

SOME THOUGHTS ON THE FUTURE CHALLENGE OF JUSTICE AND LEGAL REFORM
IN LATIN AMERICA

Linn Hammergren, USAID/El Salvador

The following short contribution is a summary of my side of an electronic exchange with a group of AOJ managers in the Latin American program. As such it is not intended to address some of the broader issues of why and whither AOJ (already battered to death in prior exchanges with CDIE), but rather to examine a series of questions within the context of an existing program, whose general outlines, objectives, and strategies I am taking as givens. For the benefit of those who missed this electronic conversation, and especially those less familiar with the Latin American AOJ program, I am prefacing the discussion with some brief background material to place the remaining remarks in context.

The exchange began with an offering by Mario Pita of USAID/Honduras on his mission's achievements in removing some inquisitorial features of the draft Criminal Procedures Code their program is promoting as a key element in Honduran justice reform. This rather esoteric theme provoked two responses from me on the impact of law reform and training in bringing about concrete changes in justice system performance. For the uninitiated, it's worth mentioning that code reform, and especially the introduction of criminal justice systems based on adversarial, oral procedures as opposed to inquisitorial, written ones, has become a central organizing theme in most Latin American programs. This is in large part at the insistence of Latin American reformers, who, even before AID began its AOJ efforts, had targeted antiquated procedural systems as the key to many of the problems and vices characterizing the administration of justice in the region. A large number of the countries where we work are now drafting, discussing, or implementing new procedural and substantive codes intended to introduce greater transparency, immediacy, due process guarantees, and a respect for human rights. While not all these virtues are expected to flow automatically from the adversarial, oral model, the working hypothesis is that they will be more easily achieved through the latter, especially when supported by training in the new processes and a variety of complementary activities including popular legal education campaigns, administrative reorganizations, and introduction of modern technologies.

Although the Salvadoran program is no exception, and in fact has introduced a Minor Offenders Law (Ley del Menor Infractor)¹

¹The law went into effect on March 1, 1995. It was preceded by a new Family Code and Family Procedures Law, which although treating strictly civil matters, also introduced oral trials, a

consistent with these principles, our experience suggests several caveats about the faith in this particular kind of law reform and its ability to deliver more accessible, more efficient, more effective, and more humanistic justice. Briefly summarizing the arguments expanded below, I am first concerned about the very notion that the basic problem was a procedural one and that one of our primary aims should thus be assuring that the new legislation is adversarially pure. I believe this puts the emphasis in the wrong place and may even encourage some ill-advised innovations. I have called the belief in the superiority of the adversarial system a convenient fiction because it provides a mechanism for introducing more fundamental kinds of change that have nothing to do with the adversarial-inquisitorial dichotomy. Some of these other changes may be legal as well (the elimination, for example, of not only institutionalized, but legally required human rights abuses²), but most are cultural and institutional in the broadest sense. My second argument is thus not that we should drop the emphasis on code revision, but rather recognize that the goal is producing real improvements in system impact and that here law reform is only the first step in a very lengthy process of institutional transformation.

Training, another part of the standard package, is also important but limited in its impact. As we are seeing in El Salvador, with two new procedural codes (family and minor offender) in effect, and after a year and a half of system wide training in the new laws and principles behind them, we've only touched the tip of the ice berg. There have been concrete improvements in some aspects of system performance (arbitrary arrests radically reduced, preventive detention for juveniles now becoming the exception, greater public awareness of their rights in criminal and family jurisdictions), but all and all we still have highly dysfunctional systems. As one of my consultants recently noted, as we get a better understanding of what doesn't work and why, it's clear we have enough to keep everyone busy for ten to fifteen years more.

In an effort to simplify our goal statement for the ever present critics, we've started talking about a three part process of legal, cultural, and institutional change. In some sense, we've accomplished a good part of the first two stages. The main pieces of new legislation are drafted, and either approved and in effect or near that point. Cultural change we've equated with formal training and popular legal education, and there too, we've made substantial progress. The current set of "judicial operators" have

greater role for the parties (the dispositive as opposed to inquisitorial principle), and a greater emphasis on due process and civil rights.

²In El Salvador, for example, the Criminal Procedures Code currently in force makes preventive detention the rule rather than the exception. It also includes a presumption of guilt rather than innocence in the case of certain crimes.

all been exposed to a series of short courses on the new laws, and are fairly well versed in their content. We've made less progress with lawyers in private practice and the general public, but there is reasonably greater awareness of the existing and new rules of the game. The remaining, almost untouched problem is institutional change -- how to make the actors and organizations in the sector perform according to the new rules and principles of action. And here the obstacles are enormous.

One of the problems is the human resource base. Sure our judges, prosecutors, defenders, and their staff now know the new legislation, but, owing to the poor quality of education in the country and a lot of other cultural baggage, they lack most of the additional skills and knowledge to put it into effect. They also have a number of "inquisitorial habits" and biases which will not be eliminated by simply changing the law.³ Law and Development did have a point here -- in the long run, vastly improved legal education (and I'd add, general educational reform in all disciplines) is the answer, either that or a four year judicial school which devotes most of its time to teaching reading, writing, logic, general studies, mathematics, principles of management, ethics, and so on. Given the global dimensions of the problem, just replacing the incumbents isn't going to help; we'll still have judges who can't reason or write a simple resolution, expert witnesses whose grasp of their disciplines is shakey to say the least, statisticians who have never heard of a management information system, and administrators who are that in name only.

Added to this is the problem of inadequate physical and financial resources. Latin America has been accustomed to bad but cheap justice. The improvements we are promoting are going to cost more and the notion of supplying higher operating budgets doesn't seem to sit well with many Ministers of Finance. This means that the systems can't attract good people, but even when they do, they can't provide them with the basic equipment to do their work. As one example, Salvador's public defenders handle ridiculously low case loads, in part because they are poorly paid, and thus, contrary to the law, devote a good part of their time to private practice. However, they also are hampered by lack of vehicles and communication equipment. With access to the latter, one truly full time defender could handle the cases and territory currently covered by three or four. It would also help if they were required

³Whether the adversarial system is better or not, it depends not only on legislation and acceptance of certain principles, but also on how people view and do their work. Under the Minors Law, we still have judges who dominate courtroom discussion and think nothing of asking leading questions, as well as prosecutors and defenders who have no idea of what to do inside or outside the courtroom. Poorly developed techniques for questioning witnesses have not improved any, and the assumption that a "neutral judge" on deciding a verdict will simply discount evidence that shouldn't have been entered remains very much in place.

to live in the districts they serve, but given the inadequate salaries and their extraofficial outside work, to do so would make the jobs still less attractive. AID and other donors can't solve this problem directly, but until it is solved, many of our efforts will not have their full payoff.

This raises still another problem which is the truly irrational organization of most of the entities in the sector. Despite CDIE's objection to a focus on administration and technology, the fact is that even highly motivated, well trained personnel would find it impossible to work in these nightmare bureaucracies. Less motivated and less trained individuals need the support of rationalized organizational structures if they are even to begin to do their jobs. This includes things like supervisory and incentive systems, work standards and performance evaluation, a distribution of human and material resources bearing some relationship to demand, rationalization and standardization of procedures, improved document management, storage, and retrieval systems, and so on. This all sounds like so much insignificant detail until you run into an organization like Salvador's Procuraduria General de la Republica (defense and other legal assistance) or its Fiscalia (Attorney General's Office), where there is no way of locating a case, determining workloads, or assessing how long it should take for a matter to work its way through the system. While both the Procurador and Fiscal are constantly clamoring for more positions and higher budgets, it is obvious that they are already paying staff for doing virtually nothing, but that this is impossible to verify unless one follows the suspected shirker on his rounds for a week or two.

Although organizational disorganization reaches such extremes as to go beyond efficiency to the issue of efficacy, I am reserving this as a separate topic, the problem of inadequate or simply nonexistent functional job descriptions for key system actors (or even entire institutions). This is a long standing problem, but the new codes in particular assign actors new functions, and thus can only work if these functions have adequate operational definitions. To give the fiscales (prosecutors) responsibility for directing the police investigation and promoting the "accion penal" (criminal accusation) is one thing, but to translate this into what they do when they get to the office on Monday morning is another. Neither the codes, nor training in their content is going to help much here; what is needed is an entirely new model of the prosecutor's function and the identification and transfer of the skills needed to carry it out. If the task is most difficult in the case of the fiscales, it is equally important for the other system actors. Our new family code, for example, adds a procurador de familia (family lawyer) whose function, eight months after its creation, is still unclear, as is the division of labor between this office, the existing procurador auxiliar, and the juez de familia (family court judge). Three months after the entrance into effect of the Ley del Menor Infractor, some fiscales and police still believe the latter's function is only arresting and transporting minors -- the fiscal is to conduct the investigation,

although that generally means nothing gets done.⁴

In stating all this, I don't want to suggest that the problem originates in incomplete legislation. It is instead the failure to realize that the legislation must be complemented with this additional work. Unless that happens, you either have chaos or a continuation of past practice, and thus no real change. I know the code writers often bet on things simply working out, and over time they may. However, that's scant consolation to someone trying to get a divorce or child support in the new family courts, to the public who see cases being thrown out of court because the police and judges disagree on what constitutes good evidence, and to the kids being held in the municipal drunk tanks for lack of juvenile facilities.

There are, however, a few things to be said about the new laws and the place of legislation in the reform process. First, it is obvious that existing legislation needed to be modernized; although it's probably true that there was room for substantial improvement even within the existing legal framework, the latter often obstructed change, enshrined some questionable values and principles (status crimes, the presumption of guilt, inadequate due process guarantees, etc), and defined practices and procedures which no longer make any sense. Second, although new legislation by itself may have very limited impact, it is a good place to start because it's relatively easy, inexpensive, and creates mystique and momentum. While it's still going to be difficult to reorient and reorganize Salvador's Fiscalia, it's easier to do this in the name of a new procedural system than for reasons of efficiency and efficacy.

Third, and returning to an earlier statement, I'm still not convinced that this couldn't have been done as a modified inquistorial system, which in the end is probably what we will get anyway.⁵ However, if local reformers believe an adversarial system

⁴By last report (June 30, 1995), the juvenile court prosecutors had amassed 900 new cases which remained virtually unattended.

⁵This is not only because of ingrained habits (see note 3 above), but also because the code writers themselves seemed to equate the adversarial model with only a few of its basic elements. Thus, observers more accustomed to working under the U.S. or British system have commented on the failure of the new codes to include such factors as a concern for the chain of custody or various aspects of rules of evidence. Potentially more serious is the writers' failure to take into account some of the dangers of the adversarial system, for example the frequently excessive zeal of prosecutors, and the safeguards adopted to reduce them. From this standpoint, there may be some reason for concern about Honduras's decision to eliminate the juez de instruccion's ability to determine, on the basis of a preview of evidence presented by both

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with oral trials will work miracles, than we'd be fools not to use that belief. The problem was not an inquisitorial system, but a bad, antiquated inquisitorial system, and we'll have an equally bad adversarial one unless we move beyond the notion that the key to success lies in these global features rather than in the more mundane details of how the pieces work and fit together.

Finally, it's here that I have a problem with the codes as written. I think the main authors have been excessively motivated by a fit to principles (some of them of questionable validity⁶) and fairly inattentive to the operational side --how things will work in practice. And where they haven't had principles to guide them, they often just punted, introducing some pretty questionable innovations.⁷ Some of them have little or no practical experience

parties, whether a case merits going to trial. This may indeed be an overinterpretation of the adversarial principle as even in the United State the prosecutor's decision to take the case to trial is subject to screening by another neutral body -- a grand jury and/or magistrate in a preliminary hearing. While defendents may waive the right to this review, it remains as a potential brake on excessive prosecutorial ~~zeal~~.

⁶One should probably distinguish between first order principles (presumption of innocence, right to defense, no punishment without a predefined crime) which we accept as givens, and a series of second order principles derived from "juridical science" which may be proxies for the first, or by some process of deductive reasoning have come to be seen as uncontestable elements of the ideal process. These would include the belief in the intrinsic superiority of the adversarial system, the elimination of the extrajudicial confession (which really aims at eliminating the coerced confession, but some would say, by overkill), or the notion (enshrined in our new Minors Law) that whatever can be reconciled should not be taken to trial. Two points should be made here. First, principles are not rules but guidelines, and even first order principles may conflict with each other, thus requiring some sort of compromise. Second, while the distinction between first and second order is a judgment call, it does suggest the desirability of asking what we are trying to achieve in realizing a principle and whether it could be attained by some "less principled" mechanism.

⁷Our Minors Law for example puts no limit on the number of times an offender may conciliate his/her offense out of the system, nor on the type of offense to which this mechanism may be applied. We already have cases of juveniles who have conciliated half a dozen or more offenses, including rapes and other violent crimes. In some cases this conciliation has been forced on the victim by friends of the suspect. Another problem is that our code writers often seem to be a little behind the curve in terms of how innovations have fared elsewhere -- unlimited conciliation has already been tried and found lacking in several European countries,

to guide them, and all have been inclined to adopt mechanisms supposed to work elsewhere based on very sketchy understandings of the nature of that success, its contextual conditionality, or even the precise details of the foreign model. While this doesn't mean the codes are unworkable, it does produce several kinds of problems: overly complex procedures;⁸ insufficiently defined procedures;⁹ mechanisms that won't work until certain infrastructure, offices, and capabilities are provided;¹⁰ a stipulation of offices and services likely to be beyond the capabilities of these countries for decades to come;¹¹ and utter

producing some of the readjustments El Salvador will undoubtedly have to make. Many of the code writers are aware of experiments with boot camps in the States, but seem not to have read more recent literature which casts doubts on their success.

⁸Our draft Criminal Procedures Code for example requires three oral hearings before a case goes to trial -- many observers believe this is excessive. It also allows the victim to override a prosecutor's decision to dismiss a case, a nod to victims' rights which goes even beyond the normal right to appeal a dismissal.

⁹Our Minors Law (a product not of AID's project but of UNICEF assistance) has been criticized for its inadequate attention to the appeals process, for its sketchy treatment of the prosecutors' role (also a problem with the CPP), and for its broad references to preserving the minor's dignity, which some police believe prohibits using handcuffs even on violent youths.

¹⁰The Family Code will require the creation of a still nonexistent family registry if some of its provisions are to work. The Minors Law stresses alternative sentencing and programs like community work, supervised release, and special education, none of which exist yet. Hence, the existing alternatives are either release or incarceration in detention centers which fall far short of the special facilities envisioned. Minors when first detained are also to be kept in special facilities apart from adult prisoners or sentenced juveniles; such facilities do not exist. The emphasis on conciliation as a part of these two jurisdictions and the new adult criminal system is also frustrated by lack of training in these skills. What passes for conciliation is often forced negotiation and an imposed settlement which leaves neither party satisfied.

¹¹In addition to the problems mentioned in footnote 10 above, one might mention the "multidisciplinary teams" of psychologists, social workers, and educators who are supposed to assist the juvenile court judges. While such teams exist, the level of education in these disciplines is, if possible, still worse than that in law -- hence the quality and content of assistance is highly dubious, if generally well intentioned. I had one psychologist assure me that a heavy dose of transcendental meditation was a sure cure for any offender.

flights of fancy far exceeding human and organizational capacities anywhere in the world.¹²

Fortunately, in El Salvador, and I suspect elsewhere, no one seems to expect laws to be implemented as written; they do, however, expect that a new law will make things that they care about better rather than worse. This allows leeway for selective implementation, but also suggests that selection should focus more on output and less on abstract principles. From this standpoint, Honduras' victory in reducing the juez de instruccion's (investigating judge¹³) role in the intermediate stage of the criminal process may be important, not because it realized the adversarial principle, but because it makes for a more straightforward process, and if you have good prosecutors, may allow less room for external manipulation of the process. (However, as noted above, to the extent it makes the prosecutor alone

¹²One of the most inconvenient provisions of the Minors Law is the prohibition of record keeping on unsentenced juveniles by police (and in some interpretations, by any one else in the system). This is intended to avoid stigmatizing youths as trouble-makers. As several observers have noted, information on gangs or on problem minors is essential, especially if the policy is to take minors into the system only when all other recourses fail. Presumably the police may want to make an arrest only after several encounters with a child, but without records will have no way (except their memories) of knowing when the limit has been reached. Given the sophisticated information systems managed by gangs, denying police an equivalent ability is to give them a near insurmountable handicap. Clearly such records should not be openly available, and if the police prove abusive may have to be retained by the prosecutors or the court. However, it is already evident that legally or not, police will keep records; hence, making it legal may provide for better control of potential abuses.

¹³Under the former system, this judge did the principal investigation of the case, repeating or supplanting that done by the police and prosecutor. The position has been retained in most reformed systems, but responsibilities are usually restricted to overseeing the police and prosecutorial investigation to assure it does not violate legal rights. When the investigation is completed, the prosecutor presents it to this judge, who usually has the final say as to whether it goes to trial or not. In Honduras, this step was apparently eliminated. Under the new Salvadoran system, it remains. After the preliminary hearing, the judge may decide to dismiss a case for lack of evidence or send it back for further investigation. Such a decision may be appealed. If the judge objects to the prosecutor's decision to drop charges, he/she takes the matter to the prosecutor's immediate supervisor who has the final say. Without implying that things work best in the States, it should be noted that the prosecutor's powers in our own country are more comparable to those under the new Salvadoran system than what I understand to be the revised Honduran proposal.

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responsible for the decision to go to trial, it may give him/her too much unchecked power and may merit reconsideration.)

To summarize, without detracting from our joint efforts to date, the purpose of this piece has been to stress the amount of work remaining. Much of this our projects will only be able to begin; the danger of course is that an inadequate follow-up may produce some very negative reactions to the initially positive changes. It was not AID's choice to introduce the Salvadoran Minors Law with so little advance preparation nor in its current, insufficiently vetted form. The necessary preparation of the system and the modifications of the law will have to be done after the fact. The experience has, however, been helpful in giving us a head start on preparations for the Criminal Procedures Code, and we hope will also be a useful example to others in Latin America and elsewhere who are embarking on similar efforts.

-- San Salvador
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