program statements and of this point in particular.

progress involved such factors as improvements in the police charge sheet (e.g. whether the pages were consecutively numbered, whether the important events were adequately noted and documented), the types of evidence collected, and the timely involvement of the supervising prosecutor. For an uninformed observer, such indicators may be meaningless; thus it is vital that they be incorporated and explained in the overall strategy. Without intermediate indicators, one would have to do as one U.S. agency partner suggested -- "give us the money and a few years time, and you can judge our success by what you see at the end."

The other element involves estimating reasonable times for achieving both intermediate benchmarks and progress on the ultimate objectives. How long does it take to improve a charge sheet and how long does it take to reduce the average time for handling police investigations? This is more difficult and subject to enormous variations among institutions and national settings. As an educated guess, based on my own experience, I would suggest that a simple pilot project, aiming at improving operations and outcomes for a single office or courtroom might take between two to six months to establish new procedures (assuming they have already been designed), and might within a year's time anticipate measurable results on such dimensions as time to process cases, backlog reduction, and client satisfaction. Replicating the pilot on a systemwide basis and achieving somewhat more modest, but still measurable impacts could take two to five years depending on the size of the organization and the amount of cooperation elicited. Large complex organizations and lesser control over the replication could well extend the process still further.

Most justice reforms deal with several institutions and a variety of extra-institutional changes. Time to process a case depends not just on the prosecutors but also on the courts, private lawyers, and their clients; reduction of pretrial detention may require legal change and cooperation from police, defense, judges, prosecutors, and prison authorities. Replicating pilot activities, whether in one institution or several requires budgetary increases and improved macro administrative and managerial capabilities in the relevant organizations. Hence, while under optimal conditions, visible alterations in the systemic goals and indicators might take five years, systemwide change is probably a question of a decade. Here some additional cautions are necessary. Where the strategic hypothesis mandates changes in procedures to produce improvements in output, there will be a necessary lag between the former and the latter. Over the short term, there may even be temporarily declines in systemic output, as institutional actors adapt to new requirements (e.g. time to process cases may actually increase). Client satisfaction may lag or decline still further. Finally, results attained in pilot projects are usually better than those achieved after replication. Pilot offices are often chosen because their members are more receptive to innovation. Even where this is not the case, they may respond more enthusiastically because they sense they are special; the Hawthorne effect<sup>18</sup> is as likely to apply here as in a

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<sup>18</sup>This is a classical sociological phenomenon whereby experimental subjects are observed to respond favorably to any intervention. In the factories where it was first observed, experimenters trying to ascertain the effect of different types of lighting found that production

factory. This is not to discredit the value of pilot projects but simply to caution about extrapolating from their results. In short, timing the impact of interventions is as much an art as a science. This does not justify wild guesses or arbitrary estimates. Observation of other projects, a good contextual analysis of the obstacles likely to be encountered, and use of expert opinions can narrow down the options. Nothing, however, substitutes for a good strategic design which identifies the intermediate changes that will have to be produced before the desired impact will be achieved or for its adequate explanation as a series of causal linkages, benchmarks and indicators,<sup>19</sup> intelligible to outside observers as well as participants.

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increased whether they raised the lighting, lowered it, or left it as before. Unfortunately, the results are not long term. Once the attention is removed, production returns to prior rates.

<sup>19</sup>As USAID is currently developing ROL indicators, I risk confusing the issue by adding further comments. Nonetheless, in response to questions raised by initial readers, it may be worth stressing that institutional change efforts, and ROL reforms as a whole, rarely progress in a strictly linear fashion. This makes it particularly important to articulate the entire strategy; otherwise observers will not grasp the significance of critical interventions (e.g. the creation of a training program), benchmarks toward their achievement (a needs assessment, curriculum design); or indicators of their impact (improvements in judicial skills). Even at this level, systemwide changes in indicators may take years, and annual progress will be measured with benchmarks. Until several of these interventions are in place and have had time to interact, progress on the overall goals (judicial decisions made in accord with legal requirements) will be difficult if not impossible to track except within the more advanced pilot courts. *This is not just a problem of measurement; it is a consequence of how institutional change occurs.*

## 2. LEGAL ASSISTANCE AND PUBLIC DEFENSE

Of the three major institutions in USAID's criminal justice repertoire, legal assistance has proved the easiest to work with and offers the clearest model of how to proceed. In Latin America, the majority of USAID's legal assistance support has been directed at creating or strengthening public defense. This emphasis stems from the regional focus on criminal justice, and from a related belief that the most critical kind of legal assistance is that provided to individuals accused of crimes. This might not hold in other contexts, either because public defense already exists, or because for whatever reason, the greatest concern is lack of assistance in other areas.<sup>20</sup> General legal assistance programs may be organized just like the defense programs described here; more specialized kinds of assistance (usually advice rather than representation) have also taken other forms, some of which are discussed in the final part of this section.

At the conceptual and organizational levels, setting up a legal defense program is relatively easy. This as we shall see is not the case for prosecution and the judiciary. For defense, the greatest problem is sustainability as it relates to long term financing and overall policy on the level of services to be maintained. Defense is easy to organize so long as someone is willing to pay for it. The ease of organization can be disadvantageous because it promotes overly ambitious goals. Latin American reformers have adopted the notion of a right to free defense for everyone, sometimes even for those who can pay their own way (this in the interest of equal rights). The idea that legal assistance is a subsidized good, eventually paid by someone, has not penetrated as yet. The costs of defense, like that of justice as a whole, are only beginning to be contemplated. A current regional tendency to increase sectoral budgets, after over a century of gentile to abject poverty, has created a false optimism within the sector. This has also been fed by an influx of external financing. Nonetheless, here as in the other areas of institution building, it is none too early to start thinking about sustainability over the longer run, and to begin looking for alternative, less costly mechanisms. We return to this theme in the last part of this section, but it is a caveat to keep in mind in discussions of the strategic model.

### Background

Although Latin American constitutions and some criminal codes guarantee a right to defense and often imply the provision of public defenders for indigent populations, public defense programs were relatively undeveloped throughout Latin America. Under the traditional inquisitorial system, in which an investigating magistrate examined the circumstances of a reported crime to

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<sup>20</sup>It's a little hard to envision this second situation, but where the criminal justice system is not very effective, people may have more problems with land related disputes, or something as simple as establishing legal identity. Political conditions might also make it more practical to start with noncriminal programs.

determine whether charges would be brought, and collected relevant evidence, this was theoretically unnecessary. The magistrate was supposed to search for the "truth" and thus protect all interests. In effect, the investigation was usually one-sided and left suspects, and poor suspects in particular, at the mercy of a system which seemed bound and determined to find them guilty. Often the process was never completed, and the prisoner languished in pretrial detention for years. Whether the system could have worked more fairly is a moot point. The trend in Latin America is toward a more adversarial<sup>21</sup> criminal process with an independent prosecutor who assists the investigation, asks for an indictment, and argues the case in court, and a separate defense counsel who represents the interests of the suspect, presenting his case in court should it be raised to trial.

Even under the inquisitorial system, defense counsel was sometimes provided for the indigent. This was usually accomplished either by requiring pro bono work of local lawyers or naming certain attorneys *de officio* to defense work. The latter were usually assigned to a court district and received a government salary, but were not to charge additional fees. Both arrangements were woefully inadequate. "Pro bono" counsel often charged for their services. *De officio* lawyers were frequently patronage appointees with little or no vocation for their work. Their low salaries provided little incentive and encouraged collection of fees or an often illegal dedication to outside paid work. It has been argued that defense lawyers actually worked to draw out investigations and trials so as to keep their clients in detention, thus guaranteeing a steady source of income. The enormous quantity of poor defendants far outstripped the number of available counsel. Many never received any assistance, and if they did, first saw their lawyer in court, at a trial or sentencing hearing. There was no supervision of either kind of service, or even of judges' compliance with the duty to appoint it. Some countries still rely on pro bono or *de officio* services, but neither arrangement works well anywhere.

State-provided services were sometimes supplemented by NGOs or university clinics. NGOs depended on outside funding, usually from foreign foundations and donors. The university clinics resolved part of the funding problem by requiring practical work from their students. However, services were notoriously poor, erratic, and unsupervised. Since they operated only where a law school existed, their national coverage was sketchy. Furthermore, students usually lacked skills and experience. In El Salvador, students participated in the clinics after finishing their criminal law courses, which might be done in the first year of their law program. Students often charged for services or abandoned cases after they had fulfilled their practical requirements. Nonetheless in some countries (Guatemala), universities opposed the formation of publicly financed services which they saw as undercutting their own programs. Salvadoran students protested a provision in the new procedural code restricting courtroom representation to

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<sup>21</sup>This is also called "accusatory." I use the two interchangeably despite a heated debate among early readers as to which should be preferred.

accredited lawyers and thus removing a traditional, if illegal, source of income.<sup>22</sup>

### **Early Developments**

One Latin American country provided the exception to the rule. This was Costa Rica,<sup>23</sup> which in the 1960s established a public defenders office within the court system. The office, like many other elements of Costa Rica's justice sector, benefitted from the judiciary's constitutionally mandated six percent of the national budget, awarded in 1957, and greater political independence, a result of constitutional reforms following a brief civil war in the late 1940s. These changes, which enhanced the Supreme Court's role as the governing body for the entire court system, allowed it to introduce its own internal reforms, including an early movement to a more adversarial or modern mixed system<sup>24</sup> and the creation of a separate defense and prosecution. Placement of defense within the judiciary is sometimes opposed because of potential conflicts of interest. In Costa Rica it worked. At least in recent years, the Supreme Court has not interfered with the functional operations of the office even when its defenders directly challenge their decisions. As one long-time defender noted, while he suspected the Court president sometimes disapproved of his actions, he never felt pressured to do otherwise.

Organizational placement brought other advantages. Defenders earn salaries commensurate with those of judges and prosecutors and may in fact move among the three "career" tracks.<sup>25</sup> Thus, many judges and prosecutors are former defenders, and defenders can anticipate occupying higher level positions outside their own rather limited career ladder. This makes the office an attractive entry-level position and a place for incumbents to hone their skills for later use in the public or private sector. However, the joint career system also means they cannot afford to do bad work, at least not if they want to go elsewhere in the judiciary.

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<sup>22</sup>Ferrandino, personal communication, August, 1997.

<sup>23</sup>This section is based on my own experience (1989-93) as project manager for USAID's Costa Rican project. It also benefits from interviews with defense personnel, most notably Alvaro Ferrandino and Marta Muñoz, head and acting head of the Office of Public Defense, and from several documents prepared by Ferrandino which he generously made available.

<sup>24</sup>So called because it mixed adversarial and inquisitorial elements, retaining the investigative judge, but adding an oral trial in which the prosecution and defense argued their respective sides of the question before a neutral panel of judges. Evidence was limited to what the investigator had already uncovered, as documented in his case file. Costa Rica did require that witnesses appear in court; in many countries the parties read the depositions appearing in the case file.

<sup>25</sup>Actually until 1994, Costa Rica did not have a judicial career with security of tenure. Instead the Court reviewed appointments every four years. Renewal was not automatic, but decisions were usually based on objective evaluations of performance.

In early 1997, Costa Rica's public defenders numbered 160; staffing has been gradually increasing since the office's creation.<sup>26</sup> The principal office is in San Jose, but there are also offices in each of the provincial court centers. Currently, there are offices with only one defender, but the tendency is to pool resources. In San Jose, a second large office has been created to replace several two- to four-person units. It has nine defenders, three secretaries, and three legal assistants.<sup>27</sup> To the extent resources, transportation and geography allow, the same process is being undertaken nationwide. Because Costa Rica is a small country with good transportation the consolidation of offices does not create problems of access.

Curiously, in Costa Rica the right to their services is not determined by need. Anyone accused of a crime is entitled to a defender should he/she wish and until 1994, paid no fee.<sup>28</sup> There are cases where individuals clearly capable of hiring their own lawyer have preferred to use the public services, apparently because of their quality. One of the most famous, the trial of a suspected drug trafficker (Ricardo Alem) in the early 1990s, was a considerable source of embarrassment to the head of the department who successfully defended him. When his defense team refused material rewards, the grateful client took out an advertisement in the local paper thanking them publicly. Defenders have also attempted to extend their services to misdemeanors and civil cases. To date, their numbers are too small to meet the potential demand.

As with successful defense services universally, the department tends to recruit young lawyers and train them on the job. Good salaries, the office's excellent public image, and an ample supply of private lawyers has guaranteed an excess of potential recruits. Defenders attend short courses held in the separate judicial school, but there is also a great emphasis on in-service training. Supervisors (*coordinadores*) hold regular meetings with their staff to discuss cases and typical problems. Workloads and performance are continually evaluated. Those who do not meet standards are not recommended for retention. Vocation or dedication to work is highly valued; those not demonstrating it are let go, even if they are doing an "adequate" job. The office head ultimately makes the hiring decisions and he and his supervisors have a major say in those on promotions and/or dismissals.

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<sup>26</sup>In addition to an anticipated increase when the new procedural code enters effect in 1998, thirty defenders were recently added, raising the number to almost 200, to comply with a requirement that they represent child support cases. Ferrandino, personal communication.

<sup>27</sup>These figures and other details are taken from Ferrandino (1997).

<sup>28</sup>The new organic law introduced fees for those who can pay -- they revert to the office and are used to expand services for the poor. Information on the efficacy of the new system is still lacking. It would be worth collecting since the cost of means tests has been a major drawback to their use in Latin America. It is often forgotten that their purpose is not to prevent the wealthy from cheating, but to hold down costs -- where they become more expensive than the alternative (providing free services to a few people who could pay for them) they are not worth the trouble.

Defenders are expected to handle from one hundred twenty to three hundred cases a year. This means a weekly average of six to ten court appearances and ten to twenty *indagatorias* (their presence during the interview of the suspect by the investigating judge, or under the new system, the *fiscal* or prosecutor). The higher number of cases tends to be handled by those working outside of San Jose, and it is here that most effort is being made to augment personnel. The staff is still small enough so that no formal weighting system is used to allocate cases, and supervisors assign them to individual defenders according to their own perceptions of who can handle them. With the scheduled transformation to a more oral, accusatory system, the department has requested an increase in the number of defenders and support staff. It is not clear whether this is because of an anticipated decrease in the manageable caseload or an increase in overall demand. Although the new code introduces pre-trial settlements and abbreviated trials, thus cutting back on courtroom time, these mechanisms will require more work and consultations if the client's best interests are to be served.

Although defenders' salaries are adequate, funds for their own investigators will only be made available under the new code. Under the mixed system, this was no problem as the investigating judge handled the collection of evidence which was shared with the defense and prosecution before the trial. Defense strategies tended to be reactive, working on breaking the prosecution's case on the basis of legal points or challenges to witnesses and evidence. In a more accusatory system, this may not be as effective. Defenders will also have to change other elements of their traditional strategies, including a frequent reliance on dilatory practices and "procedural obstructionism," which the old code tended to encourage.<sup>29</sup>

While most defense work focuses on the trial, defenders are assigned once a suspect is detained or identified. In Costa Rica, the same defender handles a case through any appeals processes, a practice most observers recommend<sup>30</sup>. Another part of their efforts involves protecting clients against illegal detentions or other judicial and police action which might endanger due process rights. In one recent famous case, the office challenged the extradition of a group of alleged bank robbers also facing charges in Venezuela. Under Costa Rican law, they should first have been tried in Costa Rica. The action was directed against several cabinet level officials and was clearly not supported by the Court (although its Constitutional Chamber upheld it),<sup>31</sup> or for that matter, by public opinion. Actions like these, and dedicated leadership tend to build the mystique that characterizes a good defense office. Although many of the best defenders eventually graduate to positions in the judiciary or prosecution, some remain because this is the

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<sup>29</sup>Ferrandino, personal communication, August, 1997.

<sup>30</sup>Mark Williams, personal communication, August, 1997.

<sup>31</sup>The granting of habeas corpus was in some sense symbolic since the prisoners were already in Venezuela. However, it was an important reminder that even high ranking members of government were to respect the law.

work which most interests them.

While it may be hard to separate the Costa Rican “model” from its historical context, the following summarize its basic elements:

1. A government financed program of full-time defenders who may not charge fees and may not take outside work.
2. Merit based, competitive appointments and fixed tenure with renewals based on performance
3. Salaries and terms of employment commensurate with those of other judicial officials
4. Sufficient organizational autonomy to give leaders ample control of factors like appointments, placements, internal procedures, and evaluation and disciplinary systems; whether or not they have the final say on these matters, their assessments should have predominant weight
5. A fairly flat organization composed of a service head, local supervisors, and ordinary defenders.<sup>32</sup> All are engaged in providing legal assistance whatever their other responsibilities. (This will not be possible where leadership is initially provided by a foreign consultant, but the latter should at least be involved in providing assistance on cases, not just in organizational work)
6. Internal organization featuring more experienced defenders supervising groups of less experienced ones; supervisory responsibilities include providing in-service training
7. Where possible, defenders should work in groups or teams, not in isolation. They each have responsibility for their own cases, but the preferred organization is a work unit, not assignment of single individuals to outlying courts. (This obviously is easier in a country of Costa Rica’s small size and relative ease of transportation.)
8. Internal standards for workloads and performance clearly and unambiguously established and used for evaluations, promotion and retention.
9. Assignment of cases by supervisors. Except in one person offices, defenders do not select their own cases.

The Costa Ricans developed their model under special circumstances, which may be changing.

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<sup>32</sup>In effect there are three ranks for defenders, but everyone, including the head of the office, handles a full case load.

The leadership under which the program grew to its current dimensions is leaving for other positions. While recruitment of upper level staff continues from within, this shift may still change the character of the operations. Movement to a judicial career system, if extended to the defenders could also produce certain rigidities. Under the prior system, defenders enjoyed four years of secure tenure, but then had to be renewed for their positions. This allowed the elimination of those who did only "adequately" or who lacked "vocation." Under a career system managed for and by the larger judicial system, the service could become more bureaucratized. Finally, the period of gradual growth may be ending as the Court's funding becomes inadequate for all the demands on it, and defenders may have to accept limits to their visions of universal defense and/or carry still heavier workloads. It is doubtful that any of these changes will substantially alter the quality of service, but at the margins they could reduce some of the enthusiasm and mystique which has characterized it until now.

### **Defense Elsewhere in Latin America<sup>33</sup>**

The Costa Rican defenders have been a model for other Latin American countries and have collaborated with USAID programs in developing defense services elsewhere. Among the most important examples are Bolivia, the Dominican Republic, Panama, Honduras, and El Salvador. Their experience does not invalidate the model; it does suggest the difficulties in applying it without Costa Rica's particular advantages. Countries attempting other approaches (Peru, Colombia, Guatemala) have been far less successful. Haiti, whose NGO based services resemble a Costa Rica style program, did not receive technical assistance from the latter. Along with the one extra-regional example, Cambodia, it also argues for the universality of the general model.

In Panama, Honduras, Bolivia and El Salvador, USAID programs succeeded in convincing governments to finance public defenders offices as a principal source of legal assistance to indigent populations. The use of Costa Rican technical assistance either from the start, or as the service developed, accounts for substantial uniformity in organization and general operating procedures. However, factors like inadequate government financing, consequently inadequate salaries, nonmerit based recruitment, pre-existing organization, organizational placement, and leadership styles and interests have produced considerable variety in the content and quality of performance. Problems are most frequent when the defense service is grafted onto an existing organization or starts too large, without a concerted effort to embed best practices from the start.

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<sup>33</sup>Information on El Salvador is in part derived from the three years (1993-95) I spent there as project manager. It has been enriched by interviews with project personnel, most notably Alvaro Ferrandino, Aldo Espinosa, and Mark Williams. Information on other countries is drawn from direct observation, interviews with national staff and project personnel, and a few USAID sponsored documents. The latter include evaluations by Mudge et al., Wilson, and the NCSC. I am also indebted to Marea Beeman of the Spangenberg Group who provided information on U.S. practices and directed me to other U.S. sources, including the NLADA.

El Salvador and Guatemala both exemplify this phenomenon. In the former country, defense was placed in the *Procuraduría General*, an organization which provided legal and social assistance to the poor. This apparently logical placement engendered two sources of conflict. First, early leadership saw defense as partially incompatible with the parent organization's mission. Because the Procuraduría represented the family, women and children, the Procurador claimed that the defense of wife beaters, child molesters and rapists undercut these broader objectives. Conflicts also arose between USAID's desire to create an effective, efficient organization and the Procuraduría's attachment to its traditional procedures and structures. The latter have been difficult to eliminate. Their persistence was aided by resentment of USAID's special attention to defense, which one Procurador claimed was compromising overall organizational morale.

As a consequence, Salvador's defense office took on the hierarchical structure of the Procuraduría, featuring inter alia, a group of higher level defenders whose dedication to appeals or special cases left them with very little work. Lacking a career system, defenders were hired on one-year, renewable contracts. Recruitment, renewals, and transfers were highly personalized, and largely at the whim of the Procurador and his immediate advisors. There is no indication that this was a particularly politicized system, but performance was clearly of little relevance, and personal relations with the Procurador were paramount. Poor performers who got along kept their jobs; the occasional good performers who rocked the boat were frustrated into an early departure. Defenders serving outlying provinces were allowed to commute from the capital city, meaning their attendance was irregular at best. Because salaries were low, everyone, even supervisors, had outside jobs, and it was informally recognized that they would devote part of their working hours to performing them. Recent technical assistance provided through the USAID project works at changing these practices.. However, bad habits are entrenched, and the low salaries provide little incentive to do better. There has been some success in eliminating superfluous positions, opening departmental offices, each with their own supervisor, and requiring defenders to live where they work.

In Guatemala, a new service was created in the court system and allowed to grow with little thought to organizational strategies. Foreign technical assistance (offered through the UNDP) may have exacerbated the problem,. The first advisors, while good defenders, seemed to lack managerial vision and skills. They devoted their efforts to backstopping defenders on individual cases, but not to the larger questions of how to make the organization work more effectively. Interviews with them in mid-1996 indicated they had given little thought to setting performance standards or workloads. Conceivably as foreigners they did not believe this was their responsibility.

Programs faced a variety of problems with funding. In El Salvador, Honduras and Bolivia USAID projects paid for the initial program which was gradually transferred to government support, but almost inevitably at lower funding levels. In Guatemala and Panama, the government paid salaries from the start, and the USG provided technical and other material assistance. Although in most Latin American countries, there arguably is money for such

services, which in effect are not that costly, there has frequently been political and popular resistance to paying to “defend criminals.” Where crime control has become a hot issue, public defense may rank only above assistance programs for prisoners in popularity. Getting government to accept and expand the responsibility has not been easy and any success is usually due to unique circumstances. In El Salvador and Honduras, it became a condition for assistance to the sector, and in the former country was also part of the peace accords ending the civil war. Conditionality in El Salvador could have been better designed. As written into the Project Agreement it implied that USAID would cut off its own funding to the Procuraduría if the government did not raise defenders’ salaries. When the conditionality was only partially met, USAID either had to interpret it very loosely or join the government in abandoning the service.

In Bolivia, a small initial program funded by USAID’s regional administration of justice project got an unexpected boost when its threatened termination coincided with upcoming national elections. The program’s satisfied clients (many of them prisoners) organized a letter writing campaign and convinced the new government to adopt it as part of its overall commitment to justice reform. Staffing has increased from the initial dozen or so defenders to fifty-five, each of them with their own legal assistant. In Panama, the Court had a change of heart in the mid-1990s and increased funding allowing the program to expand to a more reasonable size. Because defense belongs to the judiciary it benefits from increased Court budgets. In Bolivia, it remains in the Ministry of Justice. Theoretically this is not an ideal site. In terms of funding it has been fortuitous since the first minister had adopted judicial reform as his political cause. Whether the largesse will survive a new administration or the inevitable stretching of sectoral budgets remains to be seen. Although in Bolivia, pressure came from the clients, in the other countries, it was provided by human rights NGOs and donors. Public defense is almost never a public demand, since, except in Costa Rica, it is seen as predominantly a service for the criminal element.

In the countries where USAID or other donors have directed projects through NGOs, services are sometimes exemplary. This is less often true when only funding, but not technical assistance, is provided. In that case, performance depends on the independent inclinations and skills of NGO leadership, which donors rarely have adequate feedback to evaluate. When sufficient complaints mount, grants may be terminated, but until or unless that occurs, donors seem disinclined to explore potential problems let alone make incremental improvements.<sup>34</sup> Experience amply demonstrates that just because an organization says it does legal defense is no guarantee that it does it well, or sometimes, does it at all. In addition, NGO services are necessarily restricted in their coverage and face questions of longer term sustainability.

In the Dominican Republic, the defense services were mounted through a local NGO, receiving extensive technical assistance as well as financial support. The result is a smaller imitation of the Costa Rican model. With only ten defenders in a country of seven million, the coverage is

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<sup>34</sup>In Cambodia, in 1996 several grants were ended when USAID determined that a number of NGOs were providing inadequate services and were plagued by other problems.

obviously inadequate. USAID cannot contemplate expanding the service much further, and there is no tradition of private local financing of such activities. Fortunately, the Court has an interest in adopting it, but as late as early 1998 lacked the budgetary resources. Merging the defense office into the Dominican judiciary will also mean dealing with the traditional *de officio* defenders who, although plagued by all the usual vices, can hardly be expected to sacrifice their jobs. They will probably have to be given a chance to work as public defenders, but change their practices to meet the offices rules -- full time dedication and truly free services. Through 1997, the two programs operated side by side. USAID-funded defenders claim they are careful not to take the cases of the *de officio* lawyers. The latter still complain about their lower salaries and a loss of clientele (with the additional illegal fees) to the USAID project .

The Haitian project also works through NGOs, but rather than creating its own, used existing organizations operating in nonlegal areas. They were chosen because of their service network outside the national capital. The only pre-existing legal assistance NGOs in Haiti were centered in Port-au-Prince. The strategy required extensive technical assistance to train NGO leaders to manage a legal assistance program and help them recruit lawyers to staff it. The grants also pay salaries and related costs. The approach helped assure the presence of legal services outside the capital, but also produced conflicts with the Port-au-Prince based organizations. As a consequence, one of them was later awarded a generous grant to provide legal assistance in the capital. Although the Ministry of Justice, which contains all the rest of the sector (prisons, police, courts, and prosecution), has expressed interest in establishing its own services, these would have to be totally donor financed. In Haiti, government financing of defense seems impossible over the short to medium run.

A comparable situation holds for the one extraregional example, Cambodia, where USAID financed a small public defenders office as a local NGO. Technical assistance and direction is provided by a US based NGO. Despite having to train its own paralegal defenders (since Cambodia lost most of its professionals during the Khmer Rouge period), the service is excellent, managed by experienced US defenders, and organized on a small scale like the Costa Rican office. It is not the only legal assistance service in the country, but the others are also donor financed NGOs. The Cambodian government, which only pays its judges \$25 a month, is unwilling to assume financial responsibility for a service which pays defenders \$300. Hence USAID's twenty or so defenders and the additional seventy paid by other entities will have to survive on that basis for the foreseeable future. As in the Dominican Republic, it was not difficult to create a good service, but financial sustainability remains a problem. Cambodia also added a problem of political viability, even prior to the 1997 coup.<sup>35</sup> Given the enormous need for such services, donor-supported defenders could make a visible difference by focusing on less politically sensitive cases and issues and adopting a cooperative rather than confrontational stance toward judicial authorities. Choosing to do otherwise would have lessened their impact

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<sup>35</sup>The program survived the Hun Sen coup in mid 1997, although reports on its current activities are not available.

and might have made their work impossible.

In this as in the other two NGO programs, donor financing generated additional conflicts. The various programs competed with each other for staff and faced problems from Cambodia's private bar, an entity also supported by USAID. Although there is more than enough work for its forty or so potential members (the only lawyers in the country), bar leadership had cast its eye on the jobs and salaries of the donor supported paralegals. New legislation curtailing court representation by any but bar approved lawyers appeared to support the association's desire to have the NGO programs and their donor financing pass to its own control. A solution satisfactory to all parties has apparently been reached, but the larger point is that the niche filled by a public defense program often has occupants. The promise of external funding may attract still others. The potential obstacles posed by these vested or would-be vested interests are not great, but if ignored, can undermine or sabotage a program.

As noted a few countries adopted or retained significantly different systems. Peru continues with a mixture of *de officio* defenders and specialized NGOs, most of the latter financed by USAID and other donors. Coverage remains inadequate, and the NGOs continue to emphasize selected cases, often those of a political nature. In the past, this got them into trouble; one of the most successful services (not funded by donors) was *Socorro Popular*, the legal arm of *Sendero Luminoso*, the country's most notorious terrorist group. *Socorro* no longer exists. Several of its most famous defenders have either been jailed or are being sought as suspected terrorists.

In Colombia, the Public Defense Office created by the 1991 Constitution and Criminal Procedures Code, is located under the Human Rights Ombudsman (*Defensor del Pueblo*) within the *Procuraduría General*. The Procuraduría's traditional function is that of monitoring the legality of public sector actions and investigating complaints against individual civil servants. The newly created ombudsman monitors human rights, receives and investigates complaints on abuses, and is also responsible for public education campaigns. The placement of the defense office is unfortunate since it virtually guarantees an inadequate budget, in effect what remains after the higher tiers meet their own needs. Its 470 members are almost all under contract, and because of their low salaries are allowed to take outside paid work. As a result their caseloads are very low; figures for 1995, and 1996 indicate an average of ten cases per defenders annually.<sup>36</sup> Lack of job security, an almost nonexistent internal organization, and the virtual absence of resources for other expenses are additional impediments to better service. However, the biggest problem seems to be that the Human Rights Ombudsman is the real organizational head, and he is too involved in other responsibilities to take institution building to heart.

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<sup>36</sup>This is the figure presented in the office's annual report. The training director for Public Defense gave a higher average of fifty cases per defender. However, he also admitted that many (most?) of these involved the abbreviated process, used for misdemeanors and minor felonies.

## Some Reflections on Quality

Several references have been made to services working well or poorly. The obvious question is what criteria are used to make these assessments. If the question is a little easier to answer for defense than for prosecution or the courts, it nonetheless poses problems, especially as one tries to attach more objective measures or make cross national comparisons. In the latter case, contextual elements pose additional complications. While defense services may be more similar universally than other aspects of criminal justice, their operations are still conditioned by the specific legal tradition, and the actions of other institutions.

The quality of services is measured by a variety of factors. Coverage offered (total cases carried) absolutely and in relation to demand is obviously important, and just as obviously conditioned by the office's size. Hence cases handled per defender is another important measure. The ideal workload will vary by the type of legal system, nature of the cases addressed, and factors like dispersal of populations or courts served. Statistics available from the United States are a useful point of reference, but cannot be taken as an absolute target.<sup>37</sup> Still they do suggest that defenders' caseloads in Latin America are low and have received insufficient attention. Costa Rica's 150- 300 cases annually are on a par with U.S. figures, assuming a mix of major felonies and less serious cases. Colombia's estimated 10 cases annually is far too low no matter what the extenuating circumstances. As the Colombian example also indicates, the type of case is as important as the number. Conceivably instating a minimum caseload without regard to this second factor could encourage defenders to take on less important cases and thus diminish the office's impact.

Where there are great delays in processing cases, a defender's "active" caseload is deceptive, including many which lie dormant for long periods. This may be because defenders don't do their job, or be due to factors completely beyond their control. Where there is no detainee (or where the defender's first task has been to get their client released from pretrial detention), "active cases" may not require or allow much action. Under traditional Latin American systems, a case without a prisoner may never go anywhere, and keeping a client out of pretrial detention was often tantamount to winning it.<sup>38</sup> Some Latin American defense programs keep statistics for habeas corpuses presented (against illegal detention) or other technical motions as well as cases

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<sup>37</sup>Figures vary even within the United States. One set, taken from Washington state indicates the following annual workloads: felony 155; county misdemeanor 450; Seattle misdemeanor 380; juvenile 330. National Legal Aid and Defender Association (NLADA), p. 21. It has also been noted that the new Latin American mixed systems, because they do not include or will take time to adapt to a plea bargaining mechanism, may place a considerably larger burden on defenders, substantially reducing the number of cases they can handle.

<sup>38</sup>Until information systems improve considerably, no one will worry about an unexpunged criminal record.

represented. In curbing due process abuses, the former may be as important as the latter.

Quality thus extends beyond the number or type of cases handled, but here becomes more difficult to evaluate or convey. Cases won or dismissed short of trial is an obvious indicator, but also depends on factors outside the control of defense. For example, in a country like Japan, where prosecutors take only sure things to court, there is little room for defense victories. In Cambodia, because of the idiosyncracies of the system, it has proved difficult to reduce pretrial detention or to get an acquittal. Thus the defense goal is often a guilty charge with a sentence limited to time already served. As noted, in much of Latin America, where pretrial detention is abused but negotiable, the number of pretrial releases attained is a significant measure in and of itself. In short, prevailing practices make such additional indicators of impact context dependent and extremely difficult to compare across systems. The more fundamental issues of quality almost defy cross system comparison -- things like user satisfaction, the skills of defenders, their conformity with ethical and professional norms, or the perceptions of trial judges and prosecutors. These are all relevant, and may be used to track progress in a single system. However, they are hard to convert into more objective measures or to isolate from the system in which they are enmeshed. While context specificity does not make them ideal indicators for external reporting, such judgments are essential to program monitoring by management. From the standpoint of improving performance they are still more critical.

### **Factors Affecting Performance**

Despite the difficulties of deriving objective measures of quality, we have enough of a sense of which services work better to be able to attribute causes. These can be divided into external and internal factors. The former include the office's placement, its autonomy of action, and leadership. The latter relate to procedures and methods of operation.

#### ***Placement***

A good deal of time has been spent arguing over the initial placement of a defense service, either in government or outside, and if in government, where. Much of this focuses on potential conflicts of interest and the risk of their distorting the service's mission. Defenders themselves usually prefer an autonomous organization, whether government or donor financed; beyond this there are various views as to whether they would be better off in the court system, the Public Ministry, or the Ministry of Justice. As the examples indicate, in the abstract these arguments may be pointless. Most of the logical alternatives have their share of successes and failures. Location does matter, but because of details that must be judged on a case by case basis -- for example, the likelihood that the parent organization will interfere in defense operations, provide an inadequate budget, or impose patronage appointments. Such inclinations are not inherent to courts or Public Ministries per se, but rather are a consequence of how specific organizations operate in a given country. Placement within an existing organization that will leave defense alone may be preferable to a free-standing entity which is vulnerable to external pressures and budget cuts. Moreover, where a program starts, may not be where it ends up.

## *Organizational Autonomy*

Perhaps more important than the specific location is ensuring that wherever located, the entity has sufficient funding and autonomy to meet its immediate needs. While a good deal of this is determined by who is in charge at a given time, there is a further consideration. What appeared to be the most ideologically appropriate locations (Colombia's ombudsman's office or El Salvador's Procuraduría) often do not provide these conditions. This is partly because similar missions are harder to separate than divergent ones and partly because they compete for the same resources. In Colombia and El Salvador, the parent organization also saw itself as protecting the poor and monitoring human rights, but prioritized other actions. In El Salvador, at least one Procurador believed defense services conflicted with his organizational mission. An entity which protected the family, women, and children could not defend "rapists and child molesters." In both cases, the fact that the parent organization was notoriously ineffectual and poorly structured also impeded an effective defense service. Conceivably, it is easier to maintain functional autonomy within an institution which never pretended to provide similar services.

Wherever the service is placed, it is important that its leadership have adequate control over its operations, and that political pressures not be allowed to shape defenders' actions or appointments.<sup>39</sup> One further problem in the Dominican Republic has been a certain bifurcation of leadership. There is an in-house project manager, an external advisor (a high ranking Colombian defender who makes period visits), a head defender, and an NGO which runs the project. Given this diffuse leadership, even with a group of only ten defenders it has been difficult to maintain discipline; those who wish to avoid it, campaign with the other decision makers. El Salvador's office has encountered similar problems in that it is the Procurador General and not the head of the defense service who sets overall policy and who exercises most say on personnel policies. Members are well aware their relationship with him, not their on-the-job performance, determines whether they keep their positions. Bolivia made greater progress because it was the head defender, not the USAID project manager or the Minister of Justice, who exercised all authority. Unfortunately, as regards the ministry, the situation may be changing.

## *Leadership*

A defense service is almost exclusively dependent on the quality and performance of its staff, and thus on the ability of leadership to forge both. Having a good leader who understands and values defense can compensate for myriad other problems. This of course is an area where donor control is limited. In El Salvador, some of the obstacles facing USAID's project might have been countered by more effectual and dedicated head defenders. One solution in creating a service has been to give leadership to an external advisor; this is likely to work only in the case

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<sup>39</sup>The judiciary and prosecution are more frequent targets of both kinds of intervention, but defense is not completely immune. In Bolivia, for example, there are signs that political parties are now viewing the 110 staff positions as targets for patronage appointments.

of NGOs. Alternatively, a permanent or visiting advisor who knows defense can guide willing but inexperienced leadership in making the right choices. Observational tours to other countries where the service is more advanced can also be helpful. Little can be done with corrupt, lazy, or incompetent leadership, but in many cases, the more important obstacle is a failure to understand the importance of organization and procedures in making a defense service work.

### ***Internal Organization***

A good service is not just a collection of individual defenders, but rather an organization with a basic if simple structure. For purposes of supervision, training, and building an esprit de corps the ideal seems to be work units with more experienced defenders as supervisors. Individuals handle their own cases, but meet regularly to discuss them, exchange information, and talk about common problems. In some countries (Bolivia, Colombia) this has been combined with more formal seminars to discuss readings or new techniques. If the groups are small enough (10 or 12 at most, 6 to 8 in more problematic systems<sup>40</sup>) the supervisors can carry their own caseload, rather than simply functioning as managers. Supervisors also evaluate defenders' performance and make recommendations as to their retention in the service.

In addition to full-fledged defenders the work unit can also include lawyers in training or paralegal assistants. In Costa Rica, these individuals are a primary source of candidates for permanent positions. Bolivia appears to be evolving a similar arrangement. However, the way in which these "legal assistants" are used is also important. El Salvador has, rather unsuccessfully, included a department composed solely of students doing their practical work. Current thinking is that the students should be assigned to work with individuals or groups of defenders to guarantee them a more productive learning experience and to optimize their contribution to the overall effort. Integrating students directly into the defense service (as opposed to university-run clinics) poses the usual problems of any internship program. It requires oversight, takes defenders' time from their normal work, and can embed bad as well as good habits.

### ***Operating Rules and Standards***

A public defense service is not a complicated operation, but because its members do much of their work independently, it is essential that basic standards and operating rules be clearly set. These include a transparent system for selecting and assigning cases (otherwise a potential source of corruption and abuses), productivity and work guidelines (including a workload minimum), standards of ethical conduct (most importantly rules against fees, conflict of interest, and outside work), and a clear set of criteria for performance evaluations. Whether because of more focused resistance or just force of habit, even many good defense supervisors seem to have problems

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<sup>40</sup>Estimates come from the Costa Rican office and expatriate advisors working in other countries.

thinking in these terms. Getting them to estimate a reasonable caseload is often nearly impossible, but clearly essential to both planning and supervision. Perhaps one solution is to reassure them that the results are referential -- they will never be applied without a consideration of special circumstances. This is another area where direct exposure to other systems can be helpful; sometimes standards are set low because no one imagines more can be done.

### ***Salaries, Recruitment, and Conditions of Employment***

The ideal situation is one where defenders, judges, and prosecutors working at roughly the same level receive the same salary, and where that salary is similar to what the comparable private sector professional makes. Unfortunately, this is rarely the case. In a sector not noted for its generous working conditions, except for oddities like Cambodia, the general rule is for defenders to be still more sorely underpaid. Still, the gravity of the situation is often exaggerated, leading to overly drastic or inappropriate solutions. Cambodia's NGO defense staff are probably overpaid. This alone may be the biggest threat to the sustainability of the effort. Colombia's defenders make roughly the same salary as a lower level judge, but because they are contracted, receive no job security or benefits. Recognizing this, the ombudsman and head of defense tolerate an extraordinarily low case load while lobbying to hire twice as many defenders under the same conditions. The logical and less costly solution would be to pay good defenders the other 50 percent they lose in benefits, give them longer contracts or tenure, and expect them to carry ten times as much work. El Salvador could get by with fewer defenders if it selected carefully and provided better working conditions and salaries. In short, recognizing the limits on public financing, the solution is not more defenders, higher salaries, or job security, but a combination of these elements with a program that stresses higher level performance. It follows that donors should be careful about the precedents they set or the recommendations they make. Poor calculations can lead to unsustainable programs or counterproductive arrangements. A good defense program, one which gives participants experience they can use later in their careers, can compensate for slightly less favorable working conditions.

### ***Support Staff, Infrastructure, and Equipment***

Although it is obvious that these factors affect work quality (and quantity), budgetary constraints have impeded systematic attention to them. It is generally a major victory to get defenders adequate salaries; providing them with adequate working conditions is often impossible. Proposals to give defense offices budgets and facilities comparable to those of the public prosecutors, whether valid or not,<sup>41</sup> are unrealistic for virtually all countries where USAID

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<sup>41</sup>NLADA's argument assumes that if 70% of defendants are indigent, then the defense budget should represent 70% of that for prosecution, plus extra funds for the investigators and experts provided free to prosecution (by the police or other agencies). The argument fails to consider that cases not involving indigent defendants are likely to be complicated, requiring far more effort and resources on the part of prosecution. Also if the burden of proof is on the prosecution,

works.

As with workloads, recommended guidelines for staffing are available from U.S. sources. However, the suggested one secretary for every four attorneys (three for the felony division and five for misdemeanors) are only a dream for most project situations. Even if the staff is available, their own quality is often another problem. Furthermore, U.S. offices rarely face such stark choices as those between a vehicle, a compute, or a secretarial staff. Nevertheless, more consideration could go into how nonsalary funding is used and how the alternatives will affect performance. As for judges and prosecutors, pooled staff is generally more efficient if requiring more managerial skills. Where the office and its location are not a *fait accompli* (because it has been donated, purchased, or is "all that is available") placement and layout are factors to consider. Accessibility to clients and to public transportation for staff who may not have their own vehicles is crucial. While not yet for defenders offices, placement in a lovely old house in a nice section of town is a frequent problem for other services -- judicial schools, some NGOs, etc. It can be as impractical as the other extreme -- a building worthy of being condemned in a section of town where neither the defenders nor many of their clients want to venture. Although these factors only affect productivity at the margins, they are the kind of details which determine whether or not an additional investment will have an impact, and where a small amount of technical assistance can be decisive. This can be just as true when the basic elements --- the building, the staff, or the equipment -- are already there, as the external advise can help maximize their potential and avoid some obvious errors.

### **Lessons Learned on Public Defense and Considerations for the Future**

#### ***Establishing a Defense Service: Starting Small and Starting Right***

Generally, when defense services are proposed, the natural tendency is to strive for maximum coverage as early as possible. Sometimes this is a legal requirement -- Colombia's constitution and judicial organic law seem to mandate a defender for every local court. Currently there is more concern about meeting the requirement ( and so adding 800 more defenders) than raising the productivity of those already in place. Experience suggests the wisdom of starting small, establishing good practices, and then building outwards. El Salvador's defense office which grew rapidly thanks to initial U.S. funding, adopted a series of bad practices which are difficult to eliminate. These range from low caseloads and nonexclusive dedication to the work to charging for services and misuse of equipment.

While some observers have suggested a bad service is better than none at all, reorienting the organizational structure, the work habits, and the skills of over a hundred defenders and their

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or if, as in many Latin American countries, they are expected to investigate both sides of a case, one can argue for their need for more resources. Regardless of the arguments, politics will give the prosecution a higher budget, and defense will have to use its funds still more economically.

leadership is not easy, especially because of the vested interests and expectations allowed to develop. The Bolivian service also began poorly, but this was rectified when the organization was still small. Since then it has successfully expanded. In the case of Bolivia this meant replacing most of the first group of defenders. This was easier because only a dozen individuals were involved. Once an organization has grown, mass replacements are generally not feasible, and members have to be retrained gradually to new practices.

### *Setting the Base*

The three constants in successful defense services are organization, conditions of employment, and leadership. Conditions of employment involve much more than salaries. A mix of these factors can compensate for lower wages. Part of the compensation is provided by organization and leadership. An organization that works with good leadership can attract good people, and over time provide the argument for giving them more resources. Without adequate organization and leadership, good working conditions will provide sporadic service at best. Those who do well will see slackers receive equal rewards and may decide to slack off themselves.

Leadership must be dedicated as well as decisive. Salvador's project continued to suffer from externally weak leaders (the Procuradores), who although they exercised almost autocratic powers within the institution were too beholding to external forces to move the organization ahead, or to replace a weak, but well connected head of defense. The Procuradores never captured the concept of public defense, remaining fixated on the organizational mission and on maintaining harmonious relationships within and outside the organization.

### *Territorial Coverage*

One problem faced throughout much of Latin America is that of dispersed populations and courts, which make it difficult to place defenders where they will be fully occupied and yet still accessible to potential clients, especially in isolated rural areas. Generally, services began in urban centers and gradually spread outward. Making services available to remote populations poses several dilemmas, ranging from cost-effectiveness (i.e. there may not be sufficient work to keep a defender fully occupied) to apparent incompatibilities with such preferred organizational practices as teamwork and effective supervision. They do not lend themselves to easy solutions. In Bolivia, a recent experiment has been the formation of mobile teams, who travel from one rural center to another. This requires transportation, in this case supplied by a grant from the Swiss government, which may make it less feasible elsewhere. As discussed below, at some point alternative services may have to be considered, including a limited use of such traditional and admittedly frequently abused arrangements as the part-time contracting of local counsel.

### *Technical Assistance*

External advisors should be defenders and some should have experience in managing an office. Training and especially field training for the different institutional actors has been most effective

when done by practitioners. There are always exceptions. In El Salvador, an excellent public defender taught some classes to prosecutors. He claimed he felt like a traitor revealing the tools of the trade, but he was effective. Prosecutors can train judges, judges can train defenders, and especially in mixed classes, virtually have to. However, sustained technical assistance requires conveying the mystique, and each profession has a different one.

In setting up a service, management skills are also vital. It is possible to be good prosecutor, defender, or judge and still not be able to manage an office or convey to others how to do it. The two sets of skills are not incompatible, but having one by no means guarantees having the other. In Guatemala this has already proved a problem, as discussed above. All advisors need not be managers, but some of them must be if the program is to succeed.

### *Timing*

Compared to prosecution and the courts, establishing a viable defense service, whether on a pilot or global basis takes relatively little time so long as there is adequate cooperation and financing. The problem is not knowing what needs to be done, but rather overcoming the political and financial obstacles arising in specific cases. The Bolivian project began from scratch in 1991 and by 1995 was operating on a nationwide basis. The Panama project despite some initial setbacks has taken a comparable amount of time to grow to national coverage. The pilot activities in the Dominican Republic, Cambodia, and Haiti were really consolidated in a couple of years, although the first two had a longer germination period, and the latter two remain very fragile. In El Salvador and Honduras, the process has been longer and less satisfactory, in part because of problems in the transfer to national funding and in the case of El Salvador the placement of the organization. Clearly those setting targets must be aware of such potential obstacles.

### **Looking for Alternatives**

As the above examples suggest, however successful the model, it has limitations. Defense is not the most expensive justice service, but it has its costs, and as a subsidized good is subject to abuses. The dream of providing a free defense for anyone who goes to court is not realistic anywhere and certainly not in developing countries with so many more urgent needs. Thus, while some kind of public defense office is necessary, other means must be found to meet the potentially crushing demand for its services.

This is still more true of the expansion of legal assistance into nondefense areas. Some possibilities involve the introduction of mechanisms not requiring a lawyer's services -- alternative dispute resolution or small claims courts where simplified procedures make pro se representation the normal rule. These arrangements also require special training for judges who will have to simplify their approach to make proceedings intelligible to lay participants. Others involve using a network of legal defense programs in which the Public Defense Office is just one element. Costa Rica has not been a good model for this strategy, but it will probably have to explore it as its own court budget begins to run short. Other countries, which already have

multiple services, may explore the connections from the start. A better coordination of services among NGOs, university clinics, and even the private bar may help resolve the problems of territorial coverage and providing access to a greater number of potential clients.

As alternatives are explored, one obvious problem is that of existing inequities in reimbursement and quality of services. Many of the existing services survive by fleecing their clients. Others offer free services of fairly low quality. If the Public Defense Office becomes linked with them, it can expand overall service, but must put additional effort into quality control and policing. This will cause resentment, especially if the public defenders are perceived as the service elite, with higher salaries and the most important cases.

### 3. PROSECUTION

Moving away from defense, the neat institutional strategies quickly disappear. For prosecution, like the courts, USAID projects have developed interesting techniques and methodologies. They fall short of a single approach that can be considered a successful model. A central problem is that prosecution is a new function in Latin America. Thus, no one is yet sure how it should operate either in its investigative or purely prosecutorial role. While Latin Americans speak of a transition to an accusatory system (as in the United States), their new procedural rules are mixed, drawing from a variety of models.<sup>42</sup> It is quite likely that Latin America will have to invent its own solutions, and that external assistance can at most help frame the alternatives while providing some elements essential to all of them.

#### Background

To realize its procedural reforms, Latin America has had to create a new entity -- the public prosecutors office. Most often, this entailed readapting an existing Public Ministry whose former function had been monitoring judicial performance to ensure respect for due process rights and emitting nonbinding opinions on judicial decisions. It usually performed both tasks poorly and in a few countries, had completely disappeared. Under the prior systems, the investigation of crimes and collection of evidence was in the hands of an investigating judge, whose performance was also frequently lackadaisical. Judges did "desk investigations" based on evidence supplied by the police, compiling a case dossier composed of written depositions from witnesses, experts, and the accused. When physical evidence was collected, it was rarely handled adequately; the notion of protecting the chain of custody was almost nonexistent.<sup>43</sup> The police investigation was generally separate and unsupervised, unlike the classic French system where the investigative police report to the investigating judge and follow his instructions. Thus, Latin American countries were faced with the need to improve already inadequate practices while introducing a new entity charged with a different kind of investigation/prosecution in a different relationship with the police and the judiciary.

The transition has not been easy. In many cases, the Public Ministry or Fiscalía assumed the role formerly exercised by the investigating judge, a change of names or organizational position, but not of functions. In some countries, this tendency was reinforced by the transfer of the former investigating judges to the prosecutorial office and by the code's retention of a description of the

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<sup>42</sup>The code reform movement in Latin America and the new criminal procedures codes are discussed in detail in Hammergren, "Code Reform."

<sup>43</sup>Evidence rooms, if they existed, were often little more than closets or basements. Judges often kept evidence in their chambers in unlocked cupboards. In El Salvador, a judge was legally allowed to entrust evidence to a trusted community member. Valuable evidence -- cars and arms -- often ended up being used by a friend of the judge and never appeared if a trial was ever held.

investigation matching what the judges had formerly done. The usual insistence that the prosecutor supervise the police investigation has been interpreted in a variety of ways, none of them yet satisfactory. Even where the *fiscales* (prosecutors) received their own investigative police, the problems are not resolved automatically. At one extreme, the prosecutor has assumed the role of investigator, usurping the police's duties and leaving less time for his own functions. In others, he has become little more than a bureaucratic paper processor, presenting the police findings in court.

The incomplete transformation is aggravated by two other factors. First, even where a Public Ministry existed, its traditional organization was weak. Whatever logic lay behind its structure was more congruent with the inquisitory role. Where "prosecutors" were not expected to do much, there was no need for an organization to support or monitor their work. Budgeting, personnel, procurement, and planning systems were almost nonexistent. Mechanisms for assigning or tracking cases were similarly undeveloped. Often the highest ranking organizational members, assigned to appellate courts, had minimal case loads, and routinely dedicated themselves to other activities. Recruitment was usually highly politicized rather than skills or merit based. There was no mechanism for setting organizational policies, and when leadership intervened in cases, it was most often to favor friends of the government. Organizational poverty was the general rule, and usually more extreme than that of the courts.

Efforts to eliminate these organizational weaknesses were hampered by a second factor -- the fact that no one seemed to know where they are aiming. A mixed system implies something that is not quite the U.S. style adversary and not quite the French impartial investigator of the truth.<sup>44</sup> This has implications for the purpose and method of the investigation and for what the prosecutor will do in court. Many new codes maintain a trial format which looks much like the inquisitorial system -- a single presentation of evidence rather than the two opposing versions of the American trial, the use of court appointed expert witnesses, and the maintenance of the system whereby both expert and lay witnesses are allowed to give their uninterrupted testimony rather than being guided by questions posed by one of the parties.<sup>45</sup> The notion that witnesses belong to the parties who will thus "prepare" them is often rejected. This suggests that the courtroom role for the prosecution, defense, and judge will be different from the U.S. model, and that the wholesale adoption of U.S. trial techniques could be inappropriate.<sup>46</sup> Still, most Latin American

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<sup>44</sup>Those interested in the workings of European systems are referred to Jacob, Fennell, and Fionda.

<sup>45</sup>For a discussion of the different styles of truth finding, see Damaska.

<sup>46</sup>Some U.S. advisors have contested this statement, arguing that the reformed codes are more flexible than appears at first glance. In some countries (Colombia, El Salvador) they seem to be reshaping the initial interpretation, bringing it closer to U.S. practices, which in the end may be more useful than what was first intended.

prosecutors have a long way to go before this becomes a problem. It does suggest that as with defense, the immediate aim should be on basic and thus more universal skills, leaving the advanced courses until it becomes clear whether they will be useful. This means predominately investigation, the development of a case theory, and its presentation in oral arguments in court, coordinated with the use of evidence however presented. It also means as in defense, the development of organizational structures that facilitate the work of individual prosecutors and the development of agencywide policies. However, as elaborated below, the prosecutorial organization is inevitably larger and more complex than that for defense.

Efforts to generalize about work with prosecution are impeded by the fact that each Latin American system seemed to start in a different place. The location, prior functions, and organizational strengths and weaknesses of the Public Ministry varied considerably. In some countries it did not exist. In Panama, a strong, well staffed ministry already dominated the criminal justice system, although its traditional role was not the one now required. Most countries had investigating judges who were sometimes (Colombia) seen as the logical point from which to recruit staff. There were also major differences in the resources made available for the transformation, and in political and institutional leaders' commitment to the process. Thus, despite similar goals, circumstances required they be reached through a number of different paths. The source of technical assistance also shaped the programs, especially as regards their strategic priorities. One approach might stress individual skills, another the work unit, and a third the overall organization. All three elements are necessary, but no program has integrated them successfully. The following examines three examples -- El Salvador, Panama, and Colombia -- each of which emphasizes one approach; explores its strengths and weaknesses; and discusses how the missing elements might be incorporated.

### **El Salvador: Starting from the Top<sup>47</sup>**

In El Salvador, when the USAID project first focused on institutional strengthening of the Fiscalía General (that part of the Public Ministry<sup>48</sup> responsible for prosecution), nothing worked.

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<sup>47</sup>The discussion is based on my own experience as project manager in El Salvador and also benefits from information and interpretations provided by a series of advisors. Aldo Espinosa, Ana Montes, Robert Selk, Luis Chang, and Mark Williams were particularly helpful as were the documents they elaborated for the project. The most recent project evaluation (Mudge, 1996) is the only widely available written source. While I find it overly optimistic about the extent of change, it provides a good overview. Spence et al. (1994, 1995) is also relevant.

<sup>48</sup>In El Salvador, the Public Ministry comprises three separate institutions, the Fiscalía General, the Procuraduría General, and since 1991, the Human Rights Ombudsman. Its creation in 1952 included only the first two entities, but they have always been united only in name.

The entity, which has existed since 1952, had a quasi-prosecutorial function.<sup>49</sup> Its members were supposed to work with the investigating judge and police in collecting evidence on an alleged crime, and on the basis of the judge's case file (*expediente*) were to decide whether to ask for an indictment, and if granted, argue the case for the prosecution in court. In effect, *fiscales* were so remiss in these duties that wealthy private parties with an interest in a criminal case sometimes hired their own private prosecutors. To the extent anyone did any investigation, it was the police, and the key piece of evidence was a confession, often beaten out of the suspect. USAID in early 1983 decided that a part of the problem was the absence of more sophisticated investigation and set up a forensics laboratory and a special investigative unit. The ineffectual use of the former and the highly politicized and often abusive operations of the latter made it apparent that the obstacles were more than merely technical.

As USAID moved into a global attack on impunity and human rights violations, its attention still did not turn to the Fiscalía. The first Judicial Reform Project (JRPI) instead emphasized two other elements: the creation of a civilian police force with its own investigative body, and a legally based judicial reform, intended to modernize the entire criminal justice process. The new Criminal Procedures Code, the key to this second objective, stressed due process guarantees and a shift to a more accusatory system, which would give oversight of the police investigation to the *fiscales*, and enhance their role in the presentation of the case in court. Nonetheless, the institutional strengthening of the Fiscalía would not become an issue until the second Judicial Reform Project (JRPII) was well underway, in mid-1994.

When USAID finally examined the institution, what it found was not encouraging. Apart from a reasonable number of employees, the Fiscalía had none of the characteristics required by its new role, or even for the one it theoretically exercised under existing laws. Sorely underfinanced, its salaries hardly attracted the best candidates, and in fact many of its *fiscales* were not fully accredited lawyers.<sup>50</sup> When the judiciary received a 6 percent budgetary earmark as part of the Peace Accords, the salary gap worsened. Anyone wishing employment in the sector was more likely to seek a position with the courts than with defense (under the Procuraduría General) or prosecution. The Fiscalía's structure was neither intended nor suited to eliciting performance from its already unprepared staff. Appointments, assignments and promotions were almost exclusively on the basis of personal and political ties. There were no career system, requirements

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<sup>49</sup>The organization also had other functions. According to one observer (Tijerino p. 7), of the 47 basic units, only 11 were linked to criminal prosecution. There were special units to protect human rights, the rights of woman and children, and the environment. One office specialized in the collection of unpaid fines and taxes. Since the agency kept a percentage of its collections, this was an important source of additional funding although many observers termed it incompatible with the organizational mission. See Tijerino.

<sup>50</sup>Tijerino (p. 11, fn 3) indicates that only 20 percent were lawyers and cites one *fiscal's* claim that 50 percent of his colleagues could not distinguish between a criminal and civil matter.

for service (aside from the theoretical status as a lawyer), means of evaluation, or any way of determining what employees were doing. Information systems, to determine caseloads, or even locate cases were nonexistent. Budgeting, procurement, and other administrative functions were hopelessly inadequate, although there was an apparent excess of administrative employees whose only function seemed to be collecting their pay checks.

The functional structure, like that of the Procuraduría was based on an antiquated system of *fiscales ascritos* (assigned to individual courts) and *fiscales especiales* (higher ranking *fiscales* who in theory handled more important cases, but in effect often had a ludicrously low caseload). There was no training program. Although *fiscales* did appear at oral hearings, they usually restricted their participation to reading portions of the judge's *expediente*, either to the judge or to juries, or irrelevant, emotional speeches. Political and personal pressures or simple bribes tended to decide the outcome of most cases -- although the judges were the usual targets, *fiscales* also participated in the process. The head of the Fiscalía, the Fiscal General, was a political appointee. Between 1993 and 1996, he was an Arenista<sup>51</sup> lawyer who had specialized in civil (as opposed to criminal) law and thus had little feeling for his organization's primary role.

With so much wrong, it was hardly apparent where to start. The initial strategy was to focus on overall organization, a sort of reengineering of the agency that would eventually evolve down to the operational level. It was complemented by the inclusion of a majority of individual *fiscales* in courses offered in the Judicial School. Here, along with judges and defenders, they received training in the general principles of the new criminal codes and some specialized courses in courtroom skills. ICITAP, which managed police training, also included *fiscales* in its courses at the new Police Academy. During the early years this was not coordinated with USAID. In fact USAID was not consulted nor even informed after the fact as to who had received the courses. Since ICITAP did not follow up with the *fiscales*, there is no way of determining what, if any, impact this additional training had. Over time, USAID placed more attention on field training and follow up, bringing in short term advisors to work with groups of *fiscales* on the job. This allowed more emphasis on skills and on organizing the working unit, as opposed to the institution as a whole. Coordination with ICITAP and other donors working on police investigation also improved. However, coordination between police and *fiscales* continued to be an issue through 1996, and neither ICITAP nor USAID seemed to be addressing it directly. It should be noted that unlike other countries (Panama, Colombia), the investigative police have no formal attachment to the Fiscalía. Lingered debates over whether this situation should be changed (to bring it into conformity with constitutional provisions introduced in 1991<sup>52</sup>)

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<sup>51</sup>ARENA is the government party, representing conservative, status quo interests.

<sup>52</sup>In 1997, it appeared that the constitution would be changed, and the investigative police left as part of the National Civilian Police.

undoubtedly discouraged more coordinated efforts.<sup>53</sup>

Of the countries surveyed here, and in fact of all USAID's Latin American projects, El Salvador attempted the reengineering of the Fiscalía most systematically, using it as the lead element in institutional strengthening. The objective situation both facilitated and required this approach. The Fiscal General, while not fully appreciative of the problems facing his agency, was not adverse to the effort. He may in fact have found it less threatening than a more immediately assertive campaign to start fighting crime. Furthermore, the internal chaos recommended some initial top down changes. Since the organization was small (some 420 fiscales in total) this was also practical. Also, unlike Panama, there was not sufficient organizational decentralization to allow isolated pilot models. However, the preferences of project staff also shaped the choice. The long term advisor for the Fiscalía was a Colombian lawyer with strong planning skills, experience with court reorganizations in his own country, and no background as a *fiscal*. Thus, he worked off his strengths and his own commitment to organizational development. A final factor influencing the selection was the prior creation of a training program which included the *fiscales*. Although the program did not focus on the prosecutorial skills that would have to be developed, changing its orientation or adding a parallel training program would have produced tensions within the project advisory group.

The advisor began with his own informal assessment of the organization's situation and the development of a scheme for its global restructuring. His proposal stressed three features: a flattening of the structural hierarchy to put more professional employees in operational roles and the redeployment of staff into geographic and functional working groups; the reorganization and strengthening of administrative support services both for the organization as a whole and for the work units; and the additional of information systems to track work load and case progress. In the latter, he was aided by another project element providing an automated case tracking and case management systems for the courts. These were adapted for the Fiscalía, generating the first sets of fairly reliable data on the organization's workload.

The initial scheme was relatively simple. In broad outlines (pretty much all that existed) it is not that different from models adopted elsewhere -- replacing much of the former mixture of geographic and special units with four regional centers, each subdivided into groups specializing in types of crimes or functions. Most of the *fiscales especiales* were reassigned to these regional groups and subgroups. For the time being the *fiscales ascritos* were left where they were (assigned to specific courts) and one group of *fiscales especiales* was designated to oversee their actions. The initial scheme also left untouched a few central specialized units -- in drugs and

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<sup>53</sup>However, the Constitution, the Organic Law for the National Civilian Police, and a directive issued by the Presidency on April 21, 1994 clarified that police investigations were to be directed and coordinated by the Fiscalía. Observations and interviews from mid-1995 made it abundantly clear that this virtually never happened. Tijerino, pp 14-15. If USAID was not doing enough to promote the practice, ICITAP tended to resist it.

affairs of interest to the state-- for both political and practical reasons. The four regional groups would each be served by common administrative support services, headed by a unit chief and an office for receiving and assigning cases.

The scheme was organized as a proposal to be presented to the Fiscal General, the upper level leadership, and eventually to the *fiscales* en masse in a series of working sessions and eventually an organizational retreat. Prior to this, the advisor accompanied the Fiscal and his deputy on an observation trip to the United States to help sell them on the idea. The goal was to get the organizational members to adopt some version as their own proposal and thus give the advisor the validation to help them implement it. Much of the documentation for the retreat focused on concepts like organizational mission, participatory planning, the need to adapt to changing circumstances, the importance of structure, procedural standardization, performance indicators, teamwork, and the individual's contribution. It was also accompanied by a short but dramatic set of charts, indicating the distribution of workload by region and type of crime for the 41,209 cases registered in 1995.

The process was lengthy. It took a year to reach consensus on the plan's pilot implementation. During this time the advisor advanced various complementary activities, coordinating with the project MIS advisor to start adapting the court's case tracking system and doing some initial reordering of the central administrative offices. For much of this period, the only work actually done with the individual *fiscales* was through the Judicial School's training program. However, short term advisors brought in for training or to study the proposed legal reforms eventually began to work with groups of *fiscales* as well. Their contribution was so popular that by late 1995 a decision was made to hire another long term advisor (a Costa Rican *fiscal*) to help with the operational aspects of implanting the new scheme. Other short term advisors were contracted to work on operational details and to assist the newly formed pilot unit in San Salvador (which handles about 38 percent of the criminal cases).

By 1996, several other elements were falling into place. A new Fiscal General took more interest in the program and helped push it forward. Coordination with ICITAP improved, both in general training and in assistance to the specialized work groups. A new long term training advisor introduced new methodologies, and especially an emphasis on profiling judicial actors. Whether or not this improved the quality of training, it was an asset to the institutional reengineering. An IDB loan promised additional funding for expanding the management information system and the purchase of computers. Finally, although the pilot project centered in San Salvador, an external evaluation in late 1996<sup>54</sup> indicated that the new schemes were working even better in other regions. The evaluators' hypothesis, paralleling findings in other countries, was that the lower workload and distance from the politicized center provided distinct advantages.

Nonetheless, and despite the glowing reports of the external evaluators, significant problems

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<sup>54</sup>Mudge et al. (1996).

remained. The Fiscalía's budget and thus salaries remain low. The program has to work with existing staff, many of whom still lack the minimum skills and orientations required for their duties. At least until 1996, corruption remained a problem and, observers indicate, was a factor in such basic decisions as the distribution of cases. Problems within the National Civilian Police, while of independent origin, impeded efforts to improve the *fiscales'* work. The delayed passage of the new Criminal Procedures Code (which will now enter effect in 1998) exacerbated confusion about respective roles; the new code will resolve many of these, but will also require a higher level of performance from the institution. Skills training is a persisting concern. The Judicial School program is too general, but even for 400 plus *fiscales*, on-site training will be sporadic at best. The external evaluators suggested that the number of *fiscales* remains inadequate,<sup>55</sup> although low productivity further decreases their effectiveness. The new code and other legislation (the Juvenile Offenders Law) require *fiscales* to provide additional services -- conciliation, evaluation of minors -- which will necessitate specialized training or staff. In short, now that the basic legal and organizational outlines have been established, among the next steps are a reappraisal of what is possible as well as desirable and some further modifications to adjust the legal requirements to social priorities and possibilities.

### **Panama: Working from the Bottom Up<sup>56</sup>**

In several other countries (Panama, Guatemala,<sup>57</sup> Haiti,<sup>58</sup> Bolivia<sup>59</sup>), the change strategy has focused on reengineering the work unit's operations rather than taking on the institution as a whole. The choice was influenced by certain contextual circumstances (most notably weak or

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<sup>55</sup>Mudge et al, p. 72.

<sup>56</sup>Information on Panama is based on an observational trip made in mid-1996 and subsequent interviews, in Guatemala, with the former long term advisor, Tim Cornish. I am also indebted to Samuel Chacón, currently Inspector General for the Investigative Police, and Aura Feraud, the former USAID project manager both of whom provided insights and arranged interviews with other knowledgeable Panamanians.

<sup>57</sup>Findings here come from an observational trip made in 1996. Tim Cornish, now COP for the Guatemala project, Steve Urist, Ana Montes, Brian Treacy, and Beth Hogan were particularly helpful informants. I also relied on an earlier evaluation of the Public Ministry (R. Smith) and an advance copy of an IDB report (Montes).

<sup>58</sup>Information is drawn from a series of trips to Haiti, beginning in late 1995, and my involvement in discussions and project design activities in Washington. By now there is a wealth of information on the Haitian justice system in general and the prosecutors in particular.

<sup>59</sup>Observations are based on a visit in October 1996 and interviews with project staff and members of the Fiscalía and investigative police. I am grateful to Carl Cira, Gerardo Villalobos, Olga Larrain for arranging the latter.

uncooperative organizational leadership, greater internal autonomy, or simply a lack of central control, and in the case of Panama, an institutional structure that was less chaotic if no better suited to its new tasks). It also was a function of the type of assistance provided. In all four cases, the principal advisors were experienced prosecutors who felt more comfortable dealing directly with the field operatives. Although the strategy has been implemented with varying degrees of success, in at least the first three countries, where it has gone farthest, the implicit organizational model was not that different from that attempted in El Salvador. The difference was the style of implantation -- from the bottom up -- and the consequent lack of attention to system-wide services. (Presumably, the latter will still have to be addressed, and except for Bolivia, there are already moves in that direction.) Here the approach featured the creation or strengthening of field offices, but with a similar emphasis on team building, common services within work units, the introduction of basic standardized procedures, and participatory problem solving. Because it dealt directly with the operative level it could also emphasize (as the El Salvador model would not in its first stages) coordination with other officials (most notably the police, but also investigating or local judges, defenders and trial judges) It combined reorganization with direct skill training and a more immediate emphasis on results in the form of cases investigated and taken to trial.

The strategy is to implant the model first and after proving it, move outward -- unlike the El Salvador approach which first sought systemwide consensus on the model and then its gradual implantation. Which method is more likely to bring institutionwide change rapidly and effectively is unclear. Panama, the most advanced case, began roughly at the same time as El Salvador and now has covered three of the four judicial districts, but left the biggest and the most difficult till the end. It benefitted from advantages possessed by none of the other countries -- a stronger organization at the start, better prepared personnel, and its own investigative police force, which legally if not always in practice, was supposed to work for the *fiscales*. However, support from higher leadership was initially absent, and the project operated with an extremely low profile, tolerated but not supported, for much of its existence.

Although the Panama AOJ project began in 1990, work with the Fiscalía really did not get under way until 1994. Earlier efforts focused on the courts and public defense. Tensions within the technical assistance team, the court's declining interest in some aspects of the project, and the preferences of one long term advisor, a former U.S. state and federal prosecutor with field experience in Mexico, dictated the shift. It also benefitted from the seconding of the long term training advisor from the judicial school to the prosecutorial element. The judicial school, which also trains *fiscales*, has like that of El Salvador featured a fairly general program. It did not benefit from wider institutional support, even from the Court. The Public Ministry is currently considering its own complementary program to enrich the training with a more specific skills element. The overall assistance to the Public Ministry also benefited from a case tracking system, originally designed for the courts, but never adequately adopted there.

The goal in Panama was far more specific than in the other countries -- to integrate the police and prosecutorial efforts for the more effective investigation of crimes. In Panama, despite the

greater powers and stronger organization of the Public Ministry, the police had operated independently. Human or legal rights were not their concern, and as several participants noted, the *fiscales* had been little more than the police's secretaries, signing off on the charge sheet but never doing their own investigation. Another characterization, suggesting some additional problems, holds that the *fiscales* were never investigators but merely "critics of the investigation." In other words, when they did their jobs they were perceived as obstacles, not partners, clients, or mentors of the police. As abusive as the police might have been in their investigations it is generally conceded that they were more technically oriented than comparable bodies elsewhere in the region. Their forensics laboratory was fully utilized and if they developed their investigation with little concern for human rights, they still had some idea of what they were doing. In short, as opposed to Haiti, Guatemala, Bolivia, or El Salvador, the project worked with better developed human resources, who needed reorientation more than rudimentary training. There was and still is room for much of the latter, which on the police side is seen to by a large ICITAP project (as in El Salvador, it is not just training police but creating a civilian police force). Despite some tension between the ICITAP leadership and the Public Ministry, the level of cooperation in the two efforts has been high. A former *fiscal* and early participant in the Public Ministry activities was named Inspector General of the Investigative Police in 1996. He sees much of his role as furthering the goals of the integration project.

As in El Salvador, the Panama advisor began with meetings with his target group, this time representatives of the police and Fiscalía in one judicial district. Given his practical experience, he clearly had an idea of what was to evolve, but rather than presenting a reengineering proposal, began with sessions to look at problems in police and prosecutorial coordination. The early meetings were reportedly conflictual as each group aired its complaints about the other. However, out of this and over time came a series of suggestions and proposals for more productive working relations, guided by the laws defining the roles of the two sets of actors. The emphasis was more concrete and problem oriented than in El Salvador, and the solutions were often equally mundane -- reminders to police about human rights guarantees, mutual decisions on how complaints would be handled, when *fiscales* would be called, what each group could expect and ask of the others. Attention focused on handling of evidence, the development and proper use of standardized forms, and, with the help of ICITAP, the technical aspects of evidence collection or how to treat a crime scene. The participants developed their own manual, really a collection of essays on investigation, development of a case, and criminal law. It was published by ICITAP. Early discussions were supplemented with courses, some taught by participants, and eventually an observational trip to Mexico. Once the initial group completed the exercise, they worked with other units in the same judicial district and eventually in the two other districts outside Panama City. It should be stressed that the leaders of both the Public Ministry as a whole and the Investigative Police were not supportive at first. In the case of the police this brought the unannounced transfer of some of the more dedicated participants out of the district.

As in El Salvador, the outlying regions were easier to deal with than the center. It is only now that the USAID project has ended that the Public Ministry is carrying the effort to the capital. Here they have been aided by the support offered by the new head of the Public Ministry,

legislation tightening the ministry's control over the police, their past successes (and the transfer of some key personnel to the capital), and the adoption of the program by the Fiscal Especial for Drug Matters, a separate official in Panama City with nationwide authority. The larger number of actors and the more complex, and bureaucratized organization in the capital will, as the participants admit, complicate adoption there. However, much like the preliminary consensus building in El Salvador, the success and enthusiasm they have generated elsewhere seems to be paving the way. Local participants have also introduced innovations in the capital. One of these is a special police center for receiving criminal complaints and treating victims. Another is the placement of duty *fiscales* in the investigative police headquarters.

To the extent it has captured the hearts and minds of participants and involved their energies in better handling of the investigative elements of the case (and greater respect for due process rights), the Panama experience has been a resounding success. With new leadership in the Public Ministry, its effects have penetrated upwards, inspiring a more proactive approach to institutional development. It appears to have had similar, if less dramatic effects on the ministry's investigative police. Whether there have been comparable effects on the *fiscales'* courtroom performance or the handling of criminal justice as a whole, is harder to say, and partly conditioned by a judiciary with a less dynamic approach to its own reform. Conceivably, the newly proactive prosecution and defense may encourage or shame the courts into addressing complaints about criminal justice, both as it effects human rights and crime control.

The bottom-up approach is not unique to Panama. Hardly surprisingly, the transfer of the long term advisor to Guatemala has reoriented the USAID project there to a Panama-like strategy. Guatemala poses additional obstacles: an independent<sup>60</sup> and still unreformed investigative police, a far weaker and less rationally organized Public Ministry, and a generally lower level of preparation on the part of ministry staff. Guatemala also has a larger territory and population and is emerging from years of civil war, with a more corrupt and tradition-bound justice sector. It is likely that the advisor will be successful in the *centros de enfoque* (as the pilot units are now called). It remains to be seen whether this will leverage overall organizational change. Once progress has been made with the pilot units, Guatemala might use an injection of El Salvador's reengineering strategy to fortify its bottom-up approach. It will have to deal with the strictly administrative and organizational problems of the ministry, and with the greater problems posed by the police. Here as with the courts and the defense, any solution depends on effective coordination with other donors, several of whom have begun far larger projects in the sector.

In Bolivia, efforts to encourage this approach fell flat on their face, largely because the technical advisor never fully adopted them. Although a noncooperative Fiscal General was also a factor, it appears that Bolivia's more decentralized justice system offers a particularly propitious setting for the strategy. Decentralization in fact is frequently a target of complaints; observers comment

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<sup>60</sup>Actually it has traditionally been dependent on the military, perhaps even worse than pure independence.

that district *fiscales* operate in their own fiefdoms and are more responsive to local political forces and conditions than to the center. This is a source of considerable corruption, but by choosing their sites well, reformers might introduce some interesting pilot activities. However, the general weakness of the overall institution will also have to be attended if the pilots are to survive, let alone be replicated.

In Haiti, the utter lack of institutional structure for the prosecution (which has no upper-level leadership except the Minister of Justice and thus relies on the fifteen *commissaires* or prosecutors who head each regional office) has in effect forced its adoption. However, without an organizational home (except the ministry which also controls courts, prisons and police), it will be hard to hold the model together, even if it is replicated in all fifteen districts. While hardly providing a test of the hypothesis, the three additional cases suggest that a weak parent organization requires attention earlier rather than later if a bottom up approach is to have a lasting impact. Certain aspects of the prosecution's broader role (discussed below) also make this more critical.

### **Colombia: the Mass-Based Strategy<sup>61</sup>**

In some sense the Colombian approach is another variation on the field unit strategy. However, in Colombia the latter came later and less intensively. Instead, USAID's Colombian project (implemented by the US Department of Justice's OPDAT) began with a mass training program aimed at indoctrinating all *fiscales* (and the three bodies of investigative police, only one of which belongs to the Fiscalía General) in their roles in the new organization and under the new Criminal Procedures Code. The training program occupied the full-time services of sixty *fiscales*, and part-time dedication of 2,000 others in a year-long series of short courses on aspects of the new accusatory system. A second phase of training, begun in 1997, targets the remaining 1,500 local *fiscales*, the lower level prosecutors.

The training's content is not unlike that given in other legal reform programs. It was intended to familiarize participants with the basic elements of the accusatory system as defined in Colombian law, introduce basic skills and techniques, and stress the new duties and responsibilities for each set of actors (police, judges, prosecutors, and defense). It used a highly efficient multi-tier approach -- the first group of trainers attended the initial week-long courses (taught by both local and international experts), used the materials provided to teach a another 400 *fiscales* in their

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<sup>61</sup>Information comes from two field trips to Colombia, in October of 1996 and April of 1997. Lars Klassen, the USAID representative, and Magda Rocío Moreno and Maria Eugenia Valenzuela set up interviews with members of the Fiscalía and the OPDAT staff and provided project documents. Because the Colombian Fiscalía is a very controversial entity there is a wealth of published information, most of it in Spanish, available. Gómez, Herrán, Fernández León, and Colombia, Comisión are examples. I am also indebted to the FES staff, and private individuals Aldo Espinosa, Fernando Alvarez, and Jaime Giraldo for providing information.

own offices, who in turn gave the course to still a third group. As discussed in the paper on training,<sup>62</sup> the method was notable for its ability to reach so many participants. There are doubts as to the quality of the content and participation, especially by the time it reached the last tier.

Originally intended to end here, the program evolved a second stage in which certain field offices were designated as "special units," given a second short course on new operational principles (teamwork, cooperation between police and prosecutors, results orientation, and debureaucratization) and skills, and charged with putting them into action. Unlike the "classic" field unit strategy, this was not accompanied by any further intensive technical assistance or by the systematic development of new procedures and routines. Offices were in essence left on their own to innovate, and some of the initial ten did so quite admirably. The Fiscalía's concern that neither the training nor the special units had been adequately evaluated and organizational conflicts with the principal advisor temporarily halted the expansion of the units. Further replication seems likely but with a more systematic approach. Each field unit had evolved its own way of accommodating to the new rules and principles. Without some attempt at consolidation, the variations might proliferate endlessly, an outcome which could be disastrous.

Colombia's Fiscalía, created in 1992, suffers from an inadequate if complex organizational structure which will have to be reformed.<sup>63</sup> When it emerged "overnight" as the Colombians like to say, it already had 10,000 employees drawn from a number of existing entities which were merged to form the new body. It currently numbers almost 23,000, of whom 3,600 are *fiscales* and another 2,000 investigative police<sup>64</sup>. It also is supposed to coordinate the activities of 6,000 more investigators from two independent police bodies and the investigative work of other organizations (including the military) which may be drawn into criminal cases. While Colombian professional and administrative staff are generally better prepared than those in the other cases reviewed here, all of those in the Fiscalía are either new employees or had formerly worked in other organizations with different operating systems and principles. Since the first two *Fiscales Generales*, whatever their other talents, are widely recognized as not being good administrators or managers, the organization got off to a bad start in both areas. Alfonso Valdivieso, the second Fiscal, best known for his pursuit of the famous Case 8000 (involving drug traffickers' contributions to national political campaigns), has been criticized for his focus

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<sup>62</sup>Hammergren, "Judicial Training and Judicial Reform."

<sup>63</sup>For a further discussion see Hammergren, *The Politics of Justice and Justice Reform in Latin America*, Chapter 8.

<sup>64</sup>Colombia's current population of about thirty million is thus roughly six times that of El Salvador. It has about nine times as many *fiscales* with an even higher ratio of support staff to prosecutors. Its proportion of *fiscales* to defenders is almost ten to one as opposed to less than three to one in El Salvador. Aside from the obviously inadequate number of Colombian defenders, the comparison illustrates the variations in the regional situations.

on high profile cases to the detriment of the Fiscalía's efforts against the mass of common crime.

On a purely tactical level the OPDAT program made a serious error. Having received the go-ahead from Valdivieso, it circumvented middle management above the field level. This generated conflicts with the OPDAT advisor, placing the entire effort in question. The omission was more a result of personal style than the dictates of the approach itself. Aside from illustrating the critical role of personal relationships, it also suggests the importance of inserting the change program into the organizational structure and achieving ownership at various levels. Organizational development must be more than a mass movement, especially if its leader is an outsider. In Colombia, the program's initial success with the younger *fiscales*, became a threat to mid-level leaders who saw their own power and authority being undercut. Once the Fiscal General left office to initiate his own political campaign, they moved in to reassert their control.

A second problem is that an IDB project, intended to address the larger organizational issues, has been slow in getting off the ground. To the extent it is operative, it remains insufficiently coordinated with the USAID/OPDAT project. In an entity the size of Colombia's Fiscalía, macro-organization is critical. To work at the base without strengthening administrative and policy structures is virtually to guarantee frustration and conflict. Innovative field operations no matter how enthusiastically pursued will not survive without the support of macro-systemic input --whether in terms of equipment and supplies or personnel and incentive systems which recognize their achievements. Whether an earlier entrance of the IDB activities would have supported the OPDAT efforts is another issue, but without attention to these problems, it seems dubious the special units will have much lasting impact. This is not to discount the importance of what has been accomplished in Colombia, but simply to suggest that capitalizing on its impact requires a comprehensive strategy. Organizational change can be accelerated by new ideologies and perspectives, but if these are not linked to structures their effect will be ephemeral. Both the mass training and the special units have made a difference in how individuals approach their work. They have generated procedural and operational innovations which merit replication. However, to preserve these accomplishments and extend their impact, the strategy will have to work at other levels and contemplate other kinds of organizational change. Reform can begin at the bottom, but it requires a global and top-down perspective as well.

### **Quality of Performance**

The implicit discussion of quality has focused on the intervention not the impact on organizational performance. This is inevitable because none of the examples has gone far enough to allow conclusions on the latter. Still, the experience does permit some general comments about the longer term goal and the likelihood of reaching it.

First, despite arguments<sup>65</sup> that defense and prosecution should be treated, and perhaps evaluated,

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<sup>65</sup>These of course come from the defenders. See NLADA.

comparably, we are dealing with two different institutional situations. Unlike defense, the Fiscalía's function must be assessed as more than the sum of its parts. Defenders and prosecutors both deal with individual cases and their collective performance is partly cumulative. Prosecution also has a global function of crime control or social protection for which there is no defense counterpart.<sup>66</sup> In assessing its performance, the public is more likely to speak of how it does against crime, and thus of overall organizational policy and impact. Put another way, evaluations of defense most often concentrate on what the defenders have done (i.e. how many cases have received service) -- those of prosecution are more likely to emphasize the larger task, and thus what they have not accomplished (both who "got off" and the presumed impact on the incidence of crime).

Second, prosecution is not partial or incremental. In establishing a service, the goal is immediately systemwide -- one cannot start as in the Dominican defense project with a handful of prosecutors, get the system right, and then expand. Pilot projects can be mounted, but they will always exist within a global context. Third, except in those unfortunately increasing cases of systemwide collapse, prosecution already exists, and thus the intervention must work on improving what is there, not creating something new. Fourth, in an accusatory process, the prosecution is the element with most control over how the entire system works. Prosecutors determine what crimes will receive attention, who will be taken to trial and on what charges, and how rapidly cases will move. Defense and the judiciary have an influence, but even their ability to exercise it depends on the prosecution. Finally, prosecution is always political -- often in the sense of being politicized, but always in the sense of setting policy. How it operates is thus of far more importance to national political leaders. In short, quality is a more complex concept in the context of prosecution and is measured in a variety of ways and at a variety of levels.

At the purely operational level, quality is comparable to defense<sup>67</sup> -- the number of cases handled (individually and by the entire organization, absolutely and relative to total complaints made), those completed within a reasonable amount of time, or within the official deadlines, the number of convictions, the rate of convictions over investigations or indictments filed, motions or appeals won by the defense for prosecutors' mishandling of investigations or noncompliance with due process rules. More qualitative assessments are also possible -- types and use of

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<sup>66</sup>One reader suggested that defense's role in protecting due process rights is indeed comparable, but to my knowledge, evaluations of its performance never focus on this global impact.

<sup>67</sup>It also is subject to some of the same caveats. Procedural and other legal-cultural details affect estimates as to a reasonable workload, or what kind of actions or motions can be used as indicators. The amount of prosecutorial discretion allowed and the types of complaints made are also important. Finally, while prosecutors may be more decisive in moving cases into and through the system, an inefficient judiciary will obviously affect time to judgment, as will a numerically or qualitatively inadequate defense service.

evidence, skills in putting a case together, quality of oral arguments, or external assessments of prosecutors' abilities as compared to defense, judges, or professionals in private practice.

However, because prosecutors exercise control, individually and organizationally, over what they will handle, patterns of activity and, fairly or not, their actions compared with the universe of possibilities are also important. Do prosecutors predominantly handle one type of client or one type of suspect, neglecting others? The common pattern in Latin America, despite the "principle of legality" (i.e. every reported crime must be pursued)<sup>68</sup> is an emphasis on small crimes and predominantly lower class defendants -- many of whom, it is charged, are selected almost arbitrarily. If the dispossessed, many of whom may be innocent, are those who are jailed and convicted, while the powerful enjoy impunity, a high conviction rate is a negative trend. What percentage of the crimes committed or even reported are actually investigated and taken to court? Are these the "most important" or just the easy ones? While cumulative patterns are important, it is also critical to know whether there are institutional policies and guidelines shaping them, and to what extent they are enforced. Finally, to the extent they exist, the policies and the patterns must be judged against objective conditions and public perceptions. No one really expects prosecutors to eliminate crime, but for every pattern of criminal activities, there are better and worse strategic responses.

None of the projects reviewed has gone far enough to make a dent in any of these indices except at the most basic level. The larger point is that for prosecution as opposed to defense, the objectives are more complex as are the means for assessing progress. Similarly the gap between intervention and impact is much greater -- teaching prosecutors new laws and some skills, even organizing them more rationally may begin to affect such basic variables as time to complete an investigation, percentage of complaints attended and either dismissed or carried to trial, or even convictions as a percentage of indictments. However, an improved prosecutorial agency is responsible for much more and is as much a function of its organizational capacities as of the abilities of its individual members. Thus, a "mass approach" as attempted in Colombia is still an incomplete strategy because of its failure to encompass the organizational level. The other examples and approaches fall short as well, but come closer to subsuming an entire strategy for institutional strengthening.

#### **Factors Affecting Performance:**

As these preliminary comments make clear, the factors affecting performance are complex. The

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<sup>68</sup>In Europe and increasingly in Latin America there is a tendency to replace this with the principle of opportunity or expediency giving the prosecutor the discretion to dismiss some crimes, or bargain them out of the system, because they are less socially important than others. This is very controversial since its use can clearly be abused, but it is also seen as the only way for prosecutors to handle a burgeoning crime rate. Hence, where it has been adopted, another question is how well it is used and to what end.

political nature of prosecution and the debates as to what it can and should do also complicate matters. Defense may look similar in a variety of regimes and legal traditions, but the broader role of prosecution is subject to varying interpretations as is the nature of good performance

### ***Organizational Placement and Autonomy***

Traditionally in Latin America prosecution (either as a separate entity or the investigating judge) has been part of the judicial branch. The current trend is a more autonomous placement. This is as much for political reasons as for questions of efficacy. Obviously prosecution can be a potent weapon for the executive. Even where it cedes control, the executive may be unwilling to let it rest with some other branch of government. Thus, while placement may affect performance, it will probably be given. None of the projects has affected or attempted to affect it. What is important is that the organization have sufficient real autonomy to operate and thus utilize assistance. This is less a question of formal location and legislation than of informal political understandings and practices. Where autonomy is in doubt, this not only affects project success but also puts a donor in the difficult position of helping to pursue dubious political ends. As certain aspects of the prosecutor's role will be more politically sensitive or subject to political control, one solution, as in El Salvador, is to work with what is not (in this case, common crime as opposed to corruption). This strategy attempts to create autonomy from within, by fostering professional attitudes and practices and identifications with the institution.

### ***Internal Organization***

The key to successful prosecution like that to defense is an organization which stresses the field unit and facilitates its operations. This runs counter to the traditional tendency to create hierarchies with many layers of middle management. The intervening layers reduce the percentage of human resources devoted to doing the job and impede upward and downward flows of information -- to set policy and help monitor compliance with it. Prosecution, because of its more complex tasks (and almost inevitably greater size) than defense, requires a more complex internal structure, but this must be functional.

Despite their different starting points, contextual obstacles and assets, and implementation strategies, the various experiences demonstrate considerable similarity in the overall structure they attempted for the prosecutorial agency. As with defense, the goal has been the establishment or strengthening of decentralized functional units where groups of *fiscales* work under a unit supervisor to attend to the majority of criminal cases in their geographic jurisdiction. Although the district or regional office may be further disaggregated into specialized teams working on specific crimes, or a lower level of more localized units or individual prosecutors, the tendency has been to discard the traditional preference for assigning a single prosecutor to each trial court or more complicated systems of overlapping national and regional jurisdictions. Along with this has come an emphasis on common support services, and a single system for entering or registering complaints. In Panama and Colombia, the structure already existed; in Guatemala and El Salvador it has to be introduced. In Haiti, if one counts the investigating judge

and *juge de paix* (justice of the peace) as part of the unit, it is being reinforced.

### ***Leadership***

If external donors have little influence on leadership for defense, they have still less on prosecution because of its political nature. However, prosecution is also more likely to have a bifurcated leadership. For the purposes of effective assistance, the maximum leader, the organization's face to the outside world, is less important than the secondary leadership -- that which runs the organization. Obviously, a leader who is distracted by other problems (Haiti, Colombia) or not interested in change (El Salvador and Guatemala until recently) is not an asset, but nowhere near as great an obstacle as one who simply opposes it (Panama until recently). However, apparently successful programs have been initiated under all these circumstances. For prosecution as opposed to defense, the challenges and the opportunities lie in the need to work at various levels and the critical role played by a different set of actors who manage downward and oversee the organization's day-to-day operations. These are the ones who at some point must be won over if the intervention is to move beyond its initial point of entry (whether at the top or the bottom of the organization).

Assistance projects can rarely select these internal managers, but they often have a choice among those already there. Selecting internal allies is a delicate, highly political task. It is less risky to build a broad alliance even if it includes members whose dedication is less than guaranteed. Working only with the converted is always more comfortable and may allow faster initial progress. Projects which do this inevitably create enemies who can, as in Colombia, pick their moment to stage effective rebellions. Because technical advisors often do not have these political skills, or if they do, lack the time to exercise them, other members of the assistance team or the donor project manager may have to do much of this work. Coordination is still more essential here. Where those working with the different organizational levels do not themselves share a common technical and political vision and do not meet frequently to iron out their own differences, they may aggravate incipient conflicts and undercut each others efforts.

### ***Coordination with other Agencies***

Whether prosecution has its own investigators or depends on a separate investigative police, coordination with this group is essential. As suggested by the Panama example, prosecution's formal ownership of its investigative police is no guarantee that both groups will work together nor even that the police will respect the prosecutors' lead. Resistance may originate on either side -- in Colombia, the more frequent pattern is for the prosecutors to lord it over the police, thus complicating their own work and discouraging cooperation. While it is often easier to build good relationships in the field, this requires intensive efforts on the part of local and foreign advisors. It appears necessary even when the relations at the higher levels are less problematic. Coordination with judges and defense is trickier. The tendency to speak of teamwork may be misleading. In a more accusatory system and even in an inquisitorial one, a certain separation of roles and functions is essential. The "team" works together through a common understanding of

their respective roles and responsibilities. This can be reached through some common exercises, but it also requires separate programs for each component. However where one component is not in sync, none of them can function adequately.

A word is needed on a more traditional form of coordination, effected through the system of *ascritos*, prosecutors and defenders assigned to a single courtroom where they handle all cases (but often don't follow them on appeal). The pattern may be hard to break; judges often don't like to see new faces in their courtroom, and to the extent there is a "team," want to be its leader. Most observers find the practice unsatisfactory and an open invitation to corruption. The preferred alternative has been to create larger work units, if necessary serving several courts (and allowing a single prosecutor or defender to follow a case through all levels).

### ***Operating Rules and Standards***

Because the prosecutors' actions are so central to shaping the entire criminal justice process, rules and standards are also more complex. An individual prosecutor must know how to investigate and prosecute a case, but he/she must also know which cases to pursue. Thus, while individual workloads and standards must be set and applied, organizational ones are equally critical and if set incrementally, should nonetheless be addressed early. Where work begins from the bottom up, they may first be discussed with the local unit, but will have to be coordinated or negotiated with the upper policy levels as soon as possible. This is especially important when prosecutorial discretion (an ability to select which cases to pursue or ignore) becomes a legal fact, and in situations where the demand, or backlog, is so enormous as to require setting priorities in handling it.

### ***Salaries and Terms of Employment***

Prosecutors, like judges and defenders, need adequate salaries and a career system which encourages the right practices. While their institution is hierarchical and thus subjects individual prosecutors to organizational policies and the orders of their superiors, they must also be protected from arbitrary interventions and decisions. This is important from the standpoint of maximizing individual and institutional performance. Established, transparent personnel policies, a code of professional ethics, and some security of tenure (if not permanent than at least fixed terms with intra-term dismissal or transfer only for cause) are vital. Prosecutors also must have a means of protesting arbitrary actions by upper level officials, especially when these affect their management of a specific case. In Latin America, the most advanced countries are only beginning to consider these additional requirements and so far there are no success stories.

## ***Budgets, Staffing, Infrastructure, and Equipment***

Where prosecution is a new institution, these are often inadequate, although almost never as bad as for defense. Here too the larger problem is the use of what resources are available. Since legislatures and executives are generally more willing to increase the budgets of efficient prosecutorial agencies, effective use and strong budgeting offices are an asset in making the case for higher allocations. As in the case of defense, it may be useful to contract specialized short term external assistance to review all these elements and develop proposals for improvements. Otherwise such details are likely to be overlooked by advisors, who in their enthusiasm about producing concrete results may even add to the problem.

### **Lessons Learned**

1. Where one begins working with a complex organization is determined by local conditions. Effective interventions can begin from the bottom up or the top down, but must eventually incorporate both levels if they are to be successful.
2. In terms of internal operations, all approaches coincide in emphasizing closer cooperation between police investigators and prosecutors, debureaucratization (i.e. getting the prosecutors out of the office and into the field), more effective use of administrative staff, and where possible use of pools of support staff, rationalization and systematization of intake procedures including case assignments, and introduction of case tracking and management systems whether manual and rudimentary (Haiti) or automated and relatively sophisticated (Panama). Judging by early impact, and what functional organizations do elsewhere, the emphasis appears to be correct.
3. A focus on the work unit provides the most visible impact on performance, but it is of necessity localized. It is complemented by attention to overall institutional restructuring or mass-based training programs. Both of the latter are vital to replication and sustainability of what are essentially pilot field efforts. They are most vital in countries with a large number of field units and/or a very weak parent agency. However, with the exception of Panama and its unique circumstances, none of the other programs has gone far enough to indicate the optimal timing and most effective means for addressing these other elements. .
4. Strategies for improving coordination with the police vary widely (as they do in the United States and Europe). Although both Panama and Colombia have their own investigative police,<sup>69</sup> only the latter has established permanent police-investigator teams. Panama seems to be getting as positive results with coordination between field *offices*. In the other countries where the

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<sup>69</sup>Although no Latin American project has introduced non police investigators for prosecutors, this has been suggested as a way of easing coordination with the police. Such investigators do not replace police investigation, but can complement it and should be more responsive to prosecutorial direction.

police are not a part of the Public Ministry, coordination has advanced less far. Potential problems with the team approach are that it may make the police too dependent on prosecutorial direction, undermine the chain of command, and deemphasize routine activities the police can and should carry out on their own..

5. The more complex pre-existing and recommended organization for the Public Ministry, the dual nature of the prosecutors role (investigation and prosecution), its greater political sensitivity, and the need for coordination with the police make the institutional strengthening process harder to conceptualize and implement. While the change strategy can utilize pilot projects, unlike defense, the ministry cannot be implemented as a pilot. It either already has, or must be introduced with national coverage from the start. This usually means that it is born flawed and that institutional strengthening will necessarily require reorientation and reinvention.

6. Public Ministries nonetheless have proved more receptive to external assistance than have many courts. As opposed to defense, they are more likely to get favorable budgetary treatment from cooperating governments. If a donor can find a satisfactory strategy, they may represent the most cost-effective means of leveraging broader change in an entire criminal justice system.

7. The background of technical advisors has a great impact on the choice of strategy and on its efficacy in a given situation. This is true even of those with prosecutorial experience because of the great variety in the organizational details of even developed prosecutorial agencies. However, whatever the initial thrust given by the principal advisors, a greater variety of skills and perspectives will be needed to fill out a program. Here even less than in defense can it be expected that one outlook, or one advisor, will be sufficient.

8. It almost goes without saying that the institutional strengthening of a prosecutorial organization takes more time and is liable to more setbacks than that of defense. Where an organization already exists, the strategy requires its transformation not its creation. Thus, good practices will coexist with bad ones for some time. Even without political intervention, recalcitrant leadership, or inadequate budgets, the extent of the transformation and the amount of behavioral change required are much greater. Working under relatively positive conditions, Panama was able to produce visible changes in internal operations in three of the four judicial districts within three years. However, impact on the time to complete an investigation remains unmeasured. It is likely to be positive, but an uncooperative judiciary may well have blocked the ultimate objective of speeding overall time for processing cases. Although the project has not documented them, it is likely that other strictly prosecutorial indicators have also shown improvement -- for example, a decline in human rights abuses by the investigative police, better use of evidence. Progress in other countries in introducing procedural change has been much slower. El Salvador may almost match Panama's record, but in Guatemala, even with a substantial investment of donor resources, concrete results are likely to take much longer.

#### 4. THE JUDICIARY

Although the judiciary is the core sector institution and initial target of reform, USAID projects have yet to evolve a concerted methodology for its strengthening. A principal reason is that the judiciary is more difficult to work with than either defense or prosecution. Impediments include its basic organization (nonhierarchical, decentralized, and with a collegial leadership), ideological and political considerations like judicial independence and a greater sensitivity about outside intervention, and a tradition-bound and relatively insular judicial culture. In addition, the nature of the judicial function makes it harder to define better performance. Defense and prosecution have more narrowly defined purposes which lend themselves to more elementary quantitative and qualitative assessments -- number of clients or cases handled, number of acquittals or convictions, or reductions in various types of crime. In the case of the judiciary while quantity is relevant, quality is more central and more elusive. And even for quantity, judges unlike defenders and prosecutors, are likely to resist the notion that more is better -- it is the quality of the decision they value, no matter how long it takes to reach. In short if the modern judiciary is as much a bureaucracy as the modern defense or prosecutorial office, both it and its would-be reformers are resistant to seeing it as such, making it difficult to define specific goals for its improvement.

As a consequence, external assistance programs do not provide a model for its restructuring and reorientation (as in the case of defense and prosecution); instead they offer tools to help it to achieve this on its own. Principle among these are programs in training, administrative systems, and court administration. Less frequent, but potentially more critical is assistance to improve the selection and monitoring of professional staff. Indirectly, assistance in rewriting legislation, especially procedural and organic codes, is also relevant. However, here except for the emphasis on accusatory, oral criminal justice, the direction of change has been left to the judiciaries themselves. Since training and law reform are treated in other modules, they will only be discussed briefly here.

##### **Background**

Latin American judiciaries all follow the civil code tradition, a generalization not significantly affected by the recent move to more oral, accusatory criminal justice processes. Even reformed systems retain many inquisitorial practices. The usual changes do not affect such civil law elements as the importance of statutory law, judicial career patterns, or notions about the separation of governmental powers.<sup>70</sup> Some of these traditional perspectives are also undergoing

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<sup>70</sup>Civil law systems are often characterized as separating functions, not powers -- whereas the common law tradition does just the opposite. One result is the greater insistence in civil code countries on the legislature's monopoly on law making. This affects not only the judiciary's view of its own role, but as judicial review is introduced, the kind of constraints it attempts to place on the executive. In Costa Rica, the Constitutional Chamber has invalidated a number of

modifications, but the process is longer and the directional trends less clear. They are in any case not areas emphasized in external assistance programs.

Of the three institutions discussed, the judiciary is the oldest and the most bound by institutional tradition and culture. Within the region, its failings and thus targets for reform are similar. Latin American judiciaries tended to be underfinanced and subject to extensive external intervention and a high level of politicization of their appointment systems. Over time this has eroded the professional competence and orientation of many of their members, increasing vulnerability to corruption. It has also weakened institutional leadership. Especially where legislation calls for the replacement of entire Supreme Courts with each change of national administration or where turnovers are frequent for whatever reason, their members, the logical and often official heads of the judicial system, tend not to identify with the institution or with its development.

Administrative systems, both at the macro (judiciary-wide) and micro (courtroom) levels are generally antiquated, inefficient, and themselves the vehicles of extensive corruption. The laws governing judicial organization and operations are often outdated and because of their excessive detail, obstruct modernization. Thus, effecting improvements may require legal as well as operational changes.

One advantage enjoyed by USAID programs in Latin America is the recent tendency to increase judicial budgets. Latin American justice sectors as a whole have traditionally suffered from underfinancing. This is still true for many of their institutions, but almost across the board judicial budgets have been increased. There is still considerable debate as to how much is enough, whether in terms of overall budgets or judicial salaries.<sup>71</sup> The increases to date have improved both and consequently eased the task of external agencies. The effects of longer term poverty and continuing political intervention still pose enormous constraints on institutional strengthening programs -- especially as they affect the quality of human resources and judicial culture. Furthermore, budgetary increases are not always used wisely, but with some exceptions (Haiti is the most obvious) countries now appear able to support a judiciary at reasonable levels, meaning that change programs have a chance of sustainability. Political intervention in internal operations and in appointments in particular also seems to be declining. Honduras, for example, which once represented the most egregious case of new governments replacing almost the entire seated bench, has recently avoided this practice, despite no change in the basic legislation.<sup>72</sup> Latin American governments may still prefer docile judiciaries, but they seem to want them to be

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laws which it believes give law-making functions to the executive (power). One example is the traffic code which allowed administrative offices to set the amount of fines.

<sup>71</sup>See Dakolias for an interesting demonstration of the lack of correlation between judicial budgets and judicial performance. As she notes, the Latin American goal of 6 percent of the national budget is unmatched in any developed country.

<sup>72</sup>Personal interview, Gail Lecce, USAID/Honduras, March, 1997.

competent as well.

After some initial resistance, most of the region's judiciaries have adopted the ideas of modernization and of foreign assistance to advance it. Still their notion of what each involves often differs from those of other domestic actors and external donors. If there are now fewer requests for cars, computers and buildings, they have not disappeared. For many judicial leaders, modernization is a means of reclaiming lost prestige and privileges -- giving the judiciary the image and importance it merits -- as opposed to improved public service. Weak administrative and governance systems continue to obstruct progress. Judiciaries are collegial bodies; thus, agreement may have to be reached among two dozen justices before the most minimal change can be attempted. The introduction of judicial councils to substitute for the *Corte Plena* (full Supreme Court) has not always helped, replacing one collegial body with another and often introducing conflicts between the two as well. Finally, if years of politically motivated appointments have weakened the overall professional orientation and competence of many judiciaries, this has not made them easier to deal with -- a judge, whether competent or not, is still a judge and thus assigns extra importance to his or her opinions on whatever the topic.

All of this may explain why USAID has been less directive in its programs for the judiciary, preferring to provide the "tools" (or more focused reforms in specific aspects of judicial performance) but giving the institution far more leeway in how and to what ends they will be used. Programs have focused on nonjudicial themes -- training, administration, new technologies -- leaving the definition of judicial strengthening to the judges. Nonetheless, a frequent sense, shared by some domestic critics, that the courts have not responded adequately suggests the need for more attention to the global objectives. We may not be able to define better justice -- which really is the crux of the matter -- but we can focus more explicitly on the courts' ability to keep up with demand, their efficient use of resources, their ability to set and uphold institutionwide standards and procedures, and the nature and extent of their contact with the public, especially as regards access to services. To be fair, these goals underlie the most common reform interventions, but cooperating courts have not always internalized them.

## **An Overview of Common Reform Programs and Interventions**

### ***Training***

The major justification for training programs has been judicial incompetence -- the frequent contention that "judges do not know the law." Despite this unflattering portrayal, training is the most popular form of external assistance, with both donor agencies and national participants. This suggests that lower level judges (its principal clientele) are willing to accept and work to overcome their shortcomings, and that upper level judges simply figure they are the exceptions. Training has a number of other functions, many of which have been "discovered" as programs

are implemented.<sup>73</sup> It has helped overcome resistance to change, identified problem areas, prepared judges for new practices and laws, and augmented identification with the institution. Not surprisingly, most training has been remedial -- aimed at filling the gaps in inadequate legal education, teaching judges the laws they are to apply, and indoctrinating them in the "new principles"<sup>74</sup> expected to inform their actions. It has also worked largely with the seated bench. Over time, as remedial programs achieve their goals, training programs will evolve to a greater focus on entry-level preparation and in-service specialization. Over the short run, they aim to improve the human resources already there. Training has also been extended to administrative and other support staff, most of whom are also sorely deficient in basic skills.

Although training programs can be costly, the investment per participant is relatively low and is justified by impact on general knowledge, attitudes toward their job, and on some specific behaviors. However, training programs have been criticized for their limited effect on system performance.<sup>75</sup> More knowledgeable judges are often not better judges, either because the increase in knowledge is irrelevant to what they do, or because they don't apply it. Among the more specific criticisms and explanations are a failure to link course content to improved performance and more specifically to targeted behavioral change, an over reliance on short courses with no follow up, and a failure to make complementary changes to reinforce training's impact. Participants return to their old jobs, supervisors, and incentive systems which rapidly discourage efforts to behave differently. Training in short is important, but is often inadequately designed and insufficiently coordinated with broader reform goals. In itself, it is an ineffectual source of institutional change or of changes in the behavior of individual members. These concerns and criticisms have led to an increasing interest in redesigning training programs, to make them more cost-effective and to augment their contribution to overall reform. Perhaps still greater attention should be turned to the factors obstructing training's impact, the complementary changes and programs without which even the most relevant new knowledge and skills will never be applied. Institutional strengthening does require both remedial and permanent training programs; the challenge is to optimize their potential.

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<sup>73</sup>See Hammergren, "Judicial Training..." for a discussion.

<sup>74</sup>Some of these principles are not that new and are already recognized in national legislation. Judges may not understand their application, or have adopted contradictory practices. This is frequently the case of human rights and due process guarantees, for years honored in the breach.

<sup>75</sup>Interviews with those involved in training in several countries elicited this view. Luis Pásara (MINUGUA, Guatemala), Luis Fernando Solano (Supreme Court, Costa Rica), Carmen Blanco (Costa Rican judge, trainer, and consultant), and Aldo Espinosa (Checchi, El Salvador) offered especially helpful analyses.

## *Law Revision*<sup>76</sup>

Legal professionals in general and Latin American lawyers and jurists in particular often equate reform with legal change. The greater importance of statutory law in the civil code tradition and the tendency for codes and other legislation to attempt to limit judicial discretion encourage and in some sense justify this outlook. However, the perspective has disadvantages: a tendency to downplay or ignore implementation and the need to prepare institutions and their users to apply new laws; the practice of imitating or adopting legislation from other countries with little regard for the nonlegal factors allowing its success or even a close inspection of what that success really means; the frequent use of legislation for purely symbolic or political ends (to tip the scales in favor of institutional or political actors); and a preference for ideal as opposed to problem-solving models (e.g. reform is equated with imposing an ideal system rather than resolving specific problems and complaints). While the adoption of new laws can spur other reform efforts, of itself it is an ineffective means of introducing change, let alone improvements. Latin American legal history is replete with progressive laws that were adopted and never implemented. There is a real danger that many current reform efforts will augment the list.

Still, linking reform to law revision is often convenient and necessary. It provided USAID with allies among Latin American jurists who had been promoting code reform and other legally based change for decades. It gave direction to and increased the urgency of complementary changes. Training, administrative reforms, and new career systems, rather than existing as isolated programs, were reoriented to prepare for implementation of new legislation. Law reform gave programs a positive slant -- making it easier to enlist the support of institutional actors who might otherwise have borne the blame for system failings. It also "entrapped" political support -- political leaders staked their names and careers on a new code without realizing that its passage was just the beginning. Once committed to the law's enactment they often found themselves committed to the more difficult work of implementation as well. In short, whether necessary or not, legal reform has been a lever for achieving more substantive change in institutional structure and performance.

Nonetheless, its limits should be recognized as should the distinction between new laws and improved laws. Proponents of law reform have too often overestimated their ability to provide the latter. Reformed codes have been too ambitious in their thrust and have occasionally contained their own flaws. Code drafters and those writing new organic laws, when not imitating "more progressive legislation" from Europe or the U.S., often designed the new systems without adequate understanding of their workings and picked benchmarks and deadlines arbitrarily. Organic laws frequently mandate an expansion of judicial offices and employment far beyond budgetary capabilities and quite possibly beyond real needs. The famous six percent of the national budget adopted by Costa Rica and imitated by other countries was itself an arbitrary

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<sup>76</sup>Vargas gives a good summary of the Latin American experience. Maier et al. is also useful. The arguments in this section are elaborated in Hammergren, "Code Reform and Law Revision."

figure. The Costa Rican court system now spends that much, but arguably could make do with less or use what it has far more efficiently. Drafters frequently selected time limits for criminal investigations and trials that had no empirical basis and never considered the obvious fact that some types of investigation require much less time and some much more. Many codes and laws will never be implemented as enacted, and if they are to have a positive impact will require substantial modification. Unfortunately, the same is also true of constitutional provisions, passed with the same type of enthusiasm, but usually far more difficult to change. Where local allies view legal change as a necessary or even sufficient condition for justice reform, there may be little external agencies can do except maintain their skepticism, thereby not falling into the same logical errors, condition their cooperation on implementation, and provide assistance to help ensure that what laws do get passed are well designed and linked to real (existing or potential) institutional capabilities. These ideas are further expanded elsewhere.<sup>77</sup> For now, it is sufficient to note that well designed laws can facilitate and set the targets for institutional strengthening; they will not make it automatic.

### *Macro Administrative Change*

Those familiar with USAID programs often think of court administration when the word administration is mentioned. Most judiciaries also need improvements in their larger administrative structures. These include improved personnel, budgetary, procurement, and information systems. Often these are the least developed parts of the court system, a sort of necessary evil in which as few funds as possible are invested. Things may actually have been better when executive agencies (most often the Ministry of Justice) had responsibility for the courts' administration. However, an interest in reducing executive intervention in the judiciary has made this less acceptable, and in most of Latin America, it is the Supreme Court which now has that role. While courts remain poor, the administrative offices are usually veritable disaster areas -- in Lima in the 1980s they were located two blocks from the Palace of Justice in tumble-down buildings that looked like nothing more than urban slums. As courts get larger budgets, this same lack of attention can have very different consequences. After El Salvador's Court began receiving higher budgetary allocations, its administrative offices expanded their own corruption network. Top administrators visibly lived far beyond the possibilities of their official salaries. They were among the best outfitted with the fanciest cars in the entire judicial system. The justices who nominally oversaw them were aware of this, and some may even have participated in the largesse, but they generally claimed their own ignorance prevented them from asserting control. One solution, both to stem corruption and decrease the Court's political power, has been to shift judicial administration to another body -- usually an external judicial council. Most often this relocates, but does not resolve the problem.

No matter who formally oversees administrative functions, the Court president, an administrative justice, or an internal or external council, the fundamental solution is the professionalization and

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<sup>77</sup>See Hammergren, "Code Reform and Law Revision."

strengthening of administrative systems. Over time this may allow the decentralization of administrative offices to regional centers. To avoid increasing irregularities, it is probably convenient to modernize central operations first. Because administration is less central to the judicial function, it may be easier to convince the Court to undertake this kind of program. However, there will always be resistance to spending scarce funds on administrative offices or to delegating powers, even nonjudicial ones, to professional administrators. Courts' love-hate relationships with their administrative responsibilities are well known. While complaining about the time they devote to such matters,<sup>78</sup> they may still resist letting someone else decide on vacations schedules, appointments, basic procurements, or salary for administrative staff.

One vital area for administrative strengthening is the development of information systems. These may for the first time allow upper level policy makers, both judges and administrators, to monitor what is happening in the judiciary as a whole. Despite the often autocratic behavior of Latin American Supreme Courts and chief justices, they inevitably lacked information on the systems under their control. Their arbitrary interventions in the workings of lower level courts or replacement of recalcitrant judges were the exception not the rule and were usually based on complaints voiced by preferred clients, not on a sound knowledge of what was going on. This encouraged timidity on the part of the mass of judges who never knew when a complaint might bring the wrath of the Court down on them. It probably encouraged corruption and malfeasance among those already inclined in that direction. They knew that most of their actions would pass unnoticed and that a good relationship with local and national elites was the most important factor in keeping their jobs. Aside from maintaining order, even while respecting judicial independence, better information systems are essential to planning. Judges always complain that they are overwhelmed with work, but without reliable statistics, it is impossible to know where and whether this is true. Budgetary requests lack justifications and what resources are available are unlikely to be used to their best effect.

Establishing a permanent, useful management information system (MIS) is not easy, but the hardest part is not the design of hardware and software systems.<sup>79</sup> Whether the system is manual or automated, the difficult part is determining what data are needed and how to ensure they are provided in an accurate and timely fashion. The number of attempts initiated and abandoned are myriad. Most judiciaries in Latin America have statistical offices and collect statistics; however, no one uses or trusts them. If provision of information is enforced, it often is entrusted to an ill-

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<sup>78</sup>It is not infrequent for the *Corte plena* to spend two or three half day sessions a week overseeing administrative details. Justices commonly estimate they spend a quarter of their time on administrative work.

<sup>79</sup>While absolving them from responsibility for my conclusions, I thank Luis Ospina and Aldo Espinosa of Checchi/El Salvador; Jose Carlos García and Daniel Meana (Dirección de Informática, Supreme Court, Panama), and various officials in Panama's Public Ministry for a series of helpful discussions.

trained and poorly motivated staff member who as often as not invents the reports that are submitted. For the system to work it must be useful both to those at the top and at the bottom, and ideally there should be some means for cross checking its quality. Designers must understand the judiciary's workings from both perspectives. This also means adequate training for users at both levels. Obviously computerization may ease the work, but it cannot ensure the quality of data or their eventual use. At present, USAID projects have installed MIS in several Latin American countries.<sup>80</sup> They are currently under evaluation in the anticipation that the best of them might be packaged as a model for other countries. Absent the results of this evaluation, a few tentative general recommendations can be offered:

1. The most sustainable MIS will place fewer demands on the source of the data which is almost always the field office. Data requirements should be limited and should also be part of what the office collects for its own purposes
2. Although it is often tempting to establish a new collection system for each type of data, this is usually counterproductive. It increases the workload on courtroom officials and may later lead to efforts to construct macro systems on inadequate bases.
3. Systems should be designed with an eye to future expansion -- that is to say the collection of more data at some later point in time. Where procedural systems are undergoing change, they must also be designed to accommodate it.
4. Most systems will require both manual and automated elements; the former should be designed to facilitate eventual automation.
5. Despite the desire for sustainability, no system will last forever. Automation technology changes rapidly, and thus locking in data collection to the most modern hardware and software (or to a court structure that itself may change radically) is locking in obsolescence. It may be preferable to anticipate a thorough redesign within ten years and thus not try to plan for expansion beyond that.
6. Although no existing systems are perfect, it may be preferable to adapt one developed elsewhere as opposed to starting from scratch. This is particularly true of the development of software systems. Court computer personnel often want to design their own product, but the time and money invested have rarely validated the results. Custom designed systems may be impossible to modify once the designers depart, and while they may resolve some problems they often introduce many others.

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<sup>80</sup>Notable examples are Panama, Bolivia, El Salvador, and Colombia. None of these is completed as yet, and in Panama and Colombia it is the Fiscalía which has adopted the system initially designed for the courts.

The two success cases in administrative reform, Costa Rica and Peru, occurred without foreign assistance and responded to unique national circumstances. In Costa Rica, the judiciary did this on its own, benefitting from a substantial budgetary increase, relative political independence, and a lengthy period (the 1970s and 1980s) when demands on and controversies surrounding them were at an all time low. During the late 1980s and into the 1990s, the Costa Rican Court has continued its administrative modernization programs, this time with external funding. In Peru, the Fujimori administration imposed an emergency plan on the judiciary, usurping its powers and handing them over to a technocratic reform group. Under the guidance of this group, Peru is investing a significant quantity of national resources in the modernization of systemwide and courtroom administration. Both countries have or will soon have modern administrative systems, although the implications for judicial independence are in marked contrast.

In more normal circumstances a less enlightened judiciary is left on its own to do what it can, and will be receptive to external assistance but always within limits. Designing improved administrative systems is not difficult and can utilize expertise and mechanisms developed in other public and even private sector entities. The critical task for assistance is to get sufficient information on current operations, and to convince the judiciary to adopt and use the improvements. Vested interests and a certain institutional reluctance to air its dirty laundry or reveal its own ignorance are two major impediments. Courts are increasingly receptive to the adoption of modern information technology, but more resistant to such critical but more intrusive techniques as the upgrading and replacement of personnel, the merit-based appointment of administrative staff (ending a tradition of nepotism and patronage), the introduction of internal controls, and greater transparency in internal operations.

In some cases (Panama and Honduras) costly investments were made in automating administrative procedures, only to be abandoned or partially implemented by the Courts. Two apparent obstacles are the behavioral changes required on the part of the Court members themselves to make the systems effective, and the resistance of existing administrative staff which the Court may be unwilling to combat. Both programs erred in their overreliance on automation as a source of change as opposed to basic organizational restructuring and more intensive, participatory work with administrative staff. In Honduras, USAID investments in improved statistical and management information systems have been allowed to languish for lack of trained personnel to operate them. In Panama, substantial investments in a management information and judicial statistics system have produced only partial results because participating offices continue to operate as independent fiefdoms. Human Resources has developed its own statistics system which it manages separately from that created for the Judicial Statistics offices. Neither one cooperates with the far weaker training department, and those involved in developing automated systems occupy still a fourth division. Conceivably had the Court taken a more direct interest in using the new tools to improve its own management capabilities, much of this dispersion of effort would have been eliminated. Panama's judicial administration is hardly the worst in the region, may in fact have some of the best prepared personnel. However, its lack of internal direction gives the impression that its offices are often working at cross purposes and at the very least not contributing to overall system efficiency. In short, while the lack of modern

tools and technology impede administrative and overall institutional performance in Latin American judiciaries, the fundamental problems are rooted in flawed organization and institutional cultural. These can be remedied, but they require direct attention.

### ***Judicial Governance***<sup>81</sup>

USAID projects have generally not worked with the introduction of new systems for judicial governance. To the extent they have been adopted independently in a variety of Latin American countries, they deserve attention. The most common arrangement is the introduction of a judicial council.<sup>82</sup> This is usually an external body, composed of representatives from other public and private sector entities. The latter are most often professional associations and universities. Although the judiciary may have its own representatives on the council, they are usually a minority, and sometimes, as in Colombia, are specifically prohibited from being active members of the institution nominating them. Occasionally (Costa Rica) councils are internal organizations, with representatives from the various levels or instances of the judiciary. This is a special case and is discussed separately below.

When councils were first introduced it was argued that they would protect the judiciary from politicization. Hence, their initial and still most common function is in the appointment system. They either prescreen candidates to judgeships (and occasionally to other sector institutions, most commonly the Public Ministry) or make the final selections. More recently, several countries (Colombia, and in theory, Bolivia and the Dominican Republic) have extended to councils the administrative management of the courts. Although they sometimes replace executive management, this is often a means of reducing the Court's control over the rest of the institution. After an initial wave of enthusiasm, most Latin American judiciaries have come to view the councils more critically. The councils have proved no more adept at their roles than whatever body they replaced, have frequently fought with the courts they were to serve, and have often been a means for further political intervention. The proposed agenda for the Third Meeting of the Organization of Supreme Court of the Americas<sup>83</sup> thus lists judicial councils as a theme, specifically referencing their use for executive intervention in judicial affairs.

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<sup>81</sup>The following draws on interviews and observations in El Salvador, Costa Rica, Colombia, Peru, the Dominican Republic, and Bolivia. Conversations with Néstor Humberto Martínez, Jose María Rico, Aldo Espinosa, Jaime Giraldo, and Ana Montes were also sources of information.

<sup>82</sup>For discussions see Rico, Martínez.

<sup>83</sup>This is an entity whose creation was sponsored by USAID through an agreement with the Federal Judicial Center. It includes all the judiciaries in the hemisphere, with the exception of Cuba, and is intended to help them discuss common problems and reform needs.

Certainly in the area of administrative oversight, there is no reason to believe an external body, formed of judge-like members will be any better than the judiciary itself. In fact, it could be worse because it lacks the judicial (i.e. user's) perspective on administrative needs. The Supreme Courts' poor administrative performance has been partly blamed on insensitivity to the situation of ordinary judges; an external council is unlikely to overcome this failing. In addition, the council often has its own institutional interests to advance. One recent problem in Colombia has been the council's desire to use sectoral funding to build its own offices and capabilities, many would say needlessly duplicating those already existing elsewhere. In addition, the creation of a council has often diverted attention from the more immediate problems of modernizing administrative operations regardless of who oversees them. This tendency is encouraged when the council is mistakenly seen as a solution in itself. It also arises because the conflicts surrounding its introduction create additional distractions.

In areas like judicial training or running a judicial school, a council may have certain advantages. Council management may be preferable to that of the Court, especially if the school is to serve other institutions and if it can find ways to insert a nonjudicial, client-focused perspective on training needs. However, both in Colombia and in El Salvador, progress in advancing judicial training has been hampered by interinstitutional conflicts and the council's diversion of funds to its own strengthening. In El Salvador, USAID support to the school overcame most of these setbacks. In Colombia, five years into the national judicial reform program, the courts were still "served" by two judicial training programs -- one belonging to the council, one to the Ministry of Justice -- neither of which had advanced very far. With the ministry's school's transfer to the council (January 1998) judicial training may finally assume its necessary role.

The councils' role in evaluating judges, internal discipline, or otherwise managing the judicial career is more controversial. However, the judiciary, usually the Court's, own role in these same areas has also been debated. At heart this is a dilemma of individual and institutional accountability and one for which the solution(s) is (are) not obvious nor likely to be found by simply inventing a new organization. In El Salvador the friendly conflict between the Court and the council has led to a duplication of some functions. The council evaluates judges and passes its findings on to the Court. The Court also does its own evaluations and takes whatever action is required by either or both as regards disciplinary procedures or eventual dismissal. The council's presence has doubtless strengthened the Court's resolve to conduct its own *depuración* (purge) of the judiciary. At the very least, the existing arrangement is better than the prior one where no evaluations were done, and so far does not seem to have produced abuses.

Where the councils' role may be most appropriate is in the judicial selection system, both for initial recruitment and advancement in the judicial career. The judiciary's preference has of course been to manage the process itself -- possibly in some variation of Colombia's system (called *cooptación*) where the Court picks even its own members. In Colombia the council now does the initial screening and presents the Supreme and lower level courts with lists from which they make their choices. El Salvador's system is similar but more complex. The lists are formed partly by the council and partly by elections conducted among the entire bar (including judges).

Selection of lower level judgeships is by the Court. Those for the Court are by the National Assembly. Although many countries leave the Court in control of lower level appointments, the adoption of a council mechanism for this purpose is the emerging trend. (Costa Rica's internal council, an entirely judicial body, provides lists to the Court, or in the case of justices, to the Assembly).

In regard to the selection of the judiciary, two issues are being addressed, not always as explicitly as might be desired. There is first the goal of introducing an objective merit-based system ensuring that the judges chosen will be the most competent and otherwise appropriate available. Neither the councils nor the judiciary have come very far in resolving this essentially technical problem. Criteria are frequently inappropriate (either too academic or just irrelevant). They often exceed the candidates' capabilities, forcing the lowering of standards if any appointments are to be made.<sup>84</sup> However, the design of a merit-based system is theoretically independent of the body to apply it. This is not true of a second, less purely technical issue regarding the nature of the judicial role and its relationship to broader sociopolitical circumstances.

It has long been a complaint in Latin America that even, or perhaps particularly, the least politicized judiciaries have tended to a certain isolation from their respective societies, embodying a caste-like or oligarchic outlook which places them and their decisions outside the boundaries of national culture and cultural definitions of justice. Here the judiciary's desire for control over its own appointment and career systems conflicts with another ideological viewpoint which demands that judges be in touch with social reality. This view suggests the utility of councils (and ones more representative than those in existence) to select or vet judges, thus guaranteeing broader political and social inputs. The argument transcends simple merit to issues of representation, accountability, and values. Entrusting judicial selection to an external council is not in itself a solution, but it may be a more effective means for developing one than letting the judiciary choose itself.

As the evolution of this discussion suggests, the issue of judicial governance is a transcendental one and quickly enters a wholly political realm of the relationship of the judiciary to the other branches of government and to society as a whole. This is not the most appropriate arena for external technical assistance, especially since it involves questions which none of the suppliers of assistance have themselves resolved. It does suggest the need for caution in working with governance bodies, schools, and selection systems. Donors may unconsciously advance solutions which on greater reflection are not the most appropriate. Unfortunately, it is often easier to create new mechanisms than to appreciate their significance. Where technology leads politics, the consequences can be both unanticipated and undesirable. (I will also note that where politics replaces technical knowledge or technology is adopted without adequate technical analysis, the results are equally disastrous, as any number of reforms by fiat or the still more

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<sup>84</sup>This was the case in El Salvador's earliest attempts (1995) to link training to the selections system.

numerous politically designed reform mechanisms demonstrate.<sup>85</sup>)

Costa Rica has chosen a different path for the council, by introducing it as a body internal to the judiciary. This does not address or resolve some of the issues of judicial selection and accountability, but as regards governance it offers distinct advantages. Costa Rica's court always managed its internal governance via commissions composed of justices and occasionally of lower level judges and administrators. The mechanism was time consuming, and as it usually required approval of policies by the Court en banc, absorbed still more of the justices' efforts. The 1993 Judicial Organic Law revised the system, introducing a Superior Judicial Council to handle most administrative oversight. A second council is responsible for screening candidates to the judiciary and other professional positions (defense and prosecution). While some decisions, and the final appointment of judges, are left with the Court, the council members' full-time assignment to administrative oversight substantially reduces the time spent by other justices and judges on administrative matters. Combined with well developed, professional administrative offices, this is a model other judiciaries may wish to consider. It certainly will be more politically appealing to them given the current skepticism about external councils. For a more heterogeneous judiciary in a larger country, the model could be modified or augmented with district councils. Its five-member composition in Costa Rica is too small to reflect adequately the interests and perspectives in a country with twenty or thirty million as opposed to Costa Rica's three million inhabitants.

#### *Selection, Monitoring, and other Personnel Matters*

These are potentially the areas most critical to improving judicial performance in much of Latin America. They are also the ones where USAID programs have worked least, perhaps justifiably given their political sensitivity and consequences. Once a country decides what kind of judges it wants and who will select them, the rest is merely technical. However, those preliminary questions have still not been answered definitively. Thus, apparently technical responses have enormous political implications. Still, the same can be said of judicial training, which if it does not select judges, certainly shapes them, and where it is used as part of the selection process, also influences whom is picked. In selection as in training, there are two common responses to the handling the political content. One is to let the clients (judiciary, council or whoever) define the content or criteria and simply help with their operationalization; the second is to engage them in a process of thinking through criteria as well. In training, and where it has been attempted, in selection, this is often in the form of discussions of the "ideal type" judge or other official.

It has been argued that U.S. assistance cannot be much help because of our different expectations of our judges and tendency to elect or appoint them by political criteria. In effect there is enough

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<sup>85</sup>Many judicial councils are prime examples; elements of El Salvador's Peace Accord agreements also proved impossible to implement or led to unanticipated and not very desirable consequences.

experience rating judicial candidates, even in elected systems (where bar associations or other NGOs may do it) to invalidate that objection. Furthermore, in the case of administrative staff, just as sorely in need of performance ratings, there is a wealth of experience. There is a problem in its transfer to systems where the specific job requirements, information available, and abilities of the pool of applicants may be quite different. More important than the particular rating systems may be a transfer of the methodology for developing them --- this may also allow the inclusion of a wider variety of groups and opinions in their application. So far little of this has occurred in USAID projects, in part because the national counterparts have not requested assistance, in part because USAID managers have been reluctant to offer it. However, as even the so-called merit based systems most recently introduced are often seriously flawed, a concerted effort to encourage discussions might be helpful. This could eliminate abusive or seemingly pointless approaches -- a frequent preference for psychological tests purporting to show "judicial vocation," the aforementioned overly academic tests, or the ever popular *concurso de mérito*, in effect a comparison of curricula which usually conceals a comparison of personal or political contacts. It might also reveal that progress in introducing merit selection is far less than claimed. Panama's new career system tests candidates on their Spanish, knowledge of judicial organization, and mastery of personnel regulations -- the same test is applied for candidates to the judiciary and to administrative offices.<sup>86</sup>

As Latin American countries begin to evaluate the progress of their initial reforms, the issue of judicial selection and the far broader questions about the judicial role are receiving more attention. Sometimes the judiciaries have initiated the discussions. In most cases, the actions of stronger, more independent courts have raised concerns among other institutional and political actors. If the motives behind them are suspect, the concerns are valid. Donors cannot and should not provide the solutions; they can support the discussions, expose participants to alternatives, and encourage the inclusion of views outside those of the institution itself. Conceivably this should occur only after an institutional strengthening program has achieved initial advances. Especially where the courts are very weak, politicized, and disunited, advancing some institutional consolidation, even if based on outdated models, may be preferable to opening them up to still more external influences. The point is debatable. Institutional strengthening which fosters less rather than more accountability is an evident risk. One partial solution is to encourage programs (outreach, mixed training, public fora) which approach the issue tangentially, exposing judges to the public and the public to their judges as a basis for future debate over the judicial role.

Surprisingly, projects have done more in supporting the development of judicial inspection systems. These usually internal bodies receive and investigate complaints on judicial (and administrative) actions and also do their own field evaluations. Because they are internal to the judiciary, and because the assistance usually focuses on operational issues, not policy, they may be perceived as less sensitive than the selection process. However, they won't work without a

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<sup>86</sup>Personal interview, Maruquel Arosemena, Director of Human Resources, July 29, 1996.

good deal of institutional political will. Haiti's judicial inspection office has been hampered by an inadequate budget and lack of official permission to make field visits. In Honduras, the Public Ministry's Inspector General (responsible for receiving complaints on the entire judicial sector) has been more active because the head of the Public Ministry has made fighting government corruption one of his personal causes.

Assistance has also gone to external agencies, most notably Human Rights Ombudsman, which may also be responsible for investigating complaints of judicial abuses. These entities usually are limited to reporting the results of their investigation to another body, rather than taking direct action. While they may be more highly motivated than the internal inspection offices, they suffer from similar technical inadequacies and could benefit from the same types of assistance. Given the suspected level of judicial corruption, incompetence, and malfeasance in many countries, a multiplicity of entities and a certain duplication of functions is not inconvenient. Most need help in very basic areas: defining their agenda (since the ombudsmen in particular inevitably set it too broadly); doing adequate investigation; and preparing and presenting their findings. Often beset by problems that are the mirror image of each other (inertia as opposed to overenthusiasm), neither the internal nor the external agencies have been very effective. For the internal agencies, the chief obstacle is creating political space and internal dedication; in the external agencies, it is defining a focus that is less than the entire universe of judicial and official malfeasance. Although it is tempting to prefer the external agencies because of their optimistic, messianic vision of their roles, an effective internal control entity is just as, if not more important.

### *Court Administration*

After training, this area has occupied most of USAID's judicial strengthening efforts. (Code reform could also be added, but it aims at much more than the judiciary). Although it is linked to and often confused with macro administrative reform, it has often worked in isolation. In a few cases (Costa Rica, Nicaragua) it has been more necessary -- macro administrative development was more advanced, but court administration was a new concept. In others it has been a donor or court preference. Improving courtroom performance may be more interesting to donors and less threatening to the institution -- if there is corruption, malfeasance, or incompetence in lower level courts it is not the justices' problem. The same cannot be said of corrupt or inept central budgetary, personnel or procurement offices. Although projects usually begin with lower level trial courts, their success has sometimes brought invitations to work at a higher level, in the Supreme Court chambers (Costa Rica, El Salvador). Advances in improving courtroom administration will eventually require macro level reforms -- if only to ensure supplies of materials, adequate staffing, and eventually mid-level reorganizations (for example the introduction of shared or decentralized facilities.) They also are important as the base for any systemwide management information gathering.

Court administration projects have been dismissed as nonreforms, equipment drops,<sup>87</sup> or technical solutions to nontechnical problems. They certainly are not *the* solution to improving judicial performance, but the same can be said of any one-dimensional remedy, be it new laws, training, higher budgets, or the replacement of incompetent or corrupt personnel. In fact, unlike many alternatives, improved court administration is often a necessary (but not sufficient) condition. Law reform is often less necessary than claimed, and incompetent personnel can be trained to do their jobs and systems put in place to encourage their compliance. However, where disorganization and inefficient, irrational procedures prevent people from doing their work, the improved laws or better intentions will be of little avail. Substantial improvements can be achieved with simple innovations -- not computerization, but improved filing systems, revised job assignments, and reordered procedures. In fact such changes are most important. As many observers note, automating a bad system just produces automated chaos.

Court administration interventions inevitably begin as pilot projects,<sup>88</sup> working with a selected number of courts to develop and test new systems. They often build on and develop techniques already invented within a few local courtrooms. This is important from the standpoint of introducing sustainable practices and ensuring ownership of the results. The amount of external assistance required varies. In some cases, it facilitates local invention and innovation; in others it will have to be far more directive. In either case the first step is to develop an overview of the state of the system and of existing practices. A variety of techniques have been used. In El Salvador, the process began with an inventory (census) of all existing cases, to develop a picture of the system workload. Although inventories and less costly sample surveys can confirm conventional wisdom, they usually reveal aspects that had not been suspected. Where courtrooms have a substantial accumulation of cases, many if not the majority may have been inactive for years. Thus, the judges' real workload (i.e. active cases) may not be unreasonable, in fact may be only a portion of that handled by judges with much smaller staffs (and often without computers) in the United States or Europe.<sup>89</sup> There is often considerable variation in the distribution of cases among courtrooms, in the ability of judges to keep on top of the workflow, in the kinds of cases left uncompleted, and in the stages at which all or each type are likely to bog down or be forgotten. Studies may also reveal indications of judge shopping or of suspiciously different patterns of decision making among different judicial offices. Statistical studies cannot explain problems. They do provide a better understanding of their dimensions,

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<sup>87</sup>Hansen et al, p.

<sup>88</sup>Examples, and the source of the general comments, include El Salvador, Costa Rica, Honduras, Peru, Guatemala, Haiti, Panama, and Bolivia. I am especially indebted to Aldo Espinosa for explanations and documents from his work in Colombia, El Salvador, Panama, and the Dominican Republic and to Gabriela Fernández for contributions from Costa Rica and El Salvador.

<sup>89</sup>For an interesting comparison, based on costs per case, not workload, see, FIEL, Chapter 1.

nature, and relative importance and are a potent source of hypotheses as to their origins.

A thorough inventory is a very expensive procedure, even in a country as small as El Salvador. However, it has other uses, as the basis for a backlog reduction program, a first cut at a management information system and thus a source of baseline data to measure advances, and a very dramatic means of educating court leadership on the problems they are facing. Many of these purposes could be served by a survey of a sample of courtrooms which may be still more accurate and less costly. Still, court members not used to statistical studies may find a survey less convincing than an inventory or census. (In El Salvador, the deciding factor was less the judiciary's biases than those of the external advisors who themselves were not versed in statistical techniques; trained statisticians may also run up survey costs by insisting on greater accuracy than is really needed.) Thus although some kind of "count" should be done, the format selected will depend on such factors as its intended use and audience and resources available.

In addition to a statistical overview, a study of existing courtroom operations is necessary. Frequently this involves first determining what is legally required and then what is really done. There is usually a gap between the two, and considerable variation in real procedures from courtroom to courtroom. External assistance is required here as well, but it is essential that system members be involved in the process. This improves the quality of the analysis and can sensitize them to underlying issues. In more sophisticated systems, judges and staff may be able to do much of the analysis themselves; in others, most of the burden falls on outside advisors. Ideally the products are flowcharts of case management, detailing the steps in their handling, who is responsible, the legal and real times required, and the various detours and deviations, especially those where bottlenecks or paralysis occurs or where procedures are not clearly defined. After the statistical and operational studies, the next stage is an analysis to develop improved methods. Here external advisors will be a major source of ideas, but the process should be highly participatory and attempt to utilize innovations suggested or already adopted by local staff. Although additional training is required if the new systems are to work, much of it can be merged with the participatory discussion.

An alternative, quick methodology has sometimes been substituted. Here the statistical study is postponed and an external advisor does the first operational (courtroom) analysis, develops a series of proposals for improvements, and leaves the participatory aspects to their implementation, when further refinements and additional ideas may be introduced.<sup>90</sup> The lack of a statistical overview poses some risks -- most notably that one may not be aiming at the principal obstacles and bottlenecks or will resolve nongeneralized problems. However, with good (i.e. experienced) technical assistance, the method can produce measurable improvements in local operations, most of which can be replicated more broadly. This is feasible since many of the basic recommendations are fairly standard -- improved filing systems, use of standardized forms to record routine actions and procedures, designation of one individual to keep track of

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<sup>90</sup>For the product of one such analysis, see Espinosa.

where cases are (both physically and procedurally), reassignment of personnel to specific tasks, design of registries (either manual or computerized) to record the entry of cases, and the relocation of staff within the office<sup>91</sup>. Although the goal is always the same -- the simplification and rationalization of procedures for greater transparency, efficiency, user satisfaction, and "fairness" -- there is no single right answer, just a series of techniques whose content will vary according to the human and physical resource base and the system-specific legal requirements.<sup>92</sup> Some laws may have to be changed, but the first cut works within the legal requirements no matter how outmoded or inconvenient. Legally defined job descriptions or procedures (for example the requirement that registries be "books") are respected over the short to medium run.

The pilot projects have occasionally been combined with a systemwide exercise in backlog reduction (El Salvador). Backlog should automatically be reduced within the pilot courts, but the systemwide effort can prepare the way for pilot replication. Backlog reduction only removes the past impact of an existing problem; it does not resolve it. However, it can have a positive effect on judicial morale and on the judiciary's external image. It is most effectively done with the use of special teams, often temporarily contracted for the purpose. They review the files in each office, identifying cases that can be eliminated because of their age or other status, as well as those that the presiding official(s) can resolve on the spot. Sometimes (Peru) special courts have been set up to handle overdue but still active cases. Care must be taken that the backlog reduction team does not overrun its authority or otherwise introduce miscarriages of justice. However, where backlog reduction has been attempted, the majority of the accumulation are case files which can be closed for lack of merit -- investigations which began years before but never produced a suspect, criminal cases where no crime has been defined, or civil ones where the parties have never presented a real issue. There are always a minority of cases where injustices will be continued without further action -- especially those with unsentenced prisoners. The reduction should prioritize them, either requiring that the responsible judge take immediate action or establishing special tribunals for that purpose.

The pilot programs work on improving performance and increasing efficiency within individual courtrooms. They cannot compensate for bad laws, widespread corruption and political pressure, or the poor performance of other system actors (police, prosecutors, private lawyers, and public defenders). However, their initial impact is often impressive and may help build pressure for wider change. Where judges for the first time know what cases are in their files and how they

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<sup>91</sup>This may also be a means of curbing corruption. As Robert Paige noted during his consultancy in El Salvador, the official who sits by the door is the one likely to collect all the bribes.

<sup>92</sup>There is a wealth of literature from the U.S. experience. Although much of it is too sophisticated for assistance projects, a quick perusal is useful. The National Center for State Courts has an extensive bibliography of its own and others publications. For an example, see Hewitt.

are progressing, where clients have immediate access to information on the status of their cases, where events begin to happen in a predictable manner, the possibility of reform becomes more real. For improvements to take hold, complementary actions are needed. The new methods must be consolidated and means found to replicate them across the system; macro administrative systems will have to be adjusted to support new courtroom procedures; and various nonadministrative changes will have to be introduced.

Even with a fully cooperative courtroom staff, there are limits to what can be accomplished by altering their activities alone. Courtroom space is limited, and reorganized and purged files will eventually overflow, leading to the need for central archives and a general policy on retiring case files. Secure storage of evidence in courtrooms is only a temporary solution, and evidence rooms will have to be created. In most of Latin America each trial court has its own staff; in areas with several courts there is usually considerable duplication of functions. Thus a next step is the introduction of shared or pooled staff for greater efficiency. For example, process servers rather than covering the same territory for each of several courts can work out of a central office and be assigned to different routes, thereby not retracing each others steps. Likewise, procurement and basic services can be shared. This may help eliminate the rings of petty corruption encouraged by the proliferation of services and promote greater transparency and accountability. Common services can include a shared case assignment system, discouraging judge shopping.

While improvements can be achieved with retrained and retooled personnel, at some point, greater professionalization and higher standards for appointments must be introduced. This is the most delicate part of the equation and where many improved systems break down. Staff, however incompetent and unmotivated, is apt to anticipate this consequence. Work stoppages, strikes, and open rebellion are common responses to new working arrangements. The most usual solution has been a gradual one, dismissing only the most recalcitrant or uncooperative personnel, relying on attrition to replace the majority, and sometimes increasing staffing over the short run to allow the addition of more qualified appointees. Some countries ( Peru) have taken the drastic route of forcing and buying out employees and hiring fewer but better trained and higher paid replacements. Most countries will find this impractical, lacking the budgets, political will, and available substitutes. It is also not evident that the Peruvian solution will work; some observers predict that the designated replacements -- recent law graduates -- will find the work boring and stay on only until they find something better to do.

As these last comments suggest, the issue of political will, often mentioned as a prerequisite for judicial reform, is as likely to be a factor later as earlier in the process. Most governments and judiciaries have accepted court administration projects -- some have even requested them -- because they seem like an innocuous way of achieving improvements. The real costs of implementing them only become apparent at later stages when the vested interests of the less powerful but still strategically placed begin to be affected. Judicial strikes have never stopped a reform; those of courtroom staff have held off more than one. Clearly donors do not want to be involved in these events, and they are unlikely to be cooperating with the authoritarian governments most willing to brave them. The short to medium run solution is thus to find ways

to upgrade personnel already in place, gradually raise the standards and reward those who meet them, and accept that efficiency will be somewhat compromised by the long-standing tradition of using the courts, like the rest of the public sector, as an employment as well as a public service.

Court administration projects have frequently been denigrated as “technical” solutions which avoid the real problems of justice -- corruption, politicization, lack of access, prejudicial treatment, and general bad will. They are not as confrontational as many alternatives (for example, just firing the incumbents) and are sometimes unduly optimistic about the good will of the participants. They do aim at solving these problems, if most often by circumventing them or eliminating their “enabling environment.” They also identify and attempt to resolve a host of other problems frequently forgotten by confrontational reformers -- poor work habits, counterproductive incentive systems, and traditional, frequently legally mandated practices and procedures which seem destined to slow if not halt the forward progress of cases. Finally, they provide the basis for strengthening the judiciary as an institution -- one which is aware of the operations of its various parts and thus can take responsibility for its own improvement.

Of course, no matter how well designed, they can be no more than equipment dumps -- a host of computers, file cabinets, and supplies which are soon put to other uses if they even remain in the courtrooms. Like all bottom up strategies they must eventually become systemic. For this to occur, resources for replication must be available, replication methodologies must be designed and implemented, and various institutionwide changes introduced to ensure practices are continued and necessary inputs (personnel, materials, infrastructure) provided. This requires a far different kind of commitment from institutional leadership than the initial permission to experiment. Attempting to nail down this commitment at the start may be pointless if not counterproductive. Successful pilots can generate support which would never be available in the abstract. However, where there is reason to believe that leadership will balk at downstream problems and obstacles, donor commitments should be kept small and tightly linked to the pilots. If the latter cannot sell themselves, there is no reason to make a large initial down payment.

### **Quality of Performance and the Meaning of Judicial Strengthening:**

As was noted at the start, USAID strategy toward strengthening of judiciaries is essentially a collection of activities, most aimed less at the institution than its parts. Even when their objectives have been clearly specified and achieved, they have not been immune to controversy - first because of disagreement as to whether they constitute real improvements on their own terms, and second because of doubts about their impact on overall institutional performance. Judges who have been trained to a better knowledge of the laws they are to apply and the principles behind them may still not use that knowledge to shape their decisions. Where they do, the inadequacy of the laws themselves, the weight of political intervention, the different resources of clients, or an unreformed appointment, promotion, and incentive system may erode the impact on the quality of justice. Improved courtroom procedures may eventually cede to prior practices or, as many have charged, make unjust systems more efficient. New appointment and governance systems may transfer existing problems to new locations or introduce new

complications and sources of conflict rather than the promised improvements.

Some of these criticisms arise in a disagreement over the judiciary's role, one which exists to a minor degree, if at all, for the other two institutions. Evaluated simply as a bureaucratic organization which applies laws efficiently and predictably, improved judicial performance can be defined in quantitative and qualitative terms similar to those used for defenders and prosecutors. Quantitatively this means the number of cases handled, absolutely and in relation to total demand, average time to resolution, and percentage completed within some reasonable period. Qualitatively, the assessments are more subjective, and as in the case of defenders and prosecutors, require some external evaluation of predictability, conformity with the law, and legitimacy or user satisfaction. In this formulation, institutional strengthening becomes the ability of the judiciary as a whole to enforce this performance. Here, organizational structure, incomplete control over appointments, budget, and discipline, and the notion of judicial independence (that of individual judges) do complicate matters. Judiciaries are not expected to have the same control over their members exercised by a prosecutors or defenders' office. Thus, some other means must be found to establish identification with the institution and enforce common outlooks, values, and perspectives. Where recruitment or training is taken out of the institution's hands, this is still more difficult. In short, for all its collegiality and tradition, the judiciary is the most amorphous of the three institutions and consequently the most difficult to conceptualize as the target of an institution building effort. As the disillusionment with training suggests, something more than the improvement of its individual parts is required.

Designing a solution is also difficult because the judiciary is more than a public service provider. It is a branch of government and a political actor. It is here that the disagreements become most intense and the goals of institutional strengthening most problematic. There are indeed some governments and some reform programs which treat the judiciary as just another public bureaucracy. They aim at improving its efficiency but not increasing its independence, and where the two goals -- functional efficacy and political dependence -- clash, the latter may win out. Peru's current efforts, led by a reform group of nonjurists and imposed from without, is a prime example. It is often said that the Peruvian government is attempting to create a Chilean style judiciary, although even the latter may not be as politically subservient as the intended results in Peru. Still functional efficacy need not clash with a political role; the problem is how the latter is defined.

Throughout Latin America the debates on this issue have only begun. Following a period when measures were adopted to increase judicial independence and decrease or eliminate traditional forms of external, usually executive branch intervention, the disparate and often unexpected consequences are under reevaluation. The judiciaries which have developed more independent, institutionalized political functions have not done so uniformly. Those caught mid transformation show still more variable trends. The former group includes Chile, Uruguay, and Costa Rica. All three have been criticized for excessive social conservatism and self-imposed political restraint. The Chilean judiciary's cooperation with the Pinochet government (and its earlier waiving of many of its judicial review functions) has been interpreted as less a matter of

external imposition than internal conviction, a product of the more conservative judicial outlook.<sup>93</sup> Costa Rica's Constitutional Chamber, if not its entire court, has recently taken a more proactive stance, but even here seems informed by values and perspectives which may be out of touch with current social and political reality. Its defense of individual rights against administrative abuses has earned it enormous popularity, but came close to preventing government from carrying out such basic functions as enforcing traffic laws or setting the exchange rate. Although most countries would benefit from more of this kind of protection, the Chamber's essentially nineteenth century rights discourse may require rethinking in the context of a twenty-first century state and society.

For other judiciaries, the consequences and trends are less clear cut. Relatively unreformed and unprofessionalized courts may nonetheless use their new functions and independence to engage in institutional, partisan, and sometimes solely personal battles with other government entities. Lack of internal agreement on its role and values produces conflicts within the institution, and continuing variation in the content and quality of judicial decisions. Higher salaries, better working conditions, and increased visibility attract new kinds of candidates with different loyalties and ideas about the meaning of a judicial career. Some are content to function as bureaucratic professionals; others have absorbed a notion of social activism, and still others operate as partisan political actors, either advancing their own career or a political project.

The pressures are not only internal. As traditional politicians and social reformers recognize the changing situation, they have attempted to influence it to shape a new judicial role more congruent with their immediate interests and broader political vision. Many of the initial reform elements -- depoliticized appointment systems, expanded powers of judicial review, larger budgets removed from executive control -- were supported by groups hoping for a more activist if not revolutionary judiciary, one which would use its independence to challenge the political status quo. If their optimism was premature, opportunities have not been ignored by those with conflicting objectives. Peru's current program and Mexico's 1994 constitutional amendments<sup>94</sup> are both examples of government efforts to use conventional judicial reforms to enhance their control of the larger political system. While both "strengthen" the institution, they also attempt to delimit or direct its political impact. Their example, and the less directed outcomes in any number of countries, have encouraged a reexamination of the initial reform strategies. Most leaders and much of the public apparently want a more professional judiciary and to that extent are supportive of change. However, there is far less consensus as regards a more politically active one, and still less as to the direction and purposes of that activism.

It is tempting to argue that donors can focus on technical professionalization and leave the rest of

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<sup>93</sup>For a sympathetic interpretation of Chilean developments, see Fruhling. Galleguillos is far more condemnatory of the judges' conservatism.

<sup>94</sup>For a discussion of the Mexican reforms, see Domingo and González Oropeza.

the argument to the nations and their courts. However, its resolution cannot be separated from the conventional institutional strengthening efforts -- consciously or not, "technical" programs narrow or shape the answers to such questions as who the judges will be, how and by whom they will be selected, what values will inform their decisions, and to what extent the judiciary will operate as an institution with its own self-governance and policy making powers, as opposed to existing as a collection of individual professionals. Technical programs can reinforce policy decisions to which donors might not want to be parties. A common concern, in Latin America and elsewhere is that programs to professionalize the judiciary might also help reduce its independent political role. The counter argument is that professionalization can encourage an independent perspective and make the judiciary an ally in further reform. Conceivably either outcome is possible. Which prevails depends on what is meant by professionalization and how it is enforced. However, donors who enter without understanding the stakes and the stakeholders may be surprised by where their programs lead.

Any reform is inherently risky and inherently political, and an appreciation of both elements is still no guarantee of success. In judicial reforms, there is an additional element of uncertainty as regards the objectives themselves. This argues for entering and proceeding with caution. Experience suggests that reforms can make their own political space and that consensus on the judicial role must evolve rather than being predetermined at the start. Identification of opportunities, risks, and potential allies is highly contextual and extremely fluid.

#### **Factors Affecting Performance:**

The uncertain objectives in an institutional strengthening program for the judiciary make generalizations difficult. The answers will differ depending on whether one is looking at individual performance, performance of the institution as a public bureaucracy, or performance as a political actor. They will also differ according to the values expected to inform that performance at whatever level. A politically significant, relatively independent judiciary can still be a conservative force -- the contemporary Chilean courts are frequently characterized as such.<sup>95</sup> A dependent, bureaucratic entity can still operate dynamically. During the 1970s, Peru introduced a separate agrarian court system. Its members were vital elements in promoting an agrarian reform and favoring peasant interests. The majority opinion in Latin America favors a relatively independent, but also relatively conservative body, one which follows rather than makes the law, and which is sensitive but not subservient to changing political trends. Whether the public is more tolerant of judges who stand on unpopular principle than of those who never defy the powerful is unclear. Both positions are common targets of criticism. It is also unclear how far an assistance program can go toward combating either tendency or in laying the groundwork for a judiciary to do it on its own.

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<sup>95</sup>For a very negative view of their political role, see Galleguillos.

### *Location and Autonomy*

In most of Latin America these are givens, not dependent variables-- formally, the judiciary is an independent power, linked to the other branches of government, but not a part of them. While legal tradition often limited the judiciary's ability to curb executive and legislative actions, it officially gave the courts more independence than that enjoyed by their European counterparts or by courts in the U.S. The best example is the Supreme Court's control of judicial budgets, disciplinary systems, and the ability to name lower judges. In a few cases (Haiti), maintenance of a more European tradition eliminated even this form of autonomy. Without Supreme Court leadership, the Haitian court system had little basis for existence as a separate institution. Here location is a problem and a separate obstacle to autonomy. Until Haiti's courts achieve an organizational existence separate from the Ministry of Justice, it may be difficult to encourage their member's adoption of an institutional outlook or of responsibility for their own development. In countries like Peru or Colombia where institutional governance has been relocated elsewhere, similar concerns are emerging.

Throughout the region real independence is substantially limited by active, if often extraconstitutional intervention in appointments and decisions, and by passive constraints in the form of under funding and overly restrictive legislation (which impedes the institution's ability to take control of its own development). Even those questioning the desirable limits of greater independence, generally concede that these external constraints should be eliminated since they impede improved performance and encourage arbitrary and unpredictable decisions. The remaining disagreements center on the ideal balance between independence and accountability and between technical and political functions; these in turn hinge on different visions of the judicial role. If an absolutely independent, absolutely technical judiciary no longer seems possible or desirable, the new ideal and the means for achieving it are still the subject of extensive debate. One major question is whether increased autonomy should precede advances in the other areas and whether if it does not, it can be achieved later. The region's experience does not provide any definitive answers, but it certainly offers some dramatic illustrations of the short term impact of the principal alternatives.

### *Leadership*

Institutional strengthening requires effective leadership. Unfortunately, this is a scarce commodity among Latin American judiciaries. Decades of political intervention in judicial appointments, tends to guarantee that those at the peak of the organization are not the most competent. They also are not likely to identify with the institution, owing their positions to external influences, and often unable to count on holding office for any length of time. In addition, collegial organization works against effective leadership even by those who wish to take a more dynamic role. It is no accident that where judiciaries have promoted change their presidents have multi-year terms and consequently are able to build up their power. This has not always been used to positive ends. The father of Guatemala's new Criminal Procedures Code, exercised his powers as chief justice to prevent wider participation in the code's development

and to obstruct proposed reforms in judicial administration. El Salvador's chief justice in the early 1990s, while introducing some of his own changes, worked to undermine the new judicial council and to prevent the Court from cooperating with donor reform programs. On the other hand, Costa Rica's chief justice, now in his second eight-year term, has been an important promoter of reform and ally of USAID and other foreign donors.

Given the autocratic tendencies of more powerful chief justices, USAID programs have sometimes had more success with disinterested or weak leaders, who allow but do not promote reform. Here, they have been able to forge an alliance with members of the executive branch, associate justices, or lower level judges to advance the actual work. Over the longer term, this can be a problem unless those initial allies attain positions of greater power. In El Salvador, a program which began with the minister of justice accelerated when he became vice president of the Court. In Bolivia, USAID and other external actors cooperated with the Minister of Justice; a divided and relatively weak Court allowed them to work within the judiciary perhaps fearing that the minister would otherwise usurp the entire program. Now that the minister is gone, things may be changing. Such competitive relationships, often with a more progressive Public Ministry, have sometimes encouraged Courts to greater cooperation, but with few exceptions, even cooperative Courts have usually been less than fully devoted to accelerated change.

More typical relations with the Court can pose several obstacles to reform. Aside from closing it out, they may require diversion of funds to less productive activities, lead to abandonment of productive ones when leadership changes, or produce the incomplete adoption of innovations. As noted, USAID/Honduras' investment in automated administrative systems was allowed to languish by the Court, Panama's Court has been less than fully supportive of a new judicial school and case tracking system, and Guatemala's ex -chief justice and his successors left a comparable investment in automated systems and training in virtual abandon. Such developments are of concern not only for the lost investments but also because of their implications for further institutional strengthening efforts. On the one hand they imply that many of these efforts may be futile; on the other they suggest that the payoffs may take longer, and that the most fruitful work may best focus on changing the outlook of lower level judges, in the hopes that they will eventually bring these perspectives to positions of leadership. In any event, until the judiciary's leadership improves, institutional strengthening will continue to be impeded, and the implicit strategy of focusing on the parts rather than the whole may in the end be the most feasible.

The emergence of external judicial councils adds other complications. The presence of a council, especially one which absorbs only a part of the Supreme Court's functions, may encourage healthy competition. The implicit threat posed by El Salvador's council spurred the Court to an active role in purging the judiciary of incompetent and corrupt judges. In Bolivia, the minister of justice's move to create a council may have encouraged the Court's more conciliatory stance toward external assistance agencies. Still, where the council, as in Colombia, already has the Court's powers of governance, the dilemma facing reformers is where to seek allies. Conflicts between Colombia's Court and the council have impeded domestic reform efforts and left

external reformers in a quandary. Since councils are also collegial bodies, usually composed of “judge-like” members, their ability to assume leadership and ownership of the institution is often no more advanced than that of the Court. Thus, their creation has not closed the leadership gap and continues to obstruct effective reform, whether from within or without.

### ***Internal Organization***

This like location and autonomy is generally set by law and tradition and less susceptible to change. The organization of the judicial side of the court system is probably less important to institutional strengthening than is the reorganization and reorientation of its administrative services, both for the system as a whole and for individual courtrooms. Inadequate administrative services hinder functional performance and are a source of corruption and malfeasance. Building up a professional, accountable administrative structure can resolve these problems and also allow the judiciary to focus on its own functional performance.

A second area, and one responding to the leadership gap, is judicial governance, not as external councils, but as internal ones. Given the initially negative experience with external councils, many judiciaries may be more receptive to this alternative, and it may in turn be a way of energizing leadership rather than waiting for the next generation of leaders to emerge. Whether or not an external council exists, the judiciary might be encouraged to form an internal body, first in an advisory role, and eventually, as an alternative form of governance. External allies must tread cautiously here, but by promoting such internal organizations, perhaps initially to oversee assistance projects, they can encourage progressive judges to take a more dynamic look at their institution’s current performance and future development.

### ***Operating Rules and Standards***

One of the most difficult transitions for a judiciary is the acceptance that they do provide a public service and that this cannot function solely according to their personal standards and dictates. Even very competent judges often operate on an outmoded notion of professional responsibility which makes no concessions to increased demand and the need to change work habits to keep up with it. Traditional judges see themselves as craftsmen, not executives. Modern judges must learn to manage their cases, not be managed by them, finding ways to prioritize their attention and that of their staff. This means not only individual priorities but institutional ones -- and the development of mechanisms to facilitate judicial compliance. This may mean the introduction of legislation to allow judges to move cases ahead despite often intentional delays by the parties, filtering systems, pretrial consultations with plaintiffs, court-annexed arbitration, and legal assistants to help prepare cases. However, it also implies setting standards for caseloads, and for the timely handling of cases. These almost inevitably will be above what judges regard as reasonable and will not be met unless judges change their own approach to their work.

In most reform projects the establishment of such standards is done behind closed doors, and is

frequently arbitrary.<sup>96</sup> This overlooks an unparalleled opportunity to engage the judges (and members of the public) in the process, as a means of educating them to a new viewpoint, to improve the information on which the decisions are based, and as the initiation of a much longer discussion of judicial performance and roles. The same is true of decisions on other kinds of standards, ranging from codes of ethics to those for training, recruitment, and promotions. The immediate products of such discussions may not be the optimal ones, but in an institution whose internal culture has often been based on negative experiences, this is a potential means for forging more positive bonds.

### ***Salaries, Recruitment, and Conditions of Employment***

Throughout the region the last decade has seen marked improvements in judicial salaries, recruitment systems, and conditions of employment. Improvements in performance have been less marked. One reason is that much of the seated bench has been left in place. Despite the frequent calls for their replacement by more qualified candidates, the latter are often hard to find. Where the problem begins in poor legal training, capable substitutes may not be available. Massive dismissals are also to be discouraged; they often allow still more political intervention in the selection of those to be removed and their replacements. Thus for a variety of reasons, it is practical and preferable to work on upgrading the existing professional staff rather than hiring new judges. The argument is weaker as regards administrative staff, but even their purges can be dangerous. In both cases, an objective evaluation of existing personnel, retraining of those who seem willing to improve, and an elimination only of those found to have breached legal standards, while slower, will arguably provide a better base for future development. Exceptions like Peru, which intends to replace up to 80 percent of administrative staff and a so far unannounced percentage of judges are interesting tests of the hypothesis.<sup>97</sup>

The other reason for lack of progress is that many of the changes are not yet adequate. This is less true of salaries, but is more often true of recruitment and terms of employment. Many so-called merit appointment systems leave much to be desired, either serving as facades for a continuation of traditional practices, or defining merit in a questionable fashion. Many new systems also far short of a career, giving judges permanent tenure in the positions to which they are assigned but not providing a means for advancement. In the civil code systems, where the judiciary is a career, this is less acceptable than it might be where lateral recruitment of experienced attorneys is the rule. More thought and some external assistance are required to lay

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<sup>96</sup>This is because of an unfortunate tendency to give the decisions to the drafters of reformed codes, most of whom have no idea about reasonable deadlines. One solution would be to leave the specific deadlines to be determined outside the code. Code drafting in secrecy is not desirable of itself, but opening the process is a whole other problem.

<sup>97</sup>For a discussion of the Peruvian reform and of this point in particular, see Hammergren, *The Politics of Justice...*, Chapter 7.

out the alternatives and to study the effects of those that are implemented. More consideration is also needed as to ways to reduce judicial isolation

### ***Support Staff, Infrastructure and Equipment***

With higher budgets, many of the region's judiciaries have begun to make improvements in these areas, but once again not always in ways likely to raise performance levels. As regards equipment and infrastructure, these are not always selected, designed, or allocated in the most rational fashions, nor is adequate thought given to their maintenance. Design of new buildings is often done by architects with no understanding of judicial needs. In El Salvador, no room was left for courtroom files; courtrooms were designed so that juries had to pass through the areas where prisoners were held to enter or leave the jury room. Large equipment purchases are often poorly done, and frequently a place for bribes and kickbacks. Because of their own lack of knowledge, judges usually have to entrust these to administrative staff whose honesty is not above suspicion. However, when magistrates attempt to evaluate the results, they often find themselves incapable of exercising an informed judgement. This is an area where external assistance can be of great help, although falling afoul of corrupt administrators is often a risk.<sup>98</sup>

### **Lessons Learned**

1. USAID projects have developed a series of approaches and techniques for strengthening aspects of judicial performance. However, their impact has been constrained by the judiciary's own weaknesses as an institution.
2. Among the initial impediments to change are a traditional culture which resists innovations and undervalues those in nonlegal areas, a collegial structure which discourages dynamic leadership, leadership further weakened by decades of external intervention in appointments, and a goal of judicial independence which as most commonly interpreted encourages isolation and discourages accountability. Emerging impediments include an unresolved debate over the political role of the judiciary and innovations like judicial councils and separate constitutional courts which, whatever their benefits, further confuse that discussion.
3. It appears that the institutional strengthening of the judiciary will be a much longer term process than that of defense and prosecution, and one whose final objective are not yet clear.
4. Assistance projects can contribute to immediate improvements in aspects of judicial performance and a furtherance of the larger debate by combined programs of training, procedural

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<sup>98</sup>In El Salvador, the Court President, suspecting administrative fraud in a large computer purchase, requested USAID help in evaluating it. The results were not to anyone's liking. The administrators countered by accusing the USAID consultants of fraud, and the Court decided to forfeit the funds and not make the purchase.

simplification and rationalization in administrative areas, law reform, and assistance in planning the better use of resources allowed by increased budgets. Cross national exchanges and conferences focusing on common problems like governance, careers, burgeoning demand for services, and community relations may also foment more fundamental institutional change.

5. Programs can and have produced improvements in areas like caseload management, delay reduction, control of human rights abuses, and more consistent decision making. Efforts to improve planning and macro administrative systems have had less positive results. This may be because they were beyond the capabilities of the target judiciaries, or because insufficient effort was put into committing leadership to and preparing them for their adoption.

6. Since most of the region's judiciaries have received higher budgets, failure to adopt new programs cannot be blamed on financial constraints.

7. Although not yet a major problem in Latin America, work with judiciaries does raise legitimate concerns about strengthening the hand of regimes with little interest in fomenting judicial independence. The question is whether such work can create a demand for independence among the judges themselves and thus succeed over the wishes of the political elite.

8. Because it is often easier to work with defense and prosecution, some projects have adopted a strategy of using these institutions to pressure the judiciary to change. It is not yet evident that the strategy can work, and if so, under what conditions. In El Salvador, competitive relations between the Court and the judicial council seem to have worked to similar ends. Again it is not evident whether this competition will continue to have positive impacts or is more broadly applicable.

9. Where either the Court or political elites seem less than fully committed to reform, change is not impossible. However, the costs and risks should be weighed carefully and progress closely monitored. Where the problem is lack of interest, it may be more easily overcome than those situations where a government seeks to use reform to expand its own control. In Latin America, the most common initial problem was lack of interest. Over time, governmental and other elites may be shifting to the second position as they come to appreciate the potential for furthering their respective political projects.

## 5. IN CONCLUSION

USAID's experience with institutional strengthening in the justice sector and especially with defense, prosecution, and courts has involved a variety of strategies, tactical approaches, and discrete activities. The basic tools of reform -- training, reorganizations on the basis of redefined organizational missions and individual duties, administrative rationalization and modernization, introduction of management information systems, legal reforms, and transfer of new skills -- are similar, but the mix, sequencing, and emphases show considerable variation within and across institutions. The breadth and length of experience is too limited to provide clear-cut best models, and it is likely that they do not exist. The contextual settings are too influential in determining what can be done and what will work in any given situation. It is apparent that even in the simplest cases, change requires a series of mutually reinforcing interventions. Silver bullets are in short supply and still less likely to reach their mark. Moreover, any mechanism is only as appropriate as its detailed design, sensitivity to changing circumstances (which may dictate its declining productivity or negligible sustainability), and the tactics used to introduce it. The series of failed "correct" choices provides ample evidence.

It is also evident that while improved performance ultimately depends on what individual actors do, institutional strengthening requires attention to the organization as well as to the skills and attitudes of its members. At a minimum, the organization must facilitate its members' actions, providing them with the equipment, staff, and working conditions they need to carry out their functions. It also must set policies to direct their actions into the most productive areas, provide leadership to protect and motivate them, and set and monitor performance guidelines. In some cases, the organizational requirements to carry out these functions are not very complex, but without an institutional structure, enthusiasm and good will can degenerate into chaos. Where institutional missions entail more complex, inherently multifaceted programs of action, performance will be more than the sum of its parts, and requires an institutional outlook that can set policies which take this broader view. Even defense or legal assistance, the least complicated function, cannot operate optimally if members choose their clients according to their individual sense of who needs attention. Where this happens, as in Colombia, defenders will naturally gravitate toward the easiest cases, not the most needy. Prosecution is more than just catching and punishing crooks -- it requires an ability to prioritize the types of crimes that will be pursued in accord with some global judgment as to societal needs.

For the judiciary, the situation is complicated by the simultaneous goals of judicial independence and juridic security (i.e. predictability of decisions in accord with the law). Higher level judges can reverse arbitrary decisions, but only on appeal -- because they cannot direct trial court decisions, other means must be found to encourage common interpretations and outlooks. Added to this is the judiciary's status as a political power, and the question of how this affects its individual and collective actions. This issue relates to two conflicts unique to the judiciary, that between individual and institutional independence, and between independence of either kind and

wider accountability. When USAID and other donors began their judicial strengthening programs, neither they nor the indigenous reformers recognized how these conflicting values would affect their ability to define objectives or measure progress and success. The dilemmas remain unresolved and account for some recent setbacks in specific programs.

Leaving aside the special problems posed by judicial reforms, a few more generalizations apply to all institutional programs. The need to think in terms of institutions and not just individuals means that strategies must work at several levels. Just working on the institution will not resolve the problems in individual performance that are most often the target of popular criticisms. However, working only with individuals leaves them operating in an institution which does not support new behaviors. Where to begin, at which level, is most often determined by windows of opportunity or the accidents of advisory skills, but over the longer run programs must operate at all of them. Pilot projects can be locally successful and a means of developing broader interest in reform, especially where institutional leadership is ambivalent about change. They can also provide an opening where leaders are openly resistant; well-publicized they can build constituencies for reform within and outside the institution. Still, in the end a pilot activity has a limited impact and one which will not be sustained even on an experimental basis unless it can be replicated. So far successful replication has as often been the result of fortuitous accidents as of premeditated strategies; this is an area where more thought and analysis is required. An additional obstacle is that many pilot activities are too costly for systemwide replication, either in terms of recurrent costs or initial investments. Thus, means must be found to design them with budgetary limitations in mind.

Institutional strengthening is sometimes institutional creation, but the two are separate endeavors. Where one has the luxury of starting over, or beginning only with experimental activities, the challenges are quite different from those of reorienting an institution with its own operational styles and traditions. Moreover for some institutions, creation is immediately systemwide -- social demands require that services be provided on a global if less than optimal level. Two common problems are the elaboration of systems which because of fundamental resource constraints cannot be sustained over the longer run and the entrenchment of bad practices and design from the start. Despite the inherent attractiveness of starting over, it remains debatable whether the risks are greater in reforming a bad system or introducing a wholly new one. Proponents of the tabula rasa approach should be aware that the conditions producing the initially flawed institution usually remain operative. Objectively, the preferred, but rarely feasible situation is to start afresh on a small scale, perfect a design and then replicate it systemwide. Unfortunately, most experimental innovations will eventually have to be grafted onto an existing institution whose members may be quite adept at nullifying their impact.

Writ large, institutional strengthening and reorientation is really the essence of reform -- the goal toward which all activities eventually lead. While it may be achieved last, it must be incorporated from the start. Waiting until all the other elements -- political will, demand, and normative change -- are in place before beginning is the worst of all strategies. It encourages overly ambitious goals and designs, risks losing momentum and interest before concrete results

begin to appear, and leads to an excessive investment of resources in what should be only preparatory stages. Countries which have prioritized legal reform often invested years and millions of dollars in producing new laws which in the end were still flawed. The solution is not to strengthen the institutions first, but rather to design reforms with an eye to implementation and thus take current institutional capabilities and necessary changes into account from the start. Institutional strengthening is best accomplished over the entire course of a reform so that by the time the other elements are in place, the institutions will be ready to comply with the new rules and meet the new demands.



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PN-ACD-020

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U.S. Agency for International Development  
Washington, D.C. 20523