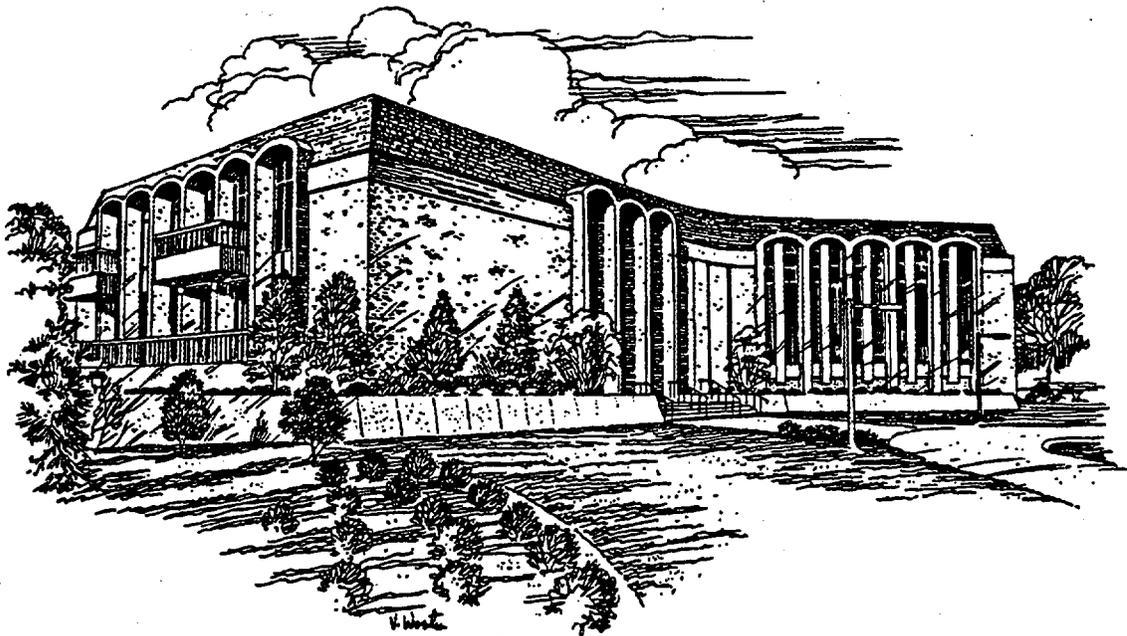


# LESSONS LEARNED

Proceedings of the  
Second Judicial Reform Roundtable  
held in Williamsburg, Virginia  
May 19-22, 1996



**NATIONAL CENTER FOR STATE COURTS  
US AGENCY FOR INTERNATIONAL DEVELOPMENT  
INTER-AMERICAN DEVELOPMENT BANK**



# **LESSONS LEARNED**

**Proceedings of the  
Second Judicial Reform Roundtable  
held in Williamsburg, Virginia  
May 19-22, 1996**

**A program supported by  
the US Agency for International Development and  
the Inter-American Development Bank  
in collaboration with  
the National Center for State Courts**

**Edited by  
Madeleine Crohn and  
William E. Davis  
National Center for State Courts**

**November 1996**

**This document was written in preparation for, and following, the Judicial Roundtable II held May 19-22, 1996 in Williamsburg, Virginia, at the National Center for State Courts, with support from the U.S. Agency (USAID) for International Development and the Inter-American Development Bank (IDB). It may be reproduced and distributed for non profit educational purposes. Points of view or opinions expressed in this document are those of the authors and do not necessarily represent the official position or policies of the NCSC, USAID, and IDB.**

# CONTENTS

ACKNOWLEDGMENTS.....	ii
INTRODUCTION.....	iii
ESSAYS AND COMMENTARIES.....	1
I.    JUDICIAL COUNCILS ( <i>N. Martinez</i> ).....	2
JUDICIAL COUNCILS - Commentary ( <i>R. Wheeler</i> ).....	12
COMMENTARY.....	19
II. A. CASE MANAGEMENT ( <i>C. Gregorio</i> ).....	21
II. B. DELAY REDUCTION ( <i>W. Davis</i> ).....	33
COMMENTARY.....	53
III.   ORAL PROCESS ( <i>J. Vargas</i> ).....	55
COMMENTARY.....	73
IV.   ALTERNATIVE DISPUTE RESOLUTION ( <i>W. Davis, M. Crohn</i> ).....	75
COMMENTARY.....	90
V.    COALITION BUILDING ( <i>R. Asselin, Jr.</i> ).....	91
COMMENTARY.....	111
VI.   PUBLIC DEFENDER ( <i>R. Wilson</i> ).....	112
COMMENTARY.....	127
VII.  ETHICS ( <i>J. Shaman</i> ).....	128
ADDRESS ( <i>F. Zemans</i> ).....	143
COMMENTARY.....	147
ADDRESSES.....	148
Address by the Honorable Mark L. Schneider.....	149
Address by Charles E. Costello.....	153
Address by the Honorable Roger K. Warren.....	157
APPENDICES.....	160
List of Participants.....	161
Steering Committee.....	166
Speakers, Faculty, and Staff.....	167
Agenda.....	168

# ACKNOWLEDGMENTS

The Judicial Reform Roundtable II and the publication of its proceedings have been made possible because of the support and commitment of many persons and organizations.

The Roundtable received financial and technical support from the US Agency for International Development and from the Inter-American Development Bank.

The authors of monographs included in these Proceedings were generous with their time, and produced excellent essays despite stringent deadlines.

Facilitators and Reporters were critical to the productivity of the many break out sessions held over three days. And, for more than a year of preparation toward Roundtable II, the National Center staff showed its deep commitment to the issues and reforms that were part of the Roundtable agenda.

The most important aspect of Roundtable II accomplishments, however, can be found in the vision and energy of the forty-four Delegates, representing twenty-seven nations, who participated in three intense days of discussions. We, at the National Center, take great pride in having had the privilege of welcoming them to our headquarters. These leaders represent the best of our profession as, together, we seek justice and strive to improve services to our communities.

We believe that Roundtable II helped generate a legacy and provided useful information to the many partners who share in the mission of justice system reforms, and hope that the NCSC will have future opportunities for such Roundtables with other colleagues, worldwide.

Roger K. Warren  
President,  
National Center for State Courts

Linda Caviness  
Executive Director,  
International Programs  
National Center for State Courts

# INTRODUCTION

Three years separate the first Judicial Reform Roundtable (JRTI) from the second (JRTII), held in Williamsburg, VA, on May 19-22, 1996. The two events are linked closely, and JRTII offered evidence of the dynamism and significance of Rule of Law reform efforts which took place in Latin America and the Caribbean (LAC) in the intervening years. Thirty-five Delegates from twenty-one LAC countries<sup>1</sup> used this forum to discuss and compare national experiences and results.

Aside from lessons learned through individual reform initiatives, the 1996 Roundtable helped surface these issues:

- Beyond differences among systems of law and legal culture, disparities in resources, and other significant variables, comparisons of experiences and exchanges of view points are informative and desirable. Most countries face similar basic difficulties and obstacles, and go through comparable stages of reform.<sup>2</sup> Further, these principles appear to be shared by many: there exists a universal interest in improving justice; those assuming justice related functions perform a public service and are increasingly accountable as such; and, judicial and justice system leaders must play key roles in strengthening public confidence in the courts, and in building organizations that perform efficiently.
- The reform momentum still needs substantial nurturing. In several countries, justice system and traditional methods of delivering justice are literally under siege, and face criticisms that challenge their credibility. Progress made during the past ten years has been significant, but may be jeopardized if technical and financial support is not maintained. Justice officials are increasingly concerned about the public's demand for improvement. However, the other branches of governments are not sufficiently supportive and involved in these efforts. Within the justice system itself, adverse variables such as complacency or corruption, frequent turn over in leadership or insufficient expertise, impede the progress of reform strategies. The recent past demonstrates that improvements in the justice system are possible but, in many countries, these achievements are still in their early stages, and appear to be still too fragile to progress on their own.
- A continued presence of, and systematic coordination of efforts among Donors are critical to the reform momentum in the region. Significant progress has been made, but most reforms are still in their early stages or raise a new generation of

---

<sup>1</sup> JRTII was broadened to include representatives from other regions (Eastern Europe, Africa and Asia), for a total of 9 Delegates representing 6 countries. The goal was to assess whether sufficient commonalities of reform issues existed toward transfer of information between regions. JRTII proved that this assumption was correct.

<sup>2</sup> As one illustration, in a study commissioned for the NCSC 25th anniversary, John B. Oakley, professor of law (UC-Davis), concluded that courts in the US face problems that "can be grouped as the "four Cs": Caseload, Cash (court financing), Cohesion (conflicts between courts and missed problem solving opportunities), and Culture (social context)." – issues that also confront, in various levels of degrees, justice systems and the judiciary throughout the world.

questions that must be addressed. The region will be able to sustain efforts on its own, at some point; but expectations that it be able to do so now are premature and counterproductive.

## **BACKGROUND**

In June, 1993, the first Judicial Reform Roundtable brought together 28 judicial leaders from 18 countries in Latin America, Canada and the United States, and 43 observers from Donor organizations, US Congress and federal agencies, and Non Governmental Organizations (NGOs). The US Agency for International Development (USAID) sponsored the event, in coordination with the National Center for State Courts (NCSC).

JRTI provided an opportunity to introduce ranking justice officials from throughout the region to trends in judicial administration in the United States and other parts of the hemisphere. Its purpose was to help identify priorities for change, with particular attention to practical features of reforms. Participants agreed that, throughout the hemisphere, core values were shared -- commitment to democracy, individual rights and individual dignity. They also concluded that a common Western legal model helped transcend differences in legal cultures, doctrine and resources, and permitted a valuable, analytical comparison of experiences.

By end of the 1993 Roundtable, attendees had identified and agreed upon these stages of reforms:<sup>3</sup>

- . Affirmative need of reforms and modernization
- . Identification of change agents and of priorities for reforms
- . Design -- including strategic goals and tactical, short term activities
- . Implementation requirements
- . Lessons learned

---

<sup>3</sup> . **Need:**  
Reform and modernization are needed, but this is not always echoed in a domestic consensus, even though the latter is a key element of successful reforms.

. **Agents and Priorities:**  
Agents of reforms should be found in all branches of government (legislative, executive and judicial branches), but an excessive reliance on the Executive exists too often and, as such, threatens judicial independence. There are too few champions of reforms within the civil society.

. **Priorities** include the development of an independent judiciary, aided by an administrative capability that is subordinate to the judiciary; the establishment of data collection and analytical capacities; increased access to and accountability of the courts; and the creation of constituencies supportive of reforms, to counterbalance resistance or passivity of the legal establishment.

. **Design:**  
Strategies should help establish the independence and leadership role of the judiciary; tactical, short term activities might include pilot programs in various areas of reform (ADR, delay reduction, etc.), training, research and analytical studies.

. **Implementation:**  
Reforms, to be successful, require active judicial leadership, flexible and competent administration, discipline mechanisms, and thoughtful sequencing of reforms mindful of scarce resources and of the need for supportive constituents.

. **Lessons learned:**  
Reforms should be monitored and re-assessed; this should be an on-going process.

## JUDICIAL REFORM ROUNDTABLE II

Building upon the 1993 event, the second Roundtable was designed to document and assess lessons learned from a decade of justice system reforms in Latin America and the Caribbean. While the purpose of JRTI was to help compare knowledge and generate partnerships and enthusiasm, it was time, by 1996, to reflect and evaluate lessons learned to date. Moreover, the JRTII focus was on dialogue and exchanges among regional Delegates, so that they might discuss directly and candidly these reforms, compare experiences across national borders, and strengthen the regional network begun through the Conference of Chief Justices.<sup>4</sup>

There were other important differences between the two Roundtables: methodology, subject matter (agenda), short term/long term projected outcomes, and sponsorship.

**Methodology and Agenda:** (see page 168)

The Roundtable was designed to provide for maximum interaction among the Delegates from the LAC countries, including Ministers of Justice, Presidents of Supreme Courts, high level justice and judicial officials, and NGOs, and with Delegates from other regions; and to encourage dialogue among 43 Observers, including technical specialists and representatives of the Donor community. The highly structured format was closer to that of a policy forum than of a more traditional conference, and each module of the agenda was to build upon the previous one.

Aside from the introductory and closing sessions, most of the program took place in small group meetings, where Delegates discussed and debated seven justice system reforms (Judicial Councils, Caseload Management, Oral Process, Delay Reduction, Coalition Building, ADR, and Legal Assistance). An eighth topic, Ethics, was presented at a lunch break, and reviewed as part of the closing plenary discussion.

The topics were selected as illustrative of practical, concrete reform programs underway in the region. All, in complementary ways, aim at 1) increasing the independence of the judiciary, and the efficiency and fairness of justice system institutions and legal framework, and 2) expanding public support for reforms and access to justice.<sup>5</sup> Several authors familiar with the subject matter, and with reform results in the LAC region, wrote brief *précis* which were sent to attendees in advance of the Roundtable.

---

<sup>4</sup> Presidents of Supreme Courts and other high ranking officials have been meeting with increasing frequency over the past few years including, on a number of occasions, at Donor sponsored regional meetings. Two separate regional associations of Presidents of Supreme Courts exist, one in Central America, and the other in the countries of Mercosur. Moreover, as an outgrowth of these developing relationships, the desirability of creating a Conference of Chief Justices was discussed at the Presidential Summit of the Americas held in 1994, and institutionalized formally in 1995 in Washington, D.C. The Conference secretariat is in Panama.

<sup>5</sup> The structure of the agenda/topics references the strategic analytical model developed by the USAID Center for Development Information and Evaluation (CDIE) - *Weighing in on the Scales of Justice*, February 1994 – see matrix on page viii

Over three days each reform was introduced, first in plenary, and then discussed extensively in small groups,<sup>6</sup> with assistance from a facilitator and reporter. The next plenary began with a summary of group discussions that had preceded immediately (general areas of agreements and differences); the summary was then followed by an introduction of the next reform topic.

In a two hour closing plenary, the Delegates commented on their work and experience of the past three days, to summarize and highlight shared perspectives and areas of disagreements.

### **Results:**

The Roundtable helped elicit reactions to the materials sent in advance, and comments on reforms underway from the perspective of judicial and justice reform leaders from the region. These are compiled in the section which follows (Essays and Commentaries). These brief summaries cannot do justice to the richness and intensity of the discussions that took place in break-out sessions. Such energy should be reflected, instead, in the follow-up that will take place in each country, as reforms are re-evaluated and pursued, and in the follow-up information exchanges and networking activities that will take place throughout the region.

The Commentaries simply attempt to capture the **general thrust** of discussions and conclusions. Some form of consensus, or agreement, on a number of issues was apparent, but did not lend itself to a formal endorsement. The breadth and number of topics were such that a consensus protocol would have been too general and, thus, not particularly helpful.

Sharp differences and diverging points of views are also noted in the Commentaries. None of the contributions and observations reference the country representatives who made them -- to preserve the confidentiality of candid discussions. The commentaries, on the other hand, incorporate comments made in **all** break-out groups: in most instances, various features of specific reforms find echoes in most countries, regardless of region. The specifics and the anecdotes may vary, and the language or definitions will surface differences (such as legal infrastructure or system). But basic principles, concerns, and aspirations are, for the most part, commonly shared. Within and outside the LAC region, Delegates told us, comparisons of results and experiences were purposeful.

The full measure of the Judicial Reform Roundtable II impact will surface in the long term. Telling indicators will be the type and number of new reforms undertaken in the coming months and years; mid course corrections, or fine tuning of existing reforms underway; analytical reviews of justice reform strategies in individual countries, using JRTII

---

<sup>6</sup> Each group included 10-12 Delegates, with three groups involving Delegates from Spanish/ Portuguese/ French speaking countries, one for English speaking countries in the Caribbean, and one for Delegates from regions other than LAC. Other attendees, such as Donors, met in a separate group, or observed Delegate sessions.

process, or materials, or both;<sup>7</sup> increases in the number of informational exchanges between, and networking among, regional justice system officials. These desirable results will be affected greatly by the type and level of assistance provided by the Donors community.

### **Sponsorship and role of Donors, and of technical advisors:**

The 1996 Roundtable was the first direct collaboration between the US Agency for International Development and the Inter-American Development Bank, as cosponsors of a multinational policy forum on justice reforms. USAID and IDB representatives participated in meetings of an informal steering committee to help prepare and design JRTII, and acted as facilitators and reporters during the Roundtable. They, along with other Donors and technical advisory agencies, observed plenary and break-out sessions, and held a number of separate discussions on Donor issues.

A complementary purpose of JRTII was to give Donors an opportunity to reflect on their role in reform initiatives, and to discuss how they might develop complementary programs, drawing on their respective strengths and organizational structures. Delegates did not make this an explicit issue, but their comments demonstrated the need for such coordination. Further, as USAID's financial support for Rule of Law programs diminishes, and multilateral development banks launch broad initiatives throughout Latin America, the transfer of institutional memory -- successful strategies and those which fell short of expectations -- is essential.

JRTII discussions helped highlight the many questions raised by promising, but incomplete, reforms (introduction of orality, coalition-building strategies, representation of poor and disadvantaged groups, for example). These initial efforts have underscored the need for an independent judiciary, accountable to the public, and for justice systems that are timely, fair, and accessible; and helped demonstrate the close relationship between these objectives and sustainable economic development. At the same time, they have created high levels of expectations among reform leaders and citizens.

Justice system reforms in Latin America are at a crossroads. Enough information exists to provide a good foundation for future efforts. Progress, if it is to occur, is likely to remain incremental and labor intensive, and will continue to require significant financial support. It will benefit from systematic investments in "best practice" research, and call for careful tailoring of future initiatives to the specifics of each country (legal, political, and cultural norms) and to the goals set by its judicial leaders. These are all areas where Donors and technical advisors can play a useful and important role. Lack of coordination, follow-through, and consistency by the Donor community would have serious, adverse consequences.

---

<sup>7</sup> Peru and Guatemala scheduled follow up Roundtables in June 96; African representatives inquired about the possibility of holding a similar event in their regions; and copies of JRTII monographs are being used in a variety of judicial and justice system reforms meetings in the region.

**TABLE 2. CHARACTERISTICS OF RULE OF LAW SYSTEM DEVELOPMENT STRATEGIES**

	<b>I. CONSTITUENCY AND COALITION BUILDING</b>	<b>II. STRUCTURAL REFORM</b>	<b>III. ACCESS CREATION</b>	<b>IV. LEGAL SYSTEM STRENGTHENING</b>
1. Supply or demand strategy	• Demand	• Supply	• Demand	• Supply
2. Development problem(s)	• Lack of political will to undertake judicial system reform	• Structural deficiencies beyond scope of system building	• Systemic exclusion of non-elite • Suppression of human rights (e.g., women's rights, minorities' rights)	• A justice system severely weakened by: • inefficiency • incompetence • inadequate resources
3. Longer term objectives	• Sustainable political commitment in support of the judicial system	• A more accountable governance system	• A legal system that promotes greater social and economic equity	• A more effective legal system
4. Intermediate objectives	• Widespread public support for the judicial system	• An autonomous and more effective judicial system	• Empowerment of disadvantaged groups	• An efficient legal system
5. Shorter term objectives	• Public pressure on political leadership to undertake judicial reform	• New legislation, regulation, court procedures (rule changing) • New adjudication structures • Constitutional restructuring	• Access to legal system for: • citizens against the state • citizens against each other • Redress for injustices and human rights abuses	• More qualified legal personnel • Enhanced legal resources • Improved court administration
6. Program Elements	• Coalition building among key elites • Support for media: • judicial reporting • investigative journalism • Support for NGOs: • mobilize constituencies for change • lobbying • affect public opinion • Anticorruption efforts • Responsible for lawyers' community	• Autonomous judicial budget • Restructured judicial review • New judicial processes (e.g., oral procedures, criminal procedure codes) • ADR mechanisms • Constitutional reform • Establish career service(s)	• NGO advocacy for disadvantaged • Paralegal training • ADR • Developmental legal assistance • Litigation aid • Media monitoring • Legal literacy	• Professionalization of courts, police, prosecutors • Human rights/ethics training • Court modernization • Increased court budgets • Law school curricula, training for judges and lawyers • Supervision of lower courts • Legal think tanks
7. Performance indicators	• Elite dialogue and common agenda emerging on judicial reform • Public opinion polls favoring legal system reform • Public attention to corruption • NGO advocacy and reformist coalition emerging	• New institutional rules improving justice system effectiveness • ADR mechanisms functioning effectively • Constitutional changes positively affecting legal system	• Justice system more responsive and accountable to disadvantaged groups • Decreased abuses • Greater equity for disadvantaged • NGO recruitment into government	• Improved case processing • Better investigation/prosecution • Enhanced legal education • Greater probity and standards • Enhanced legitimacy (surveys) • Advances in legal knowledge
8. Problems and issues	• Flagging constituent support • Competition fragmenting coalition for change	• Reforms insufficient to transform judiciary • Reforms constrained by: • limited political will • weak constituencies	• Sustainability (resources and operations) • Fragmented constituencies • Elite opposition • Limited coverage and replicability	• Manipulation by dominant elites • Inadequate elite support • Little cultural resonance for reform • opposition from vested interests • Pervasive corruption • System building insufficient; stronger measures needed
9. Prominent examples	Argentina, Colombia, Philippines	Colombia	Philippines, Sri Lanka	Colombia, Honduras, Uruguay
Note: ADR = Alternative Dispute Resolution				

NOTE: This chart was reproduced from USAID's *Weighing in on the Scales of Justice*, page 14, February 1994.

**ESSAYS  
AND  
COMMENTARIES**

# **I. JUDICIAL COUNCILS**

## **JUDICIAL COUNCILS IN LATIN AMERICA**

### **Annotations on "Judicial Self-government"**

*Nestor-Humberto Martinez Neira*<sup>8</sup>

#### **I. INTRODUCTION**

Strengthening of the Rule of Law, an urgent priority facing Latin American society today, is critical to the establishment of the governmental context and infrastructure required by the development process. This task begins, of course, with a strengthening of the administration of justice – an instrument essential to the achievement of social order, the preservation of fundamental rights and liberties of citizens, peaceful living, and the legal certainty necessary to investors. In this respect, particularly since the late 1980s, a judicial reform process has been taking place in Latin America that shows similar characteristics in various countries throughout the region.

However, reform efforts and their design have followed a conventional approach to problems relating to justice. Thus, strategies have concentrated on "doing more of the same," and included: amendments to procedures, increasing the public expense of the sector, and increasing judicial salaries and the number of courts. In the near term, results have fallen short of expectations. For example, expanding the number of judges, a simplistic response to increased demand for justice, did not reduce court backlogs in any significant ways, as documented in Colombia, Chile, and Mexico, by studies sponsored by the Ministry of Justice of Colombia (in 1995), Correa Sutil (in 1995), and the Soberanes Fernández (in 1993), respectively. Thus, despite numerous initiatives and programs, a "crisis" situation exists within the justice system. Justice is described as slow, unpredictable, congested, and as difficult to access. This explains why, in terms of citizens' trust and confidence, justice is generally held in low esteem in Latin America. This situation is different in other regions of the world, as shown in Chart 1. The issue takes on new dimensions when the institutional structure and administrative functions of the Judicial Power are addressed. This must be done, because reforms to date have not produced anticipated benefits.

A "new" vision of the judicial branch began to surface when profound reforms were carried out by Governments which reformulated the role of the public sector, reduced its size, and changed its interventionist role in the economy. These public sector reforms, however, did not affect the Judicial Power, for the third branch is inherently conservative, and not amenable to radical changes.

When one raises the topic of judicial administration, one must address this complex issue at a different level of analysis, and fashion a new approach to the problems. As a first step, one must find ways to utilize existing resources in the judicial sector more efficiently, rather than impose additional expenses in a time of financial retrenchment. Concepts of efficiency, and verification that investments in the justice sector produce social gains dominate the current discourse about judicial reforms. An essential element of the debate includes the diversity of opinions on what would be the ideal management model for the Judicial Power, specifically Judicial Councils – the topic of this paper.

#### **II. IS THERE AN ORGANIZATIONAL MODEL FOR JUSTICE?**

A first conclusion can be reached through a review of Latin American experiences. It demonstrates that no single administration or management model exists for the exercise of "self-government" by the Judicial Power. Rather, three forms of organizational schemes emerge:

---

<sup>8</sup> The author was Minister of Justice and the Law in Colombia, and judicial advisor to the Inter-American Development Bank (IDB), where he organized cooperative programs for the modernization of justice.

## A. The Judge-Administrator

**The Courts:** In some countries, the governing of the Judicial Branch is handled by the highest court: The Supreme Court of Justice. Such is the case in Argentina,<sup>9</sup> Bolivia,<sup>10</sup> Ecuador,<sup>11</sup> Guatemala,<sup>12</sup> Honduras,<sup>13</sup> Mexico,<sup>14</sup> Nicaragua, Panama,<sup>15</sup> Paraguay,<sup>16</sup> and Uruguay.<sup>17</sup>

The main objection to this system stems from the lack of "professionalization" or expertise: it removes the judge from the function of dispensing justice, and adds administrative duties to that function -- a field in which the judge was not trained. In Argentina, this situation has led to this absurdity: the nine members of the Court control 3,000 employees and even a furniture factory. As another absurd example, the payment of salaries, which involves signing thousands of checks, is an administrative task that commits the valuable time of judges, as is the case in Ecuador and Paraguay.

## B. Court-annexed agencies

Other countries have attempted to reduce the impact of "despecialization,"\* and created agencies or entities charged with administering the Judicial Branch. While annexed to the court, these entities are relatively independent.

In Chile,<sup>18</sup> the Administrative Corporation of the Judicial Power, a legal entity annexed to the Court, handles the management of financial and administrative resources of the judicial branch. Yet, here again, judges play a *de facto* administrative role, given the high level of interference by the Supreme Court in Corporation matters. This results from the composition of the Corporation's governing body (the Supreme Council), which includes the President of the Supreme Court and four of its ministers.

A similar situation exists in Costa Rica.<sup>19</sup> There, the Supreme Court has traditionally exerted a strong influence over the rest of the Judicial Branch. The Superior Council of the Judicial Power was created in an attempt to improve judicial administration. The Council, however, has a very limited degree of independence from the Court, given its structure, functions, and composition: it consists of four judicial branch employees, including the President of the Supreme Court, and an outside attorney, all of them appointed by the Court itself. The Superior Council is responsible for administration and discipline within the Judicial Power, under the framework of administrative policies defined by the Supreme Court which, in turn, also determines the budget of the Judicial Branch.

Such is also the case in Peru since 1993.<sup>20</sup> The Executive Council of the Judicial Power was charged with administrative functions, and is composed of the President of the Supreme Court, who presides, and four other members: two members of the Court, one appointed by the Courts of Appeals; and one named by the Board of Deans, representing the various law schools in Peru. A General Manager oversees day to day operations.

---

<sup>9</sup> The Magistrature Council, established by the Constitutional Reform of 1994, has yet to be implemented, due to the absence of legislative definition of the process for its incorporation.

<sup>10</sup> Through the Administrative Council of the Court of Law, formed by the chairman of same and three of its Members (Article No. 40, Law 1469 of 1993).

<sup>11</sup> The Superior Council of the Magistrature ordered by constitutional reform of 1992, has not yet started in its functions.

<sup>12</sup> Decree No. 2/1989.

<sup>13</sup> Agreement 800/1992.

<sup>14</sup> Through the Government and Administration Commission formed by the President of the Court and two of its Ministers (Organic Law of Judicial Power of the Federation of 1987).

<sup>15</sup> Judicial Code.

<sup>16</sup> Article 247 of the Constitution of 1992.

<sup>17</sup> Law No. 15,750 of 1985.

<sup>18</sup> Law No. 18,969 of 1990.

<sup>19</sup> Organic Law of the Judicial Power No. 7,333 of 1993.

<sup>20</sup> Organic Law of Judicial Power of 1993.

\*Inferring lack of professionalization or expertise (translator note).

### C. The Judicial Councils

The most recent model is a specialized entity charged with the governance of the Judicial Power. This entity is independent from the Supreme Court of Justice; its existence is consistent with principles of judicial self government and independence.

These entities emerged in the European continental system during the post Second World War period: in France<sup>21</sup> with the Judicial Council in 1946; in Italy<sup>22</sup> through the Consiglio Superiore della Magistratura in 1948; and in Spain<sup>23</sup> through the General Council of the Judicial Power.

In Latin America, some antecedents have existed in the Argentinean provinces since the 1930s, and in Peru where the military government created a Judicial Council in 1948, in order to "ensure the selection and discipline of the judges." However, the first national experience with Judicial Councils occurred in Venezuela, in 1969, through the creation of a Judicature Council.<sup>24</sup> Independence, efficiency, discipline, and honor of justice have been entrusted to this body. It consists of five judges: three appointed by the Supreme Court, one by the Executive, and one by the Congress.

The 1991 constitutional reform of Colombia<sup>25</sup> gave birth to the Superior Judiciary Council, to strengthen the independence of the judicial branch and create a specialized body in charge of its administration and discipline. It is composed of two courts: the administrative and the disciplinary courts of law. The Superior Council of the Judiciary of Ecuador (1992), and the Judiciary Council of Argentina (1994), were created to fulfill the same purpose: provide administrative support to the Judicial Branch. Although these two bodies enjoy constitutional rank, they still lack a regulatory framework, which helps explain why they have yet to begin operations.

A more limited version of Judicial Councils exists, with the sole purpose of administering the judicial career, specifically to exercise the *jus nominandi o postulandi* within the sector. As a result, these entities specialize in human resources, and have the specific purpose of preserving the independence of the judiciary in the areas of appointment, promotion, and discipline of judicial personnel. In that respect, and through their structure, these Councils help provide an institutional barrier to avoid political interference in the judicial branch. Other examples of limited versions of Judicial Councils can be found in Panama,<sup>26</sup> in the restructured National Council of the Judicature of El Salvador,<sup>27</sup> in the Judicial Council of Paraguay,<sup>28</sup> and the in the Judicial National Council of Peru,<sup>29</sup> created through the constitutional reform of 1993.

This brief description clearly shows that there is no consensus on models of judicial independence. Additionally, one cannot conclude that the concept of Judicial Councils leads automatically to the development of institutions which are similar. In fact, generalizations on this issue constitute a dangerous doctrine whenever one uses such imprecise concepts to build institutions.

How can such diversity be explained? In our opinion, this has occurred because reforms have dealt with form, rather than substance -- as Councils emerged for historical reasons, or were created through political party compromises, or reflected very limited concepts of judicial independence. Moreover, issues such as the definition of an ideal model of dispensing justice, and the incorporation within the Judicial Branch of entities which govern and provide this function, should guide the development of

---

<sup>21</sup> Article No. 65 of the Constitution.

<sup>22</sup> Currently governed by Law No. 195 of 1958.

<sup>23</sup> Article No. 122.2 of the Constitution, according to Organic Law dated June, 1995.

<sup>24</sup> Currently governed in the Organic Law dated 1988.

<sup>25</sup> Articles No. 245 and those that follow, pursuant to the Statutory Law of Justice Administration, No. 270 of 1996.

<sup>26</sup> Article 431 and those that follow from the Judicial Code.

<sup>27</sup> Law Decree No. 414 dated December 11, 1992.

<sup>28</sup> Chapter III of the Constitution of 1992, pursuant to Law No. 296 of 1994.

<sup>29</sup> Article No. 154 of the Constitution of Peru, which stipulates that the Council will be the disciplinary body of the branch and will administer human resources, and which will develop (check: "criteria for selection?") and appointments and, every seven years, will decide on the ratification of judges and prosecutors appointments.

institutions, and help ensure that these offer a comprehensive response to those objectives which led to their creation in the first place.

If we limit our objective to that of ensuring the independence of the judiciary and maintaining a balance of powers, to follow Montesquieu's concept, surely it would be sufficient to assign the administration of the judicial branch to its highest body -- the Supreme Court. But this alternative does not necessarily satisfy other criteria which are equally important. Independence must go hand in hand with the availability of expertise, incorporation within the Judicial Branch, professional management, comprehensive administration, and the need to put forth a comprehensive judicial policy that addresses the distinct powers of the State. For, what is the purpose of an independent administration, under the leadership of the Court, if it lacks the necessary expertise and management techniques, and is unable to ensure that the policy of the sector has a major impact on society?

The absence of a broad vision offering comprehensive answers puts new policy ideas at risk. It is enough to remember that countries such as Peru, initially, and Uruguay, in 1985, made a one-hundred and eighty degree turn on the modernization process when they eliminated the new Judicial Councils from the judicial structure.

Finally, a strong concept of judicial self-government needs to be fashioned. It should be realistic (feasible), modern, and participatory. This document attempts to draft an approximation of these notions, and builds on existing Latin American experiences.

### III. ANALYSIS

#### A. Professionalization

Administration is in itself a profession, both technical and specialized. The same can be said of public and judicial administration. In fact, some countries have developed a new specialty related to public administration: the judicial, or court, administrator.

By definition, the judge is not an administrator. He does not have professional training, and should not be assigned the responsibility of formulating policies for judicial sector management; nor should the judge be charged with the exercise of administrative functions inherent to the proper delivery of this public service. This conclusion leads us to assert that magistrates and judges should not be the administrators of the Judicial Branch, nor be those responsible for administering each judicial department. In the United States, for example, it has been recognized since the 1930s that judicial administration should be separate from the courts, both at the federal and state level. This acknowledgment led to the creation of **Offices of Court Administrators**. Further, most assessments indicate that the judges' concurrent exercise of judicial and administrative functions is one of the main causes of judicial delay.

Therefore, judicial self-government through the Supreme Courts is inconvenient and brings a high degree of "despecialization." In countries where this form of self-government is used, the magistrates repeatedly attest that administrative-type activities substantially keep them away from their judicial duties, while they tend to insignificant matters of personnel or financial administration; or, as an alternative, these activities become the responsibility of intermediate levels of the courts, where there is no political accountability.

Judges must dispense justice, not administer it. For that reason, the creation of institutions that are annexed to and dominated by the courts, and are charged with planning, organizing, and executing, represents a euphemistic response to criticisms of the administration of justice. Ultimately, the magistrates become responsible for these functions, not from their comfortable judicial chairs, but from the ergonomic chairs of administrators, where they do not feel very comfortable.

Further, the model of the judge-administrator places at risk the prestige of the court itself, by exposing it to the contingencies of management.<sup>30</sup> The absence of expertise and training in administration of judicial services results in the lack of modern planning systems, of adequate levels of information, and of well defined procedures to achieve economies of scale and provide appropriate methods of control. This, in turn, translates into potential loss of benefits, which the judiciary would otherwise obtain through professional systems of administration. Therefore, an institutional response to the concept of judicial self-governing needs to be accompanied by a simultaneous and adequate professionalization of judicial administration; "despecialization" is not a good alternative.

### **B. Incorporation within the Judicial Branch**

The above considerations offer a context for determining how judicial administration might be organized within the structure of the judiciary. This entity would be staffed by high level, experienced professionals, who are primarily the trustees of the judicial power, and not simultaneously responsible for judicial functions.

The concept of an independent judicial administration should not be used as a barrier, thus preventing its institutional incorporation within the judiciary. In other words, the judicial administration entity should not misuse the protection which it enjoys, and become an insular body that claims absolute independence, only to then be opposed by the magistrates and judges themselves. When such a situation develops, it can spoil even the best intentions of the professional judicial administration. If judicial personnel do not develop an adequate concept of ownership and adhesion to the model of self-governance, they will not be agents of change; rather, they will become the first obstacles to any modernization policy. A good point of reference is what occurred in Colombia, during the first five years of the Superior Judiciary Council's existence. Although its administrative magistrates were members of the judiciary, they asserted their independence from the courts, and the collaborative environment which should have prevailed deteriorated instead.

An alternate option would be to consider court representatives in the judicial Councils as agents of the Councils and, as such, revocable at any time. Similarly, there must exist opportunities for the judicial branch to hold consultations with the Judicial Councils. In Italy this is done through judicial commissions, and in Spain through a Board of Judges. Colombia<sup>31</sup> has recently implemented a committee for internal coordination. As noted above, this sector is not open to change, and is very reluctant to undergo radical innovations, which is why the administrative function, to be viable, must be located within the judicial sector.

"Isolation" can be one of the greatest dangers of judicial self-government when it is executed by a specialized institution.

### **C. Functions**

From a functional point of view, it has been demonstrated that there is no a single definition of the concept of self-government. This conclusion is particularly true for Judicial Councils, some of which become governing bodies of the entire judicial administration (Colombia and Venezuela), while others see their functions limited to the administration of judicial careers, judicial appointments in particular (El Salvador, Panama, Paraguay, and Peru).

Studies point out that the function of judicial administration has been negatively affected by the manner in which it is managed. Due to various factors in many countries, a "patchwork quilt" concept of

---

<sup>30</sup> At the beginning of this decade the purchase of a building by one member of the Supreme Court of Justice of Argentina exposed the Court to a huge political scandal.

<sup>31</sup> For this purpose, in Colombia, law 270 from 1996, recently created the "Inter-institutional Commission of the branch" within the Judiciary Council, and includes representatives from the Courts, the General Prosecutor of the Nation, as well as justice system employees. It helped create a mandatory forum for consultations on critical issues affecting the judiciary, and on expectations and results.

administration has prevailed. In some its purpose is to nominate judges, and in others to appoint them. Some propose the budget, and others approve it. Some administer the judicial career, and others exercise disciplinary functions. Some manage administrative resources, and others make decisions on data processing options.

The administration of justice, under the leadership of professionals, must be comprehensive in nature. We believe that it must assume at least three different types of functions: (1) judicial policy; (2) administration, and (3) operations and support services. In none of the countries analyzed have all three been present at the same time.

### **1. Judicial Policy**

If the administration of justice suffers from anything, it suffers from the absence of a long-term judicial policy. The Government has the obligation to formulate this explicitly. Congresses legislate in reference to specific matters. Governments discuss judicial policy, but they are not the administrators of the judicial branch. Ultimately, the judicial branch is only responsible for its day-to-day administration.

The formulation of a judicial policy implies that the judicial administrative bodies must have these powers at a minimum:

- Formulation of plans for development and justice. In general, this type of methodology or action is rarely used by the courts or the Judicial Councils.
- Definition of budgets and investment programs.
- Design of personnel policies.
- Legislative initiative to implement policy.

### **2. Administration**

An efficient administration is responsible for all aspects of management, including those of administrative, human, and financial resources. When these functions are assigned without controls and for political reasons, among different institutions, the results are inefficient and irrational solutions to the problems of justice, duplication of costs, political confrontations, and interference with programs which were developed on a sound technical basis.

The following describes an ideal combination of functions placed under the administration of justice leadership:

- Definition of the judicial structure. This helps provide major impetus to reforms, and falls within the competence of the legislature in most countries.
- Comprehensive administration of judicial careers. The management of human resources is one of the areas in judicial administration that suffers most from lack of expertise. This can be deduced from an analysis of industrial relations policies. Personnel administration should never be separated from that of disciplinary sanctions, as is the case in many countries where the judiciary remains fundamentally political, and where impeachment by Congress is the only form of sanction – but is never used (Argentina, Brazil, Chile, and Mexico).

A comprehensive administration of the judicial career subsumes a definition of staffing structures within the limits of an approved budget, and the ability to hire, promote, train, and impose disciplinary sanctions.

- Administration of a judicial statistical system. The absence of quality information is one of the justice system's greatest tragedies. Yet, practically none of the existing, relevant legislation holds the judicial

administrator responsible for the development of a judicial statistical system. Without information, viable judicial policy cannot be formulated, judicial administration becomes impossible, responsibilities are diluted, and performance indicators for the sector and for each of its employees cannot be developed. A judicial statistics capacity may include decision-making in the area of judicial data processing.

- Allocation of judicial resources. This assumes that certain categories of cases have been “de-judicialized,” and can be transferred to appropriate administrative agencies. Then, it is desirable that the judicial administration be able to assess where judgeships are most needed throughout the territory (for reasons of caseloads, population, needs, etc.), and where administrative support offices should be created or closed.
- Supervision (ability to regulate) the organization of services (such as timetables, distribution, etc.).
- Exercise of a judicial auditing unit, with the power to inspect all offices.

### **3. Operations and Support Services**

Judicial administrators cannot be deprived of any tool which facilitates their tasks. Among them, one should mention the need for judicial sociology research, so that administrative responses to the problems of the sector may have a scientific base, rather than one of preconceived ideas and opinions.

#### **D. Political Consensus**

It is clear that the concentration of all these attributes in a single body assumes a broad consensus of an eminently political nature, in order to structure a judicial government system qualified to improve problems of justice, and viable in practice. In Ecuador, for example, the constitutional reform of 1992 was led by civic movements, yet unable to muster sufficient political support; as a result, the Superior Judicial Council never became operational. Similarly, the integration of the Council into the judicial branch took more than two years in Paraguay.

When a broad consensus is achieved, the established powers must give up control of some of their traditional prerogatives, always a difficult task. The agreement which gives birth to this new type of judicial administration cannot be based on pure conjectures. It must be grounded in the purpose of strengthening justice. In the alternative, the new system will be short lived, and subject to vagaries of the moment. Furthermore, when this purpose is absent, Councils remain hostage to political decisions, and their future is uncertain. In Argentina, for example, the Council which emerged from the “Núcleo de Coincidencias Básicas” of 1993, as a political compromise within a governing agreement, has yet to be put in place. Likewise in Peru, the future of the National Judicial Council, charged with the administration of human resources, remains unclear, for its real purpose was to legitimize the executive’s intervention in judicial appointments.

It is equally important that such consensus have integrity, i.e. that all participants in the consensus adhere to the objective of strengthening the judicial branch. In some countries Judicial Councils are in the middle of a struggle for political control of the judicial power, and as such, lose any form of legitimacy -- as is the case in Spain and Venezuela (Pérez Perdomo, 1993).

#### **E. Structure**

One of the most sensitive points concerning the Judicial Councils lies in their structure. Who should be part of them?

In some ways, the answer is related to the level of responsibilities assigned to the Councils. If they are to fulfill the scope of responsibilities proposed earlier in this paper, their governance should include high level representatives of all branches of government. According to Cavagna Martínez, Bielsa, and Graña (1994), the idea is to establish a "coordinated exercise" of the administrative functions of the judiciary, which to date remains imprecise. The authors suggest further, that "in reciprocity for a reduction of prerogatives," there should be "adequate representation."<sup>32</sup>

The marked dominance of the courts in judicial administration in Latin America is evidence that magistrates try to preserve their roles and political power, to protect the theory of "judicial independence," even if this is at the expense of the administration of justice. In Chile, President Aylwin's proposal to create a Council was rejected by the Supreme Court, because it was viewed as an attack on the independence and the prerogatives of the judges (Correa, 1993).

In truth, the theory of judicial independence applies to the ability to render judgment in an independent manner, and is not contradicted by the contribution or collaboration of other branches toward improvements in the administration of justice.<sup>33</sup> An independent corporation model is not, in our view, politically feasible, nor is it lasting. Correa Sutil (1993) states that this option contains a risk of complacency. He also states that we must avoid putting judicial policy at the margins of civil society, as long as political clientelism does not result from the involvement of other sectors.

Within this context, we believe that Councils should be composed mostly of officers appointed by the judicial power itself. By contrast with the judge-administrator approach, representatives of the judiciary should not hold simultaneous responsibilities of judging. Representation of the Executive and Legislative branches would occur through the appointment of a delegate (one for each) to governance of the Councils.<sup>34</sup> This representation is justified only to ensure the proposed functional incorporation, and should remain strictly in the minority, to guard against the political clientelism mentioned earlier. From the perspective of professional composition, these Councils should be multidisciplinary.

#### F. Accountability

Judicial self-government, as an expression of the strengthening of judicial independence, has a fundamental counterpart: the responsibility of the judicial power for its own administration. For that reason, the Councils must become trustees of society through a political institution. Their administration must be transparent, they must provide periodical reports to the nation, and be held accountable to the public for programs and specific goals.

It is recommended that the law regulate the issuance and timing of Judicial Council reports, define their content, and provide for a public debate. These reports are instruments through which society will be able to scrutinize and discuss judicial policy, and understand its attendant responsibilities.

In the United States, the concept of "public accountability" it is not considered incompatible with the American constitutional premise of judicial independence (Wheeler, 1968).

#### G. Councils and Civil Society

Toward enriching judicial self governance and making it more valuable, a civil society must be prepared to demonstrate its ability to follow and review the evolution of a public service – the

---

<sup>32</sup> To learn more about the different composition and modalities of the Councils, see Cavagna, Bielsa and Graña. *THE JUDICIAL POWER OF THE NATION*. Ed. The law. Buenos Aires. 1994.

<sup>33</sup> In Italy, the Constitutional Court has stated that the principle of independence and independence stipulated in art. 104 of the Constitution, is not contradicted by the possibility of developing a collaborative relationship between the separate branches of government in matters of judicial administration (sentence 168 dated December 23rd, 1963).

<sup>34</sup> This is not an heretical representation. In France, the Council is presided by the President of the Republic. In Italy, one third of the judges is appointed by the Congress drawn from university professors and practising lawyers.

administration of justice -- including goals, Council programs, and performance indicators, which should be in the public domain.

An active civic participation in the modernization of justice remains wanting. Regardless, the law should encourage it.

#### **IV. CONCLUSION**

Judicial Councils provide an ideal opportunity to organize "judicial self-government," and will be successful if their structure and charter allows them to formulate long term judicial policies, and to carry out comprehensive administrative functions. Further, they should help integrate various public institutions and powers if they are to meet their mandate, both politically and functionally.

The Latin American experience has yet to become the paradigm of an adequate organization of judicial administration.

# CHART No. 1

## DEVELOPMENT AND CITIZEN TRUST IN JUSTICE<sup>1</sup>

COUNTRY	TRUST GROUP %	REAL GNP PER CAPITA (US\$) <sup>2</sup>
JAPAN	68%	19,390
GERMANY	67%	19,770
ENGLAND	66%	16,340
FRANCE	55%	18,430
URUGUAY	53%	6,670
UNITED STATES	51%	22,130
ITALY	43%	17,040
SPAIN	41%	12,670
COSTA RICA	39%	5,100
DOMINICAN REPUBLIC	33%	3,080
CHILE	27%	7,060
COLOMBIA	26%	5,460
EL SALVADOR	25%	2,110
MEXICO	22%	7,170
VENEZUELA	22%	8,120
BOLIVIA	21%	2,170
PERU	21%	3,110
ECUADOR	16%	4,140
GUATEMALA	15%	3,180



1 SOURCE: Carlos Lemoine "LA CONFIANZA DE LAS PERSONAS EN LAS INSTITUCIONES,"  
 2 Corresponds to the year 1991, "REPORT ON HUMAN DEVELOPMENT," PNUD, 1994

**JUDICIAL COUNCILS IN LATIN AMERICA - Commentary**  
*Russell Wheeler*<sup>35</sup>

**I. INTRODUCTION**

Dr. Martinez's paper is rich in its description of judicial administrative developments in Latin America, and thought-provoking in its practical analysis of how to structure the administrative governance of the judicial branch.

Judicial governance is a multifaceted topic. Dr. Martinez's focus here, and thus mine, is on one facet: the structure of governance bodies at the head of the judicial branch, and their work to manage the branch. He proposes a unitary council to perform the governance powers now exercised by supreme courts and other bodies within the judicial branch, and also to perform powers now exercised by other branches. The judicial branch would appoint a majority of council members (but they could not be judges). The other government sectors would appoint members in numbers adequate to reflect those sector's duties that were being transferred to the council.

My plan in this brief comment is to analyze, drawing on Dr. Martinez's paper and other sources, the components of effective governance structures by asking three questions -- (1) what functions are necessary for effective governance? (2) what skills and points of view are necessary for successful performance of these functions? and (3) how should the governance body be structured to embrace these skills and points of view? A preliminary description of court governance in the United States -- basically a combination of the "judge-administrator" and "annexed organization" models that Dr. Martinez describes on pp. 2-4 -- will help explain the orientation I bring to the subject. I conclude with three cautionary observations.

If there is any value in my commentary, it is in the questions I raise, not the answers. When I point out how the United States has answered the three questions, my purpose is only to suggest one answer, derived from one perspective. My purpose is not to say how nations should answer them, or structure their judicial branch governance, and certainly not to advocate that they structure as in the United States.

**II. COURT ADMINISTRATIVE BODIES IN THE UNITED STATES**

The United States has over 50 judicial systems: for the federal courts and for each of the states and territories. Generalizations about judicial governance include:<sup>36</sup>

1. The legislature provides funds for court operations and determines their structure and jurisdiction. Local government bodies fund some state courts, often at higher aggregate levels than the state legislature. Legislators tend to give little attention to the courts, although sometimes they take intense interest in specific aspects, reflecting the view that even independent courts are ultimately accountable to the people.

2. The chief justice and/or the supreme court are the administrative head(s) of each judicial system but three. Councils, chaired by the respective chief justices, are the administrative heads in California, Utah, and the federal courts. The state councils have a majority of judges; the federal council has only

---

<sup>35</sup> Mr. Wheeler is the Deputy Director of the Federal Judicial Center. He offers these opinions as his own, not as those of the federal judicial system or the Federal Judicial Center, which speak institutionally through the Judicial Conference of the U.S. and the Federal Judicial Center Board, respectively.

<sup>36</sup> Information on the state systems comes from *State Court Organization*, 1993 (a publication of the Bureau of Justice Statistics, U.S. Department of Justice), prepared by the conference of [State] Court Administrators and the National Center for State Courts. Information on the federal judicial system is in Wheeler, *Origins of the Elements of Federal Court Governance* (Federal Judicial Center, 1992).

judges.<sup>37</sup> Advisory councils of judges and others exist in most other states. Some are influential, but many are inactive.

3. U.S. governance bodies' responsibilities are varied, but never as broad as those of the most powerful Latin American councils (no supreme court or council exercises duties as extensive as those assigned to Venezuela's Consejo de la Judicatura,<sup>38</sup> for example).

4. In each court system, the supreme court (or judicial council) supervises a central court administrative agency, which provides administration, management, and support to the courts of the state. The offices' influence over those courts depends mainly on whether those courts receive their funds through the supreme court and administrative office, or from local governments.

5. Within most court systems are separate bodies for more specific tasks, such as judicial discipline (all the states have separate commissions). Also, separate agencies in the federal system, and about half the states, provide education and research (the Federal Judicial Center and state judicial colleges).

6. Judges are elected popularly in about half the states, and otherwise, by combinations of executive and legislative action. Some judiciaries select low-level judges, and participate on "nominating commissions," that recommend higher-level judicial appointees to the executive authority. The president appoints federal judges with consent of the Senate.

### III. SOME ADDITIONAL ANNOTATIONS ON JUDICIAL GOVERNANCE

1. What types of functions are required for the effective administration of the courts, regardless of the structure or structures that provide them?

a. Establishing basic objectives and policies. These include the fundamental purpose and necessary conditions of courts (e.g., independent courts to provide justice); the courts' jurisdiction and basic structure, the amount of public resources they should receive, and the rules under which they operate.

b. Management and administrative tasks to implement basic policies. These are generic tasks common to any organization, such as maintaining financial management and budget allocation systems, personnel classification and training, records retention, providing services and supplies (including automation), and gathering performance statistics. It also includes court-specific tasks such as judges' orientation, continuing education, and discipline; and, in the U.S., efficient means of summoning citizens for jury duty.

c. Maintaining relations with those outside the courts who have a legitimate interest in how the courts operate. Legislators, lawyers, court users, citizens (taxpayers), and the press all have interests in how the courts operate. They often influence those operations directly or indirectly. One judicial administration function is being aware of these views and trying to respond to or influence them, especially in the legislative context.

d. Assessing the performance of courts in achieving the basic policies and reassessing the validity of the basic policies. Judicial governance includes determining whether the judiciary is meeting its basic objectives and policies (relying in part on the statistics gathered under task b, above); taking corrective action; and reassessing the legitimacy of the basic policies. These functions implicate all other functions.

---

<sup>37</sup> "The California judicial council has 13 judges, 4 lawyers, 2 legislators; the Utah council has 14 judges and one lawyer. The "Judicial Conference of the United States has the Chief Justice of the United States and 26 federal judges, 2 each from the 13 "circuits" into which Congress has divided the federal court system. (There are also "judicial councils," again composed entirely of judges, in these circuits.)

<sup>38</sup> Ch. II de la Ley Organica del Consejo de la Judicatura, promulgated on 10 October 1988.

2. What skills and points of view should influence how these functions are performed? Before considering specific structural arrangements for judicial governance, we might ask in more general terms what points of view and skills will help ensure that these tasks are adequately performed. Table 1 summarizes these qualities in terms of those likely to be possessed by judges, by administrators and other professionals within the courts, and by those outside the courts.

**TABLE 1**

Function	Points of view and skills likely to be provided by:		
	Judges	Other judicial system employees	Those outside the judicial system
a. Determining basic objectives and policies (some pre-determined by constitutions)	Informed opinions, based on experience and knowledge	Advisory perspectives	Perspectives of legislators, taxpayers, and court users, which are presumed legitimate in a democracy
b. Management and administrative tasks necessary for effective operation of the courts	Practical knowledge of the judicial dispute resolution process and support that it needs; special sensitivity to threats to judicial independence	Knowledge, training, experience in administrative operations. Systemic views. Willingness to challenge judges' views	Legislative/taxpayer interest in use of public resources. Lawyers' and parties' interest in how courts operate
c. Maintaining relations with those outside the courts	Personal prestige and that of judicial office; personal contacts with legislature, bar, press, and others	Knowledge, training, experience in legislative/public relations. Prestige based on experience	Legislators/press/ others as representatives of theirs and others views
d. Assessing court performance	See roles above	See roles above	See roles above

3. How should judicial governance bodies be structured to allow these skills and points of view to influence judicial administration in proper ways? It is one thing to identify types of individuals who have skills and points of view that should control or influence the court's administration. It is much more difficult to determine the relative importance and validity of the various points of view and skills, and the specific roles to be played by persons possessing them. I cannot offer a full exposition; I can only raise some questions for your consideration.

a. *Who should set administrative policy?*

(1) The role of the Supreme Court -- As Dr. Martinez points out (p. 5), Montesquieu's theory of the separation of powers is insufficient reason to make the Supreme Court the administrative head of the judiciary. We must ask harder questions. For example, does the Supreme Court's jurisdiction provide its members familiarity with the operations of the other courts of the system? Does the judiciary, as the "weakest branch" of government, need the Court's prestige in a governance role? On the other hand, is there a risk of weakening the Court by "exposing its prestige to the contingencies of administration?" (p. 6). (Fear in 1939 that a minor scandal in a faraway federal court could harm the reputation of the U.S. Supreme Court was one reason the Court's members wanted the Judicial Conference, not the Court, to supervise the Administrative Office.)

The proper role of the Supreme Court is a separate matter from the proper role of the Chief Justice of the Supreme Court. In the U.S., for example, even those systems that have not delegated administrative

policy-making to the Supreme Court have provided a central role for the Chief Justice. This reflects a belief that the position of Chief Justice has, by the end of the 20th century, become an administrative as well as a judicial position, and that the selection of chief justices should reflect that reality.

(2) The role of judges in general -- Should other judges determine administrative policy? Dr. Martinez is of course correct that "by definition the judge is not an administrator," and should "not be responsible for the administrative function of each office" (p. 5). It is important, however, to be precise about administrative "responsibility." To say that judges should not have personal responsibility for performing specific administrative tasks -- particularly trivial things (p. 5) -- is not the same as saying that they should not be responsible for determining the overall administrative policies for the judicial system.

In this regard, I see the creation of U.S. court administration bodies somewhat differently than does Dr. Martinez, who sees their creation as "a recognition that judicial administration should be maintained separately from the courts" (p. 5). Congress created the Administrative Office of the U.S. courts in 1939, at the request of the federal judges and the U.S. Attorney General, based on this simple proposition of Attorney General Cummings: "Let the judges run the judiciary."<sup>39</sup> The law establishing the Administrative Office tells it to operate under "the supervision and direction of the Judicial Conference"<sup>40</sup> (composed only of judges). The federal and state court administrative offices are in fact organizations "annexed to the courts that perform the work of planning, organization, and execution" (p. 5) under the supervision of the judges.

The U.S. experience suggests these arguments in favor of providing judges with ultimate responsibility for setting judicial administration policy:

i. Judges have the best incentive to guard against administrative acts that may imperil judicial independence. Limitations on spending for supplies or personnel can be an entirely proper administrative function. But they can also be an insidious effort to limit a judge's ability to judge independently. As judges are fierce to guard the independence of the judicial function from encroachments from the other branches, so too will they be especially alert to possible encroachments of administrative acts on their independence. (James Madison argued in *The Federalist* that "the great security against a gradual concentration of the several powers in the same [branch of government] consists in giving to those who administer each [branch] the necessary constitutional means and personal motives to resist encroachments of the others."<sup>41</sup> Giving judges, as judges, ultimate direction of administration personnel provides them "constitutional means and personal motives to resist encroachments of" both the other branches and administrators from within.)

ii. By definition, judges have a familiarity with how the judicial system operates that no one else has or can have, and this expertise should be an important part of administrative policy-making.

iii. Judicial control of some tasks is essential, to avoid efforts by others to influence judicial decision-making, and because of their familiarity with how the system operates. Judges, for example, not the other branches of government or the law schools, should control the content of judicial education courses.

iv. Judges will have more confidence in administrative policies if they know that representative judges are responsible for them. I believe this concern (in addition to those identified by Dr. Martinez, p. 2) helps explain the resistance among Chilean judges to the council proposed there.

<sup>39</sup> Quoted in Bermant and Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 *Mercer L. Rev.* 835 at 845 (1995).

<sup>40</sup> 28 U.S.C. §604(a).

<sup>41</sup> *The Federalist*, No.51 at 337 (Modern Library ed. 1937).

v. The best people will be discouraged from becoming judges if the system's administration is controlled by non-judges.

Dr. Martinez presents effective arguments against judges' controlling administration. In most cases, however, the core of the issue is like the core of an onion -- hidden beneath many layers. For example, it is true that judges are not trained as administrators. But formal training is not necessarily a prerequisite in other areas of public life. There is a difference between the technical training that one needs to install and maintain computers, for example, and the common sense and experience to be able to articulate an organization's goals and undertake plans to meet them. This fact, though, hardly argues against providing judges training in administration. The Federal Judicial Center provides some training about administering the judge's office in its orientation program for new judges, and it has an annual educational seminar for the chief judges of the 94 federal district (first instance) courts.<sup>42</sup> A similar need was highlighted over 15 years ago in a National Center for State Courts publication advocating more administrative training for chief justices. The authors noted that newly elected state governors receive an orientation from the National Governors Association because "persons elected to the post of governor rarely come to the post with a total understanding of the administrative functions and responsibilities of the office. By analogy, much the same could be said about incoming chief justices."<sup>43</sup>

For another example, there is no doubt, as Dr. Martinez says, that when judges are administrators, their judicial work can be delayed (p. 5). Judges in the U.S. might respond that when judges do not have ultimate control of administrative policy, those who know best how to reduce delay will lack the authority to use resources and personnel in a manner best designed to reduce delay. This particular issue may take different shape in the context of administering a particular court, as opposed to serving in a system-wide administrative policy capacity. In the U.S. federal judiciary, for example, there has been tentative interest in giving some judges on the Judicial Conference substantial caseload relief so they can devote more time to their administrative policy duties. There is almost no interest, however, in full-time administrative judges.

(3) The role of those outside the judicial branch -- I am leery of having non-judges formally involved in the governance councils of the courts partly -- for the same reasons that I believe judges should be involved. This concern, however, does not deny the truth in Table 1: legislators, lawyers, and citizens all have legitimate, but different, interests in how the judicial system operates and should operate. Thus if judges wish to retain control of the administrative structure of the courts, they need to make ample provision for consultation with -- and listening seriously to -- those outside the courts who use and pay for the courts. The views of these outsiders will find expression one way or another. If the courts to not accommodate them when they can do so consistently with their independence, these outside views will press themselves in more forceful ways.

Bringing all of these different groups into a single council may be the best way to allow them to find expression -- regardless, perhaps, of whether there is consensus on the objective of strengthening the judicial branch (I think Dr. Martinez would disagree on this latter point, p. 9). On the other hand, the somewhat messier process of inter-branch relations, including occasional inter-branch conflict, may be the better way to be sure that policy-making reflects all legitimate demands.

(4) The role of administrators -- Dr. Martinez believes that the "judge-administrator" and "annexed organization" models tends strongly to produce a judicial administration that "is not characterized by the prevalence of modern systems of planning, levels of adequate information, definite processes to achieve economies of scale, and suitable controls" (p. 6). I have more confidence in these models, although I know they are not immune from failure.

---

<sup>42</sup> The agenda for last month's conference included courtroom utilization, "making sense of case statistics," judicial security in light of the Oklahoma City bombing, and the judicial personnel system.

<sup>43</sup> Tobin and Hoffman, *The Administrative Role of Chief Justices and Supreme Courts* (National Center for State Courts, 1979) 29.

The key to their success may lie in having judges retain control of administrative policy-making, but to exercise that control within a partnership arrangement with administrators. Such an arrangement can produce a better policy or administration than either could develop individually. A partnership arrangement is different from a model by which "judges make policy and administrators execute it," a concept that is popular with some judges, but that ignores the reality of organizational behavior. Just as substantive law is hidden "in the interstices of procedure,"<sup>44</sup> so policy is hidden in the interstices of administration. If judges realize that such interstitial policy-making is inevitable, they may be more inclined to work with administrators as policy is fashioned and adapted through the administrative process. The best way to make policy, for example, may be by monitoring what administrators do, and calling for alternative approaches when necessary, instead of issuing administrative fiats. Such an arrangement will also help ensure, on the part of court employees, the sense of ownership and commitment to the system that Dr. Martinez properly characterizes as essential (p. 6).

This partnership arrangement has another aspect. Judicial administrators must recognize that one of the greatest contributions they can make to effective judicial administration policy-making is to challenge judges' policy preferences. Judges are not used to having their decisions challenged, except through the formal process of motions and appeals. Administrators owe them the service of challenging their administrative views when necessary. Service does not consist solely in saying "yes sir." Unlike judges, who tend to analyze problems on a case-by-case basis, good administrators think systematically. All four tasks of judicial governance need the benefit of systemic thinking.

b. *Multiple structures.* Another question that Dr. Martinez raises is whether the administrative structure for the courts should be unified as much as possible in a single agency. He notes that the assignment of important judicial administration functions to different entities can lead to duplication of costs, political infighting, and reduced impact of policies (p. 7).

While there is danger in multiple organizations, they do not inevitably generate unnecessary costs and can serve at least four valuable purposes.

(1) They can check the abuse of power. For example, some separation between the judicial policy-making body and the administrative body would make it difficult for either to use administrative functions of auditing, personnel support, and other things to punish a judge for a judicial decision. Each acts as a watchdog.

(2) Some functions may need to be separate in order to be conducted vigorously, or, at least, to calm public fears. In the U.S., all states have created separate commissions for judicial discipline, and some have called on the federal system to open up its disciplinary mechanisms to lawyers and others.<sup>45</sup> This reflects a view that having judges discipline judges within the administrative system may discourage vigorous action -- or, at the least, that the public will perceive it that way.

(3) Separate bodies can encourage articulation of diverse views. In 1992, for example, United States Chief Justice Rehnquist referred to the Administrative Office of the U.S. Courts and the Federal Judicial Center as "two separate but mutually reinforcing support agencies" that "provide the courts and the Judicial Conference complimentary services, and, on occasional major matters of policy, diverse perspectives that benefit the decision-making process."<sup>46</sup>

---

<sup>44</sup> Maine, *Early Law and Custom* 389 (1901), quoted in Levin and Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 *U. Penn. L. Rev.* at n. 83 (1958).

<sup>45</sup> *Report of the National Commission on Judicial Discipline and Removal* 100-101 (1993); Editorial, *Opening Up Federal Judicial Discipline*, 78 *Judicature* 4 (1994).

<sup>46</sup> Rehnquist, *1992 Year End Report on the Federal Judiciary*.

(4) Separate status protects functions that would otherwise tend to be ignored in the press of business. Organizations, when funds are scarce, feel a temptation to meet immediate costs by taking resources from functions that serve long term needs -- education, research, planning, and data gathering, for example. This temptation is sometimes too powerful for the long-term good of the organization.

#### IV. CONCLUDING NOTES

1. The need to avoid doctrinairism. As Dr. Martinez points out, debate over the best judicial administration structure is especially important in times of budget shortages (p. 1), and a good way to carry on that debate is through the comparative examination of different models. I offer a mild caution, based on the experience in the U.S.. For much of this century, court reform organizations campaigned for adoption of "unified court systems," in which all the courts of a particular state would be centrally administered, centrally funded, and operate under the same procedures. Their goal was to remedy the uneven administration of justice that existed in many state court systems. Gradually, however, some court reformers seemed to become more interested in the structure of the judicial system and its governance machinery -- more interested in form than in whether the courts were, in fact, well administered; or, even more importantly, whether they were dispensing justice to the litigants. The true test of good government is not its form. Rather, as Alexander Hamilton said in commenting on the proposed U.S. Constitution in 1788, "the true test of good government is its aptitude and tendency to produce a good administration,"<sup>47</sup> and that should be the ultimate criteria we apply to any structure of court governance.

2. The value of comparative analyses. Related to point 1, perhaps the flourishing experimentation with different forms of governance structure can make the hemisphere a "natural laboratory," in which to try to assess, comparatively, the relationship between different governance structures, effective administration, and effective judging. There are huge problems of measurement and of isolating the impact of structure, as well as numerous other independent variables, on how courts operate. Surely, however, much can be learned by well-designed comparative analyses.

3. The impossibility of perfect solutions. Just as there is a need to avoid doctrinairism in judicial structure, so too there is a need to remember that, judicial politics, like any type of human activity, is inevitably messy. Machines may operate true to their creator's design, but judicial structures will not, no matter how good the design. As Dr. Martinez emphasizes, a nation's judicial governance structures reflect historical circumstances, political compromises, and different views of the proper scope of judicial self-government. Moreover, some judges will try to frustrate effective administration, for self-serving ends, while proclaiming they are protecting judicial independence. Some administrators will try to frustrate the will of the judges for whom they work, or will otherwise behave deceptively. Legislators and executives will try to frustrate judicial independence. The goal of structural reform cannot be to eliminate these tendencies, but to limit them.

In the final analysis, we should see the effort to find improved judicial administration structures in the same light that Reinhold Niebuhr saw democracy itself, which he described as "a method of finding proximate solutions for insoluble problems."<sup>48</sup>

---

<sup>47</sup> *The Federalist*, No. 68 at 444 (Modern Library ed. 1937).

<sup>48</sup> Niebuhr, *The Children of Light and the Children of Darkness* 118 (1940). (Professor Thomas Baker of Texas Tech University School of Law first noted the applicability of Niebuhr's observations to judicial administration.)

## COMMENTARY

Throughout the hemisphere, no judiciary is exempt from financial and political pressures. These vary in degrees from one country to the next, and challenges to judicial independence take differing forms. Most often, encroachment on judicial independence occurs when the legislative branch usurps discretionary prerogatives of the judiciary. Regardless, systems of justice and courts lose prestige and credibility when they are unable to dispense justice in fair, efficient, and timely ways.

The most common response to problems with judicial administration has been the creation of Judicial Councils. The Councils' status and specific functions take many forms, and can be internal or external to the judiciary, or be hybrids. Some are designed principally to separate judicial functions from those of administration or discipline. Others are to shield the judiciary, and yet others view their purpose as overseeing and monitoring the judicial branch. Their composition differs also from country to country; some include appointees that are not committed to an independent judiciary or to judicial reform.

Opinion is divided on several questions: Does judicial independence mean self government? Does outside (non judicial) participation in Judicial Councils adversely affect judicial independence? If all judicial power is concentrated within the judiciary, without checks and balances, might this lead to inefficiency or complacency? Will judicial excellence not be affected if advancement is dominated by the judicial hierarchy and follows principles of patronage? What should be the response when the judicial leadership fails to address the operational and justice delivery issues? And, why have organizational reforms, such as Councils, seldom produced the desired results?

There is unanimity, on the other hand, on a number of issues:

- The courts require good and efficient administration; such administration should be provided by competent professionals (specialization), and be complementary to judging functions.
- Conflicts exist when judges are charged with fulfilling both administrative and adjudicative functions.
- Judicial Councils should be evaluated for their contribution to an efficient and independent judiciary.
- Discipline of the judicial branch need not be exercised exclusively by the judiciary; and,
- Inadequate financial support has a direct, harmful impact on judicial independence.

In summary, debates on Judicial Councils are less about structure than about their accomplishments and results. Relevant and important questions are: do they help meet the needs of the judiciary? do they help enhance freedom from interference and improve efficiency? If the answer is “no,” should new entities be created, or rather, shouldn’t reform address the reasons for this failure?

## **II. A. CASEFLOW MANAGEMENT**

### **CASE MANAGEMENT AND REFORM IN THE ADMINISTRATION OF JUSTICE IN LATIN AMERICA**

*Dr. Carlos Gregorio*<sup>49</sup>

#### **I. INTRODUCTION**

The negative aspects mentioned most frequently in diagnosing the systems of court administration in Latin America have been: delays, uncertainty, excessive complexity, inaccessibility, and a very high cost/benefit ratio. On the other hand, the solutions that have been proposed are almost always to increase the number of judges, administrators, and equipment, or to write new codes. Frequently, it is believed that these measures will automatically produce the expected results. Meanwhile, the size and structure of the Judicial Branch grows irrationally, creating new conflicts and new difficulties.

However, a great many of the problems are rooted in the existing models for managing and handling cases. Many of the changes that could resolve these problems could be generated from inside the Judicial Branch without increasing the budget substantially or resorting to legislative reform. To be able to design changes from within, it is necessary to have basic statistical information available that can be analyzed jointly by judges and administrators, and be compared to experiences in other jurisdictions. The Judicial Branch should devise a means of constantly analyzing its administration, and look for a way of improving it, while imparting justice at the same time.

Increasing productivity and efficiency requires the redefinition of each one of the tasks, eliminating unnecessary procedures, and making technology, which is increasingly accessible, available to the administration of justice. It is also necessary to improve mechanisms of control, streamline judicial proceedings, and facilitate communication.

In many instances, the reform of judicial administration requires changing the judge's role in the process. These changes arise generally from new procedural norms, but in some cases it is also possible to change the frequency, intensity, impact, and the way judges can intervene, by modifying the guidelines on case management and the information flow in the judiciary, thereby achieving greater control of the process.

In this field, the concrete objectives of judicial reform aim at reducing delay and case back-up, improving case management and follow-up, and identifying the problems or types of cases that occur most frequently, so that special or automated procedures can be developed for them.

#### **II. ASPECTS ADDRESSED BY REFORM PROJECTS IN LATIN AMERICA**

To respond to these problems of case management and disposition of cases, reform projects in the region concentrated on introducing computerization in the courts. Procedural reforms have also played a vital role in the region as opposed to reforms of judicial administration of cases. Programs to decrease delays or case back-up are isolated. In most cases, the solution has been to create new courts, to the detriment of analytical studies of the causes that are generating the problems.

---

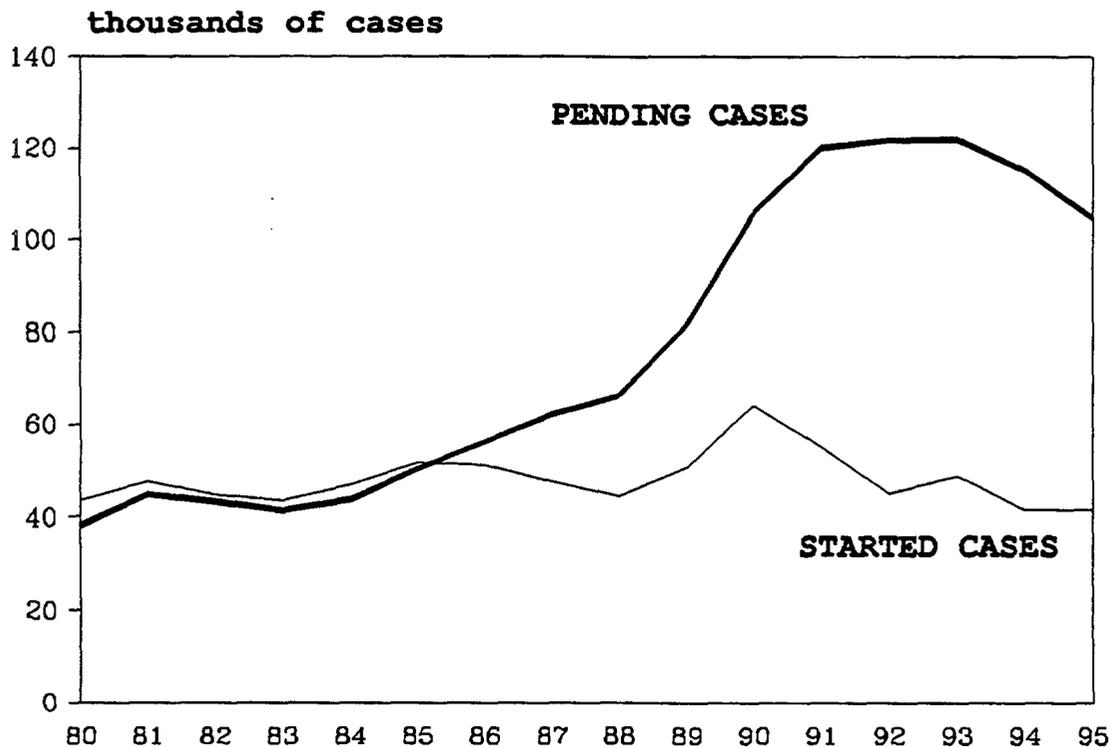
<sup>49</sup> Dr. Gregorio is a mathematician who works as an independent consultant for several organizations, including the Inter-American Children's Institute of Montevideo, Uruguay. He teaches *Quantitative Methods in Law* at the School of Law and Social Sciences of the Buenos Aires University.

### A. Case Back-Up

The solutions to the problem of case back-up in the judicial system generally include a coordinated set of measures to: (i) favor the alternative resolution of conflicts, in order to remove from the system cases that can be resolved without a judge's intervention; (ii) procedural reforms – searching for faster, more transparent process; and (iii) administrative reforms.

For example, in the city of Buenos Aires, there has been an increasing back-up of cases in the labor courts since 1985, which began to decrease in the last two years (see FIGURE 1). The causes of the back-up seem to be basically external: it is possible to see that the number of settlements reached in labor disputes started to decline as the inflationary process became hyper-inflationary. That situation was supported by a decision of the Supreme Court in the case of López vs. Pesquera de la Patagonia<sup>50</sup> which resulted in a reduction in the interest rate that was used to update labor loans. The recent decrease in the number of cases initiated could be explained in three ways: (i) the privatization process in state-owned companies resulted in a decrease in litigation; (ii) occupational accidents are now handled in civil courts because of legislative reform; and (iii) the increase in the unemployment rate, as well as an increase in the rate of people working without a contract.

FIGURE 1. Cases initiated and pending in the labor courts in Buenos Aires.



Some action was also taken to reduce the level of back-up. In 1994 eleven new courts were created solely for sentencing. Those courts handle cases that have been held up, and have a minimum number of personnel.

In El Salvador, between August and October 1993, a census was taken of active cases. The results showed 136,791 pending cases, 90% of which were in courts of first instance. Fifty percent of the pending cases were in the courts of the city of San Salvador. Fifty percent of the cases were more than three years old, and 26% were more than 6 years old. In 57% of the criminal cases, more than a year had gone by since the last

<sup>50</sup> Decision of the Supreme Court of Justice of June 10, 1992, cf. 1992-E "La Ley" ("The Law") (1992) 48-50.

proceedings, and in civil cases the percentage was somewhat higher -- 66% -- because the movement of these cases depends on the litigants.<sup>51</sup>

This situation was confronted with various actions. The main elements of the experience included: weeding out cases that were at a standstill; improving case management; designing and implementing automated systems, most importantly in the criminal courts of San Salvador and Santa Tecla; a pilot system for follow-up of sentenced prisoners, which was installed in Santa Tecla and recently in San Salvador; a plan for organizing and filing judicial files; and the establishment of a court administrator -- in charge of coordinating the assignment of cases and centralizing the management of other non-judicial tasks. All of these actions were supported with training.<sup>52</sup>

## B. Delay Reduction

The duration of the process was initially viewed as an indicator of the efficiency of the court administration system. In many cases delays become intolerable, however, and may hinder the possibility of obtaining a fair solution to the conflict.

Most of the actions taken in the region to reduce delays have been aimed at modifying procedural norms. For example, procedural reform in Uruguay began in November 1989 by changing written civil proceedings -- Civil Process Code, to hearings or proceedings held in court -- General Process Code.<sup>53</sup>

As a result of the reform there was an important decrease in procedural time (see FIGURE 2). A sample study carried out by the Judicial Reform Project made it possible to establish that the duration of the proceedings has been reduced by one-half. On the other hand, the success of the system of holding court hearings, which has undeniable advantages, depends on the right ratio between the number of judges and the number of cases. That is why, at the same time that the General Process Code became effective, the number of existing courts was modified, which meant approximately doubling the number of courts in the city of Montevideo. The existence of the new court system and the duplication of the number of courts makes it difficult to explain the reduction observed in the duration of proceedings. However, one factor may help clear up this point. It is a fact that the courts that hear litigious-administrative matters were not duplicated until 1991. Nevertheless, the reduction in the duration of the proceedings in litigious-administrative cases is similar to all the other civil, family, and labor courts. Therefore, it is reasonable to attribute this reduction in the duration of cases to the characteristics of the new procedure.

The evaluation of procedural reform in Uruguay not only indicates a marked reduction in the duration of the proceedings, it also indicates achievement of the basic objectives of immediacy, concentration, publicity, simplicity (by limiting the number of procedural types to the essential minimum), etc.<sup>54</sup>

## C. Unusual Ends to Proceedings

When analyzing the path that each case follows until its termination, one can see that not all of them end with a definite sentence, i.e. a decision that resolves the basic question relevant to the conflict. Many times the process concludes in an unusual or extraordinary way: due to expiration, settlement, abandonment of the right, abandonment of the action, acceptance of the claim by the defendant, etc. When the number of cases that do not end in the usual manner is significant, the effort of the system of judicial administration is wasted, because the conflict is resolved independently of the judicial system. Every reform project that tries to deal with case back-up

<sup>51</sup> "La Realidad de la Justicia Salvadoreña: análisis del censo de juicios activos." (The Reality of Salvadorian Justice: analysis of the census of active cases.) (1994) 35 pp. SUPREME COURT OF JUSTICE, TECHNICAL EXECUTORY UNIT AND PROJECT II FOR JUDICIAL REFORM.

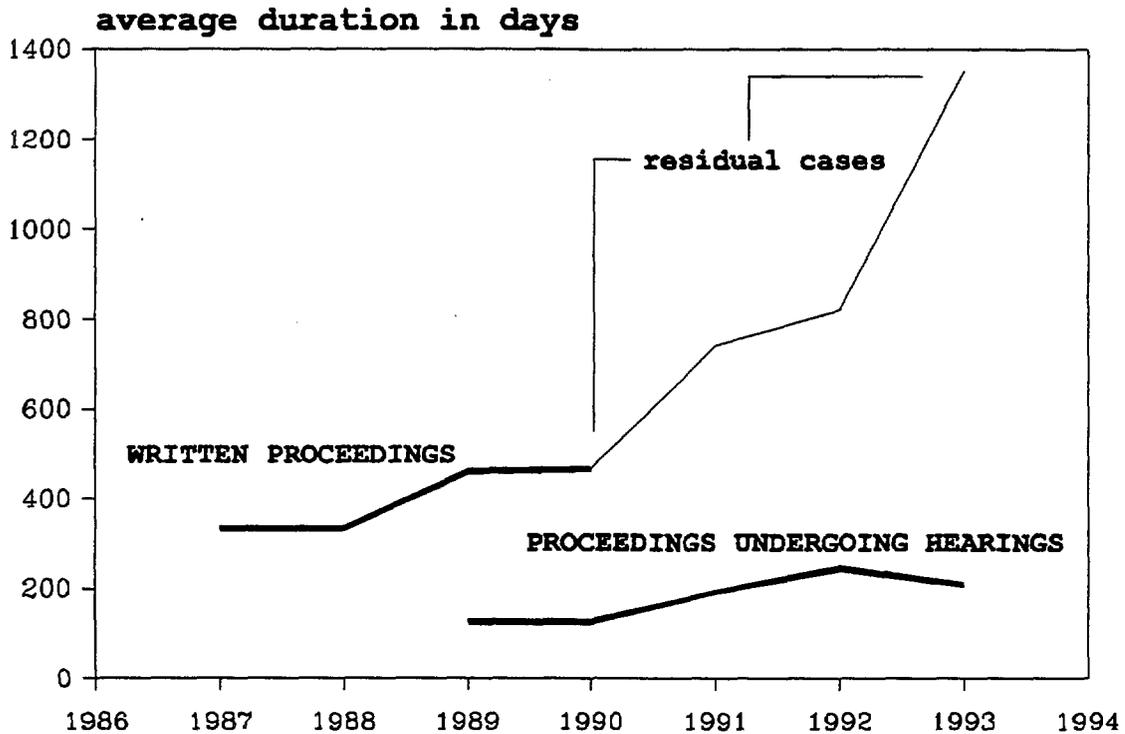
<sup>52</sup> Steve URIST & Robert LOVATO, "Evaluation of Pilot Courts." USAID/El Salvador Judicial Reform Project II, (1966) 42 pp.

<sup>53</sup> Luis TORELLO, "Lineamientos generales de la Reforma Procesal civil y el caso concreto de la reforma en el Uruguay" ("General lines of the Civil Process Reform and the concrete case of reform in Uruguay"), in "Reformas Procesales en América Latina" ("Process Reforms in Latin America"), CPU, Santiago de Chile, 1993.

<sup>54</sup> Enrique VESCOVI & María del Carmen RUECO, "Los primeros resultados de la reforma de la justicia en Uruguay: un balance a los dieciocho meses de la entrada en vigencia del Código General del Proceso." ("The first results of the judicial reform in Uruguay: a balance eighteen months after the General Process Code entered into effect") Ed. Idea. Montevideo, 1991.

and reduce delays should investigate what proportion of cases end without a sentence, why this happens, and how that number could be reduced to reasonable levels.

**FIGURE 2.** Average duration of the proceedings in civil, family, labor, and litigious-administrative courts of Montevideo.



At the end of 1992 an investigation was carried out in the courts of all matters, in Buenos Aires, to evaluate the duration of the proceedings. The investigation included a calculation of the number of each one of the possible ways a case might end. The study included courts of first instance and appeal, and the moment in the proceedings when the unusual end occurred.<sup>55</sup>

In 1995, according to Law 24,573, an obligatory instance of mediation in all non-criminal cases was established in Argentina's national and federal justice systems. Before adopting this decision a pilot experiment in mediation was implemented with participation of the civil courts (estate and family). The results showed an agreement level of 59% in estate cases and 51% in family cases. In cases where agreement was reached, the average duration of the mediation process was 55 days. In all of the cases it was found that the most auspicious time for the case to be mediated was between the answer to the complaint and the trial proper.

#### D. Accessibility of Judicial Information

The information systems should allow the sponsoring attorneys, public defenders or defense attorneys, prosecutors, or others, to ask for information about their cases, and to find out directly the stage at which they are, being able to access the data base that contains the information. A great number of needs for information will be satisfied in this manner without the intervention of personnel, making optimal use of time and space.

<sup>55</sup> Carlos G. GREGORIO, "Investigación sobre demora en el proceso judicial" ("Research on delay in the judicial process"), Centro de Estudios Judiciales de la República Argentina CEJURA, 1995.

The current trend in the systems is for the attorneys to ask about their cases from their own offices, through a system of communications that is outside the judicial information system, which gives them only partial access to the necessary information.

The most interesting experience in this area is the one that has taken place in the Judicial Branch in Chile. Consultation systems provide information about the initiation, termination, and procedural status of cases that are heard in the Courts of Appeals in Santiago. It is also possible to get this information via remote consultation of the data banks in the civil and labor courts. The public service of "Judicial Self-consultation" makes it possible to find out the status of civil cases from a distance, and obtain printed information with different levels of detail, for example, daily status, texts of resolutions, movements of a case, etc. Access is available through terminals installed on the first floor of the building that houses all of the civil courts of Santiago.

In Argentina there have been recent pilot experiments in the civil courts of Buenos Aires, that implement consultation about the status of cases from a distance, via modem.

#### **E. Improvement in Judicial Statistics**

Judicial statistics play a fundamental role in the design and optimization of case management and case-flow systems. In recent years the quality of statistical information on the administration of justice has improved significantly in Latin America. However, it does not seem to have taken advantage of the computerization process to increase the quality of the data provided, or to use it in decision-making. Most of the data that is obtained, and especially the data that is published, describes case loads. In this sense, it seems necessary to give a new boost to case management and case-flow systems, to obtain basic global information that may not be very relevant to the courts in carrying out their tasks, but will be very important in research studies to optimize administration procedures.

Presently, the statistics on judicial administration in Costa Rica seems to be one of the positive examples of how the Judicial Branch should inform the community about its operations. Important results have also been achieved on judicial statistics in Argentina, Colombia, Chile and Uruguay.

#### **F. Characteristics of Information Systems**

One of the reforms in judicial administration consists of replacing manual record systems with computerized systems for handling information. In almost all of the countries in the region this process has been a gradual one. The processes of computerizing judicial administration began with producing sentences (word processor), and followed with mechanisms for record-keeping and case flow management that replaced the court's files and books.

In almost all of the countries in the region there are computerized processes. Today, as a corollary to these experiences, the primary objectives of these systems are:

- providing information to facilitate decision-making by the judge and his assistants, as well as the parties, their attorneys, or any other person who participates in a process;
- permitting the generation of basic information for statistical analysis, evaluation, streamlining, and optimization of the system, and for decision-making by those who act as court administrators or define judicial policy.

#### **G. Purpose and Quality of the Information.**

Court information that is generated or processed may have a different entity and value. Nevertheless, the information that is normally included in computer systems could be classified in the following manner:

*Statistical:* when data is included in a computer system to be used in preparing statistics, research, or monitoring, it is not necessary to identify the name of the parties (perhaps except for the State itself or parties that have multiple cases). The most important consequence is that only the information that is included for these purposes may be protected under the "statistical secret."

*Referential:* information contained in the system facilitates access to data, the process of identification of documents, and people necessary for management.

*Documentary:* information that has documentary value furnishes the means for rational decision-making. If the parties, for example, can inform themselves of a judge's decision, or a notification, by consulting the computer system, that data should have documentary value. There should be a guarantee that all of the data classified as documentary can not be modified; or, if it is, there should be a record of the previous content, who modified it, and when.

*Record-keeping:* the most important characteristic is that including information in the record produces legal consequences. Thoroughness is also essential; in a record-keeping system, the absence of pertinent information has documentary value.

In the planning process it is necessary to establish what scope (statistical, referential, documentary, record-keeping) each unit of information will have in the computerized data system, how it will evolve in the future, and what information flows are compatible with other computer systems, now and in the future. This aspect will perhaps be relevant in future developments, or in reviewing current computer systems. A careful evaluation of information needs should probably be made -- or should be improved if one has already been done.

In many of the systems developed in the region, especially during the initial stages, the inclusion or exclusion of information was not a result of a process of identifying needs, nor were the purpose or minimum quality standards established for each type of data. One of the problems that has arisen is that the use of computer systems is not mandatory for the judge and his assistants, which leads to incomplete computerized information. The use of literal fields has also been generalized to the detriment of codified fields, and, in some cases, it has been left up to each judge to establish his own code tables. Not taking precautions in this sense leads to a lower quality of information that, although it does not affect the work of the court in principle, becomes relevant when computerized data is used in the future to conduct global studies and analyze the operation of the whole judicial system.

Information from a judicial source influences many people's decision-making process, and improvements in the quality and accessibility of that information make it possible to modify those factors radically. On the other hand, the purpose of some computer systems may be to optimize or support some particular types of cases, either for differential management, or to provide information about context.

An experiment was carried out in the civil courts of Buenos Aires to study the following phenomena: (i) the majority of the number of cases were generated by traffic accidents; and (ii) it was observed that the amounts of compensation granted in those cases differed significantly from one court to another, even when the cases were relatively similar. The installation of a data base with the amounts granted by the Court of Appeals, which enables the user to recover cases with a final judgment by means of the data of the victim or the claimants, helped resolve this problem to a significant degree. It was also discovered that the system is very useful in supporting the mediation process.<sup>56</sup>

---

<sup>56</sup> Gladys S. ALVAREZ, 'El enfoque empírico: un sistema de ayuda a la decisión judicial', (The empirical focus: a system to aid judicial decision), in R. GUIBOURG (ed.) 'Informática Jurídica Decisoria (Decisive Juridical Information) (1991) 191-210, Astrea, Buenos Aires.

## H. Case Distribution

In many cases the installation of computerized information systems makes it possible to administer the distribution and assignment of cases among the courts in a pseudo-random and fair way, according to the difficulty and urgency with which they must be resolved (e.g. protection action).

For example, there have been case distribution systems in: Buenos Aires – in the civil courts since 1981, in labor courts since 1987, and recently, in commercial courts; Santiago de Chile – in civil and labor courts since 1989; Montevideo – in civil, family, labor, and litigious-administrative courts since 1992.

An important fact associated with automated case distribution systems is to have coding tables with the objects of litigation, matters, type of case, and object of the process (gathering the synonymy used in some countries in the region). The preliminary classification of the case is proposed by the attorney who presents the demand, which permits more efficient control of the cases initiated, and more homogeneous distribution of cases. It is necessary to review the tables of options periodically, bearing in mind the needs of statistical studies and information systems. It is advisable to calculate how frequently each one of the options has appeared in recent years, to analyze the advantages of eliminating, adding, or distinguishing new options, with statistical or judicial criteria. The tables used in Buenos Aires, Santiago de Chile, and Montevideo, for example, are substantially different. One of the reasons is the different substantive legal frameworks, but there are also other elements, and specific customs, regarding litigation. For example, on the coding tables of civil and labor courts, there is a difficulty that seems to generate different solutions, which is the concurrence on those tables of descriptions of facts, rights, or actions. The tables of crimes seem to be much more homogeneous.

Distribution systems make it possible to generate common files for all the courts, or appeals courts, on the same matter. Only in a few cases are they connected via network to the courts' management systems, which permits more effective control, and makes it possible to identify related cases.

## I. Case management and Follow-Up

There are several systems in use in the region; some were developed by the technical teams of the Judicial Branch, and others by companies or external consultants. In all of the cases, control and direct follow-up of the projects, by the authorities of the Judicial Branch, was shown to be favorable.

The most important object of IANUS, the system of Criminal Case Follow-up of Bolivia, is the proceeding. The process is considered to be a chain of proceedings. The technical modules consist of: reception of the case, distribution of the case to courts, administration and storage of means of proof, administration of the file, handling of the judges' agenda, control of notifications, and control of the conviction. The system makes it possible to generate different statistics at the court level.

The criminal courts of El Salvador (in San Salvador and Santa Tecla) use a system of case management of criminal cases in the First Instance. The system makes it possible to record personal data about the defendant, government and defense attorneys, place of the commission of the crime, names of the victims, etc. They also record the dates associated with all of the events, procedural stages, and ways the case may end. A screen containing the history makes it possible to display all of the events related to the case in an orderly manner. Another system has been developed for the management of the cases of convicted prisoners, and is currently operating in the criminal courts of Santa Tecla. The system makes it possible to control: preventive detention, stay of proceedings, execution of the sentences, and ensuring that the sentences are served. In the module of Execution of Sentences, it is possible to record payments made for civil liability and the objects attached.

In the civil and labor courts of Santiago de Chile, the Case-Flow and Procedural Control System records the initiation, procedures, termination, and file of each case, and creates a record of all the procedural actions, arranged according to the type of procedure (ordinary, executive, precognition, etc.), associated with each type of case. The system can verify the time allowed by law for court action for each stage of the procedure. It also provides tools to facilitate administrative tasks, such as the generation of rosters, lists and statistics. The physical

follow-up of files, certified true copies, rogatory letters or documents is also possible. It also makes it possible to record the movements in the court's checking account.<sup>57</sup>

In Buenos Aires, an externally developed management system is in operation for labor courts. The Supreme Court's technical teams also developed a management system that is operating in the criminal and civil courts.

In Uruguay, a system is used that was developed by the Computer Center of the Judicial Branch. It is currently in use in civil, labor, family and contentious-administrative courts in Montevideo, and in multiple jurisdiction courts (non-criminal) in the cities of Las Piedras, Maldonado, Pando, Paysandú, and Salto.

The first management systems developed in the region to operate with written procedural codes were aimed at finding out *where the file was*, to facilitate the writing of the sentence (word processors). On the other hand, if procedural activity focus on oral hearings, management systems will be more oriented toward management of the calendar and the agenda. Although these were the first needs that were identified, today, experience accumulated in the use of computer technology indicates that the management system is a fundamental tool to improve effective control of the progress of the case by the judge and his assistants.

According to the experiences analyzed, management systems can be developed with different levels of involvement with procedural norms. In some cases, an attempt has been made to produce a management system that can practically be adapted to any type of procedural code; in other cases, systems have been developed ad hoc for a particular code. The experiences that have been developed by looking for an intermediate alternative leave it up to the user to include information related to procedural norms; in this way, the procedural steps or stages are included as tables, that the user can modify. Without proper coordination, this way of working tends to generate information that is not comparable.

It has been observed that a management system can suffer from a certain degree of inertia, or can introduce procedures by non-legislative means, which in some cases have kept alive institutes or procedures that were abolished when a procedural code was reformed. It is advisable to differentiate clearly, when planning the inclusion of each piece of data, table, or classification, whether or not it fits in accurately with the procedural norms in effect. Not all the procedural norms should be referred to or recorded in the system, just the ones that are considered necessary. The development of this activity requires the participation of a group of specialists in judicial procedures, court administration, and computer services.

The design and modifications in case management and case-flow systems should respond to needs that have been identified previously. If the structure of the management systems in the region is taken as a point of reference, in principle, the basic characteristics of the system should:

- have a sole system of case identification for the entire Judicial Branch;
- maintain a visual interface and consistent language for all types of courts, procedures, and cases, if possible; the different versions should have the same logical pattern and be variations of equivalent procedures;
- be flexible, and adaptable to new modalities;
- operate with adequate inter-relation to the procedural code in effect. If there is a change in the procedural code, the new cases, and the ones that are processed according to the old code, should coexist temporarily in the same system;
- replace the systems for recording case-flow (books or files);

---

<sup>57</sup> Juan E. VARGAS & Jorge CORREA, Diagnóstico del Sistema Judicial Chileno (Diagnosis of the Chilean Judicial System), CPU, 1995.

- include subsystems for differential management for some types of cases;
- have indices that facilitate access to all or part of the information on the case, by different entries (the procedure should include alphaphonetic searches). The recovered information should be accessible for modification;
- include applications to carry out the functions of recording procedural steps and stages, notifications, bonds, arrests, changes in interested parties, effects attached, calculation of judicial rates, fees, etc.;
- record dates and times of all the interventions;
- include specific applications for oral procedures, especially for management of the court's agenda. The system should include a calendar, and the possibility of knowing about and recording the events planned for each day, and the estimated duration of each one of them;
- whenever possible, include automation elements;
- contain a specific word processor and tools to generate standard documents or routine correspondence, insert quotations of jurisprudence or the names of the people involved, access the data bases, use dictionaries, protect the name of minors, etc.;
- automatically alert the advisor of minors about the presence of minors in a case, to protect their interests;
- assist the judge, his assistants, and court personnel, in scheduling hearings within a determined period of time;
- use internal reference tables and tables with modifiable options;
- contain information on calendars (holidays), availability and reservation of hearing rooms;
- tools to arrange information by date, alphabetically or numerically;
- select data through Boolean operators;
- carry out arithmetical operations, etc.;
- produce various types of internal statistical reports of the court (cases being processed and started, in court, in the jurisdiction, the previous year, delays, month by month, oldest cases, etc.) and present them jointly with global indicators of the same types of courts.

#### **J. Privacy and Judicial Information**

Computerizing court administration began by assisting in the writing of sentences (word processors), followed by case-flow mechanisms that replaced the court's files or ledgers. As computer systems grow and improve, central data bases are created for all of the same kind of courts in one jurisdiction. That is the time when people appear who are not party to any case, but who are interested in having access to, and using, judicial information.

On the other hand, the administration of justice should be transparent; publicity about its actions and decisions is one of the pillars of the system. Knowledge of precedents is what ensures respect for the principle of equal justice.

In the past, the State requested and collected data which in many cases had no apparent usefulness. This was done without the aid of computers. Presently, computer science is an optimal resource for processing the data gathered. There have also been transformations in this processing, with a significant influence on human behavior and decision-making. The way that the data was altered, and the number of times the data was transferred have varied enormously, altering the relationship of the individual with his environment, and his perception of same.

Increases in accessibility, a result of the centralized systems of judicial information, have given way to new requirements. For example, labor justice requests are received from companies that select personnel and who are interested in finding out if any labor suits have been initiated by a potential candidate for a position. Certainly the intention is to predict future conduct, believing that someone who exercised his rights in the past will not be afraid to initiate new actions in the future.

In the Court of Appeals in the Civil Courts of Buenos Aires, requests have been presented with the same characteristics; for example, to find out whether a potential tenant has been evicted in the past. Recently, the Civil Court, established by Agreement N° 922, of November 10, 1994, placed restrictions on access to judicial information, especially in the cases of family conflicts.

Aware, then, of the differences in opinion as whether to make the information collected in judicial actions public, and the certainty that the volume of information as well as facilities of access will continue to grow, the demand for information, with or without any legitimate interest, will also increase. It is considered highly recommendable to prepare legislation that takes into account the situations mentioned above, and basically defines general principles applicable *during* the development process of computer systems for the Judicial Branch.

This legislation should be compatible and complementary to the norms that determine the scopes of habeas data,<sup>58</sup> because, in principle, publicity applies to all the information handled by the public administration. Nevertheless, guidelines should be established to protect the defenseless citizen against the way that information might be used. It will be necessary, then, to establish limits in the processes of collecting data through substantive norms that require previous identification of the need for the data, and the purpose of its use, as well as limit who may request the information.

The creation of data processing systems should be transparent and accessible to all users. It is necessary for the government agencies that work with data banks to have contacts with independent institutions and non-governmental organizations that offer the services of their experts and represent the opinion of specific sectors. The risk factors, effects, and consequences that data processing systems may produce on society should be studied, as risk analysis.

The legislation should avoid the stored information's generating or permitting any form of discrimination or prejudice, for example, through gathering and keeping data on religious beliefs, political opinions, sexual attitudes, ethnic origin, disability, etc. Also, the time periods during which it is necessary to maintain the data should be identified and stipulated, defining the procedures by which it may be eliminated. Publicity does not protect the indiscriminate disclosure of data, nor does it mean converting the public administration into an information service. The legislation should determine when it would be appropriate to provide third parties with information referring to an individual.

Appropriate decisions are necessary then in this area, either to make the information in the Judicial Branch accessible to any user, and acknowledging the individual's right to petition privacy, or, on the contrary, restricting access only to those who have a legitimate interest that is duly accredited. Defining these issues is an important requirement for the development and efficiency of judicial computerization, as well as for public information services and national records, and especially for computerized statistics.

---

<sup>58</sup> The Constitution of Brazil of 1988 has established habeas data in article 5°, subsection LXXII. Equivalent prescriptions are in the Constitution of Colombia of 1991 (article 15), the Constitution of Peru of 1993 (article 200.3) and the Constitution of the Argentine Nation of 1994 (article 43).

According to the background information presented, the design of computer systems for the Judicial Branch should – while there are no explicit norms or policies – seek to maintain a balance between the:

- principle of publicizing judicial actions and decisions;

and the most recent trends toward protection of personal information:<sup>59</sup>

- principle of purpose (data will be recorded for specific and legitimate purposes, and it will not be used in any way that is inconsistent with those purposes);
- principle of proportionality (the data should be appropriate, relevant, and not excessive);
- the data obtained will be treated fairly and legally;
- right of access to information (viz. before starting any computerization, deciding what personal information is necessary, and how the information is going to be treated, recorded, and transferred to other people);
- right to know to whom your personal data has been transferred;
- right to oppose, for legitimate reasons, the subjecting of the information to data processing;
- right to rectify information;
- specific actions for guarantee of habeas data;
- cancellation of records when they are no longer necessary or relevant;
- statistical secret;
- existence of an authority for protection of personal information.

### III. CONCLUSION

Reform in the realm of case flow management has been characterized overwhelmingly by the introduction of computer equipment. Even accepting the fact that it is essential to equip court administration with all the technological advances, this is not all that needs to be, or can be, reformed.

There are several problems in this process: the complexity of new technologies and their own slang; the resistance to change; the traditional education of lawyers and judges, which does not include any knowledge of other fields, especially computer science, administration, decision-making, etc.; and pressures and commercial aspects that surround computerization, just to mention a few of the most important problems.

Nevertheless, the progress that has been made has been very important. The high degree of participation of the judges should be emphasized. In many cases they have committed themselves to pilot experiments and other kinds of evaluations.

At this moment in many judicial systems in the region, with different degrees of progress, there is computer equipment, which, in most cases, facilitates court administration. However, computer systems are just beginning to develop, which will make it possible to obtain global data. The more general systems designed to

---

<sup>59</sup> For example, Agreement 108 of the Council of Europe of January 28, 1981. cfr. Egbert J. AUSEMS, 'La protección de las personas frente al tratamiento automatizado de los datos personales en el marco del Convenio 108 del Consejo de Europa' (The protection of people in the face of automated treatment of personal data in the frame of Agreement 108 of the Council of Europe), in "Informática Judicial y Protección de Datos Personales" ("Judicial Information Systems and Protection of Personal Data") (1994) 15-27, Department of Justice, Basque Government.

distribute cases only contain information about the existence of a case. But there are still many traditional problems that have been described, like delays and back-ups.

On the other hand, the management of the justice system is increasingly becoming a subject of public debate. Although there is insufficient information, different interest groups conduct studies and reach different conclusions about the way justice is administered. The opinions and studies of the Judicial Branch, based on isolated data and keyed to sectorial interests, create in some cases the feeling that the system is out of control. These studies do influence decisions, but they usually create more of an uproar than provide information.

There are several reasons why each Judicial Branch should assemble all of the existing information on management systems and carry out its own studies. Among them, as a general framework, they should concentrate on systems corresponding to the processing of existing information in the Judicial Branch that make it possible:

- to improve sectorial planning capacity -- based on reliable, sufficient, and timely information, that improves the decision-making process;
- to improve the capacity of management analysis at the directive levels of each one of the public institutions, including the courts;
- to improve the knowledge of management in each one of the judicial offices, prosecutor's offices, defense attorneys' offices, etc., based on specific information and comparable guidelines;
- to consolidate a package of measurements and indicators that may be published in the community, as information about the performance of the judiciary and its evolution.
- to optimize the organization and administrative procedures;
- to improve statistics and make them part of the decision-making process;
- to respond to sectorial studies;
- to differentiate what is typical from what is inconsequential;
- to generalize and forecast.

**ACKNOWLEDGMENTS:**

The author would like to express his gratitude to Victoria Pérez Tognola for interpreting the data from the Courts of Buenos Aires, to Henryk Montygierd for his commentaries on the draft monograph, and to Juan E. Vargas Viancos for the information provided.

## **II. B. DELAY REDUCTION**

### **STRATEGIES TO REDUCE TRIAL COURT DELAY**

*William E. Davis*<sup>60</sup>

#### **I. INTRODUCTION**

##### **A. The Judicial Branch of Government**

The judiciary "will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."<sup>61</sup>

##### **B. Judicial Administration**

It is now well recognized that the existence of judicial independence cannot be separated from adequate and proper judicial administration. It involves both policy-making and policy administration. If the judicial branch is poorly equipped and administered, its independence will be of little value to citizens. Appropriate judicial administration requires adequate financing and leads to preservation of public confidence by the efficiency which it produces. Consistently with judicial independence, judicial administration should be provided to the judicial branch by its own staff. Less consistently, it is more frequently provided by executive departments of state. Conduct of such administration by the judicial branch facilitates judicial input to policy, and requires judicial assumption of responsibility for the progress of the branch.

##### **C. Efficiency in Conduct of Business**

The quality of independence given to the judicial branch is unique in the political spectrum and, in turn, requires of the branch that it performs its functions efficiently. A judicial branch which is a decade behind in disposal of its caseload may be independent, but it has no political relevance. The quality of independence ceases to matter to citizens if they cannot have it applied to resolution of their particular disputes.

Judicial systems are striving to understand their responsibilities and identify means of responding to the increasing expectations being placed upon them. As societies find even modest levels of economic stability, the cries for improved justice are heard. The crisis facing justice derived from the perception, if not the reality, that there is unfairness in the system -- namely, the rich have different standards applied to them or, because of skin color, there are different standards. The seemingly interminable delays in the system are recognized by the public as being symptomatic of collapsed systems, and fosters the view of the government's inability to provide basic services.

The length of time it takes for the system to resolve conflicts contributes directly to the absence of confidence and appearance of corruption. How can there be confidence in a system that takes over five years to resolve simple conflicts, or detains an individual for two years only to find him not guilty at the end of a process? It is little wonder that justice systems characterized by these conditions are not held in much confidence by its citizens.

---

<sup>60</sup> Mr. Davis is senior advisor with the National Center for State Courts/International Programs, and Principal in DPK Consulting, a firm specializing in public policy and justice reform programs throughout Latin America. Mr. Davis is former Director of the Administrative Office of the Courts (California), former Circuit Executive for the 9th Federal Circuit, and former Director of the Administrative Office of the Courts (Kentucky). He holds a law degree from the University of Kentucky.

<sup>61</sup> Alexander Hamilton, *The Federalist*, No 78.

In a 1987 report by the Instituto SER of Santa Fe de Bogota, Colombia, the authors quote a message sent by the President of Colombia, Alberto Lleras Camargo, to the Congress in 1961, saying:

*“Es cosa grave que todo el país acepte mucho como axiomática la quiebra de la organización judicial y que no haya nadie que pueda levantarse con autoridad suficiente, nacida de los hechos mismos, a refutar la convicción pública.”<sup>62</sup>*

In answer to this call for change, the response was to provide the government with a much wider authority to address these concerns. However, in an evaluation made nearly 10 years later,<sup>63</sup> the conditions had not changed. The authors believe that the reasons for a low percentage of public support is the slowness in the process, as well as the limited access to justice available to the poorest sectors of the country. Similar studies in Argentina,<sup>64</sup> Costa Rica,<sup>65</sup> and Chile<sup>66</sup> provide the same findings.

The table which follows depicts the evolutionary stages that judicial systems undergo in the process of maturing and improving performance. The graph illustrates and tracks the stages which courts follow in their development. It is conceivable that, within a country, courts can be found at all levels of development.

#### Administration of Justice Systems Evolution<sup>67</sup>

TOPICS	LOGISTICS	WORK VOLUME	WORK QUALITY	QUALITY OF EACH ACTOR
Emphasis	-Judge -Court -Nation	-Judge -Court -Appeals Court -Province/Nation -Supreme Court of Justice	-Areas/jurisdiction -Criminal -Family -Civil, etc. -Nation	-Users/clients -Public
Institution's Role	Minimum	-Begins to supervise faculty	-Supreme Court Justice/ Judicial Councils -Bar Association -Faculty	-Nation/Region -NGOs -New role for Judges
System's Foundation	System concept does not exist.	-Acknowledgment of the existence of a system. -Statistical performance.	-System and its components. -Permanence Standard.	Review of government standards, monitor, etc.
Interventions	Logistic Support. Judicial Education.	Judicial Education Statistic.	-ADR -Code of Ethics -Fight Delay -Education -Pilot Projects.	-ADR -Public Participation -Ethics -Education
Government Standards	None	Rudimentary	Volume	Quality
Structure	Decentralized	Centralized	Centralized/ Participative	Participative

In stage one, judicial systems are preoccupied with logistical questions. These questions are reflected in inadequate space, lack of supplies, and in-existent or deficient equipment that are needed to perform basic functions. Judges and court staff who are laboring under these conditions are not in a position to discuss or assess how the system is working. The focus is on daily survival and, quite commonly, lawyers and litigants are asked to provide the judicial system with these materials.

Planners and reformers must recognize that minimum financial support is required for basic operations. The Nicaraguan Supreme Court's efforts to build nearly 100 local court facilities -- in the most

<sup>62</sup> Study about Delay in Colombia, Instituto SER, 1987. "It is quite grave that people would accept as axiomatic the collapse of the judicial branch and that no one with sufficient authority will raise a hand, born of the same deeds, to refute the public conviction."

<sup>63</sup> Study about Delay in Colombia, Dr. Alonso Monada, 1971. Judicial Association of Colombia.

<sup>64</sup> Public Opinion Study on Justice, Judicial Studies Center of Argentina, Institute Gallup of Argentina, 1994.

<sup>65</sup> Public Opinion Study on Justice in Costa Rica, CID Gallup, 1994.

<sup>66</sup> *Justicia y Marginalidad, Percepción de los Pobres*, Results and Analysis of an Empirical Study, Corporación de Promoción Universitaria, 1993.

<sup>67</sup> Copyright, DPK Consulting, July 1995.

strife-torn areas, as a priority -- is an illustrative example of this stage. Further, the court, after carefully selecting the new judges and staff to serve in this area, changed these circumstances, by bringing about operational changes.

In stage two, the concerns are more focused on organization and administration. Many systems in Latin America are preoccupied with implementation of new organizational structures. During this stage, systems begin to develop the capacity to understand their own operations. This stage includes the emergence of statistics offices, planning functions, and other functions which enable systems to systematically develop standards, norms, and guidelines regarding their performance.

In stage three, justice systems begin to mature and start to address specific concerns about delay and measuring the quantitative performance of the system. The ability to collect and analyze information is a necessary prerequisite for initiating delay reduction activities. Reform efforts must first lay an adequate foundation for initiating a coherent delay reduction strategy.

It is essential that an internal capacity be developed to measure performance against standards. There is, however, an equally important requisite for the system to have the capacity to devise strategies for improvement of performance in order to implement those strategies. Efforts, to be significant in addressing delay, must have professional support to build the organizational and operational capacities.

The fourth stage focuses on qualitative issues. Many court systems in North America are still in this stage of development. Perhaps as many as 12 state and federal systems are initiating projects directed at implementing performance standards which focus on qualitative issues. The Costa Rican system in Latin America is perhaps the only one in a position to contemplate such action at this time.

## II. COMPARATIVE EXPERIENCE IN U.S. COURTS

### A. Delay Defined<sup>68</sup>

The ABA Standards Relating to Court Delay Reduction state:

"From the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery, and court events, is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once achieved, maintaining a current docket." (Standard 2.50).

The 1973 publication of *Caseflow Management in the Trial Court*, published by the American Bar Association's Commission on Standards of Judicial Administration, sets forth fundamental reasons why the court, rather than the lawyers, must control the caseflow process.

Effective coordination of multiple resources in the court environment can only be effected from a single position. The bar and the prosecutor are usually concerned with individual cases rather than the caseload as a whole. The court, as a neutral agency, is the logical central focus from which to control, coordinate and balance the interests of all parties. Although case management is a widely accepted practice in the U.S. courts, it used to be viewed as inappropriate for the court to control the pace of litigation.

An effectively designed caseflow management system enhances justice. It conserves resources and reduces the costs of litigation, while at the same time it classifies each case to the type of court attention it requires. Today, many courts have implemented successful caseflow management systems, and attorneys

---

<sup>68</sup> American Bar Association Standards Relating to Court Delay, 2.50 Caseflow Management and Delay Reduction; 2.52 Standards of Timely Disposition; Matters Submitted to a Judge; 2.54 Court Delay Reduction Program, 1985.

are playing an integral role by contributing to their design, and providing ongoing support. Although effective caseload management systems may have different characteristics, often unique to the local culture in which they operate, all successful systems include the application of three basic operational principles.

## **B. Basic Operational Principles**

1. Early Court Intervention
2. Deadlines for Case Events
3. Court Supervision of Case Progress

1. **Early Court Intervention**, or early active court attention to the case, often involves a conference between the judge and attorneys soon after a case is filed, to assess the time, events, and resources necessary to appropriately dispose of the case. Effective caseload management systems provide for relevant case information that enable the court and attorneys to tailor a timely disposition plan which best fits the unique characteristics of each case.

2. **Deadlines for Case Events** involves creation and monitoring of deadlines, or interim time limits, for completion of necessary events. An example is a discovery completion date. The total of the interim time limits are such that disposition of the case in accordance with the court's overall time standards is assured.

3. **Court Supervision of Case Progress** requires monitoring and controlling the pace of litigation. The monitoring process begins when the case is filed, and continues until a judgment is entered. Active and continuous court supervision facilitates predictable progress, promotes case preparation, and leads to timely dispositions. There is a need to consult the bar about problems with the existing caseload system and possible remedies. Experience shows that most lawyers are concerned about the effect of delay and are interested in contributing to solutions. The lawyers in each case should also be consulted about case complexity and the time needed for adequate preparation and disposition of the case. Efforts to build alliances with the bar are necessary elements in a delay reduction program. The bar will have to alter its way of doing business, and experience has shown that lawyers should participate in order to obtain their collaboration in this effort. The need to recognize that the court will take control over the process is paramount.

Unless a court asserts positive, early control over the pace of litigation, it will not be possible to achieve the most timely and just disposition. The findings of a three-year study of case processing times in 18 urban trial courts are presented in the National Center for State Courts 1988 publication, *Changing Times in Trial Courts*.<sup>69</sup> The research indicates that careful application of fundamental principles has allowed courts to manage their caseloads successfully. Following are several broad findings from research:

- Delay is not inevitable.
- Courts can process cases with speed and efficiency, and maintain high standards of due process.
- Where backlogs and delays exist, it is possible to reduce them significantly.
- Court procedures and attorneys work styles can change to move more cases in a shorter period of time without sacrificing justice.
- There is no single mode for effective caseload management and delay reduction.

---

<sup>69</sup> *Changing Times in Trial Courts, Caseload Management and Delay Reduction in Urban Trial Courts*, National Center for State Courts, 1988.

- Regardless of differing rules, procedures and resources, courts can manage cases effectively and reduce delay.

**C. Ten Key Elements of Successful Caseflow Systems**

- |  |   |
|--|---|
| 1. Leadership                                | 6. Commitment                             |
| 2. Goals                                     | 7. Staff Involvement                      |
| 3. Information                               | 8. Education and Training                 |
| 4. Communications                            | 9. Mechanisms for Accountability          |
| 5. Caseflow Management Policies & Procedures | 10. Backlog Reduction & Inventory Control |

**1. Leadership**

Successful courts have strong leadership teams, including a chief judge with the vision, persistence, personality, and political skills necessary to undertake a delay reduction program. The court manager is a key member of the leadership team who works closely with judges and staff to develop workable policies and procedures. Bar leaders also play critical roles, since their involvement in developing and supporting a caseflow management program is essential to its sustaining success. In delay reduction programs targeting specific types of cases, such as criminal cases, leaders of other justice system agencies (e.g. prosecutor) must be involved in the comprehensive system-wide planning that is required for a successful program.

**2. Goals**

Successful courts know what they are trying to accomplish because they have adopted time standards for processing cases. Many jurisdictions have adopted the American Bar Associations Standards Relating to Court Delay Reduction. Other courts are guided by time standards established by their state supreme court, and some courts set their own standards.

*American Bar Association - Time Standards for Civil Cases*

- 90% Settled, tried or otherwise concluded within 12 months from filing.
- 98% Settled, tried or otherwise concluded within 18 months from filing.
- 90 % of the remaining cases are settled, tried or otherwise concluded within 24 months from filing.
- 10% Are accorded different treatment because they represent exceptional circumstances.

*American Bar Association - Time Standards for Felony Cases*

- 90% Adjudicated within 120 days of arrest.
- 98% Adjudicated within 180 days of arrest.
- 100% Adjudicated within 1 year.

**3. Information**

Courts that succeed have information to monitor achievement of goals. At a minimum, they regularly review information about the size and age of their pending caseload, continuance rates, and trend in filings and dispositions. Most important, they use this information to assess their progress, identify problems, and determine what works well.

#### **4. Communications**

Mechanisms for good communication and broad consultation among trial court and state-level leaders, the private bar, and court-related agencies are essential to a successful program.

#### **5. Caseflow Management Policies and Procedures**

The basic principles of effective caseflow management must be turned into policies and procedures which enable the court to exercise early and continuous control over cases, to make sure that motions get resolved early, to set realistic schedules for the completion of case events, and to ensure firm trial dates.

#### **6. Commitment**

Critical ingredients of successful programs are a shared recognition by the court and the bar of the need to change the pace of litigation, and a shared resolve to achieve that change. Furthermore, in successful courts, the judges affirm their responsibility for managing the caseloads, and the court as a whole is devoted to the long-term effort required to sustain an effective system.

#### **7. Staff Involvement**

The involvement of staff members at all levels in system planning and monitoring is imperative. Staff are the people most familiar with the details of court operations, and attention to detail is vital to the successful implementation of a caseflow management system.

#### **8. Education and Training**

If courts are to manage their caseloads successfully, both judges and court staff need to know why and how to do it. Training is essential to familiarize judges, staff, members of the bar, and court-related agencies with both the purposes and fundamental principles of caseflow management, and their specific application to day-to-day court operations.

#### **9. Mechanisms for Accountability**

In successful courts there are clearly defined duties and responsibilities as well as mechanisms for accountability. Accountability requires the existence of performance goals and accurate measures of goal achievement.

#### **10. Backlog Reduction and Inventory Control**

Elimination of the backlog of cases already in the system is just as important as the development of effective means of avoiding future backlogs. Even when a court is functioning well, and delay is not a problem, control of the inventory of pending cases should be a concern.

The chart below illustrates the common elements of successful delay reduction programs. These elements were determined through a study<sup>70</sup> done in 18 United States courts.

---

<sup>70</sup> Courts that Succeed: Six Profiles of Successful Courts, William E. Hewitt, National Center for State Courts.



#### D. Managing The Flow of Cases and Delay Reduction

##### *General Principle*

From the beginning of the litigation process until resolution, either by judgment or by mutual agreement, all time elapsed (beyond what is reasonably required for the allegations, evidences, and events in presentation to the court) is unacceptable and should be eliminated. To permit the just and reasonable resolution of cases, the court, not the attorneys nor the litigators, must have control and mark the pace of litigation. A strong judicial commitment for the reduction of delays is essential and, once accomplished, must maintain the updated order of the schedule (list of litigation for the period of sessions).

##### *Principal Findings of Studies<sup>71</sup> on delay Reduction:*

Delays in the courts in the first instance are not unavoidable. Some urban courts handle all their cases in a very prompt manner.

- Existing delays can be reduced in a meaningful way. The study documents indicate dramatic improvements were achieved in spite of substantial increases in the number of cases assigned to each judge.
- There is not a clear correlation between the pace (speed) of the civil and criminal litigation and the size of the court, the population of the jurisdiction, the composition with the total load of cases, the number of cases assigned to each judge, or the percentages of cases that proceed to judgment by juror.

<sup>71</sup> Justice Delayed, The Pace of Litigation in Urban Trial Courts, National Center for State Courts, 1978; Managing to Reduce Delay, National Center for State courts, 1980; Courts that Succeed, Six Profiles of Successful Courts, National Center for State Courts, 1990.

- The presence of an alternative resolution program of disputes (ADR), either obligatory or voluntary, is not related to the processing speed of the civil cases.
- The system of assignment of cases used in a jurisdiction (e.g., master calendar, individual calendar, or hybrid) does not seem to be a decisive factor in determining the processing time of the cases.
- The implementation by the court of the key concepts of caseflow management strongly correlates to the rapidity of the processing times of the civil cases.
- In the criminal process, police practices, and those of the district attorney's office, have proven to have great impact on the general processing times of cases. Good systems present these characteristics:

Rapid case assessment by prosecutor

Early assignment of legal counsel for poor defendants.

Early presentation of the available evidence (e.g. police reports, statements of the witnesses, statements of the accused, laboratory reports)

Continuous management by the court

- Case management programs can be institutionalized.
- Leadership is the key factor in the success of delay reduction programs.
- Leadership and commitment at the local level are necessary.
- There is no single model of a successful program. Successful courts have used a variety of techniques, and have tailored them to local conditions.

### III. LATIN AMERICAN PERSPECTIVES

During the course of 1993, the National Center for State Courts conducted three delay reduction conferences (Kingston, Jamaica; Santiago de Chile; and Panama City, Panama). Those conferences were designed to present the experience of the United States courts in delay reduction, and then explore how these experiences could be used in the Latin American system.

Every country in Latin America, except Brazil, Ecuador, and Mexico, was represented at these conferences. There is a hemispheric concern about delay. Criminal delay in prosecuting cases is widely recognized as representing a critical condition in every country. Civil delays of five years and longer were reportedly the norm everywhere except Uruguay. The conferees agreed that chronic delay resulted in discrediting the justice system.

The traditional role of the judge is to analyze and elaborate principles, which can be derived from careful study of positive legislation, into a harmonious systematic structure. The components of this system are believed to be purely legal, a set of alternate truths related by rigorous deduction. Hence, the legal inquiry is almost exclusively directed toward legal norm.<sup>72</sup> The concept of the role of the judge is expressed in civil and criminal codes of procedure where the judge is to coordinate the process of litigation. The norm in civil matters is that judges do not fulfill this role. The lawyers control the process and the pace of litigation, and have a virtual stranglehold on the civil system. There are, of course, exceptions to this norm,

---

<sup>72</sup> John H. Merryn and David S. Clark, *Comparative Law, Western European and Latin American Legal System*, p. 213 (1978).

and these exceptions demonstrate the validity of this principle. Judges can actually exercise control over cases, and ensure compliance with procedures, so that delay can be reduced.

The absence of in-depth statistical information inhibits the ability of the reformers to identify appropriate strategies to confront this reality. The role of the lawyer is to be a litigator. The law school training has focused on developing litigation skills which translate into managing the procedural system to gain advantage. The process itself has created the concept of *la chicana* as an element in the bag of skills each lawyer has to develop. *La chicana* is the use of the virtually limitless procedural strategies which sometimes cross the border of legality. Judges seldom intervene in the process to restrict abuses of lawyers, and the application of sanctions is extremely rare.

The procedural dimensions of the litigation process now overshadow the outcome of the conflict. Civil procedure has become the "status" course in law schools. Rules to govern the conflict resolution process are necessary, but there also must be a neutral figure insuring adherence to these rules. Judges who are to exercise this supervisory role have invited the lawyers to self-regulate, which translates into no regulation.

It is also quite uncommon to hear of a judge imposing sanctions on lawyers for failing to comply with rules of procedure. The absence of adequate enforcement mechanisms directly contributes to the creation of a litigation system for which no one assumes responsibility. Certainly, judges do not have responsibility for the actions of lawyers, and lawyers cannot take responsibility for their counterparts' actions.

In common law systems, the focus of the process emphasizes the resolution of conflicts. The discovery procedures used in the litigation process have evolved over time, to reduce uncertainty about the nature of the case, and eliminate surprise. The idea was that the more the parties knew about each others' case, the easier it would be to resolve it. In U.S. civil procedure, the judge controls the process by setting time limits on the lawyers to finish developing their cases. Judicial education programs center on training judges how to exercise this function -- managing the litigation process.

Another dimension in the civil law system, which is frequently identified as the cause of delay, is its reliance on written procedures. The Instituto Iberoamericano de Derecho Procesal Civil has promoted the elimination of the traditional written system in favor of oral procedures. Uruguay approved task procedures in 1988, and implemented the model code in 1991. The result of the change was a dramatic drop in the time required to process civil cases. Specifically, the times changed from 2-4 years to months during the first 2 years of the code being effective<sup>73</sup>. After the first 2 years there begins a process of gradual increase in the time required to process cases. In a statistical study done for the Supreme Court, the researcher<sup>74</sup> was not able to prove whether the reduction was caused by the new code or by the creation of 100 new judgeships.

Recognizing these differences is essential to evaluate the applicability of lessons learned in delay reduction programs in the U.S. Court System. The essential ingredients of successful delay reduction programs were discussed earlier in this paper.

#### **A. Strategies to Reduce Delay**

This section addresses two strategies: 1) Reform of the Legal Framework and 2) Improvement of Court Operations. The legal framework refers to enabling legislation that controls how cases are presented and resolved. The focus of operational strategies looks directly at how the judicial system operates, interacts with its users, and supervises itself.

---

<sup>73</sup> See page 50.

<sup>74</sup> Gregorio, Carlos, Estudio Estadístico Acerca del Establecimiento del Juicio Oral, USAID/UNDP Project, Uruguay, 1994 (not published).

## 1. Legal Framework

The emphasis on changing the legal framework is evident in virtually every country in the hemisphere where written procedures have been used traditionally. In the following countries, legislative reforms exist in various stages of development, and are designed to alter the current legal framework:

*Lessons of the Introduction of Oral Process in Latin America*<sup>75</sup>

COUNTRY	REFORM IN PROCESS	REFORM DEBATED	REFORM APPROVED
BOLIVIA	Criminal (1994)		
BRAZIL	Criminal (1993)		
COSTA RICA		Criminal (1995)	
CHILE		Criminal (1995)	
EL SALVADOR		Penal (1994)	
ECUADOR		Criminal (1993) Suspended	
HONDURAS		Criminal (1995)	
NICARAGUA	Criminal (1996)		
PANAMA	Criminal (1996)		
PARAGUAY	Criminal (1994)	Public Ministry (1995)	
PERU		Criminal -accusatory- (1995)	Criminal -oral plenary- (1991) Civil (1992)
VENEZUELA	Criminal (1995)		

### Court

Office of Justice of the peace	5 months
Civil Court	6 months
Labor Court	3-8 months
Family Court	4-7 months

These legislative reforms require changes in the operation of the system. Taking advantage of the legal procedure reforms, to undertake administrative and operational reform, is key to leveraging the maximum intended reform.

## 2. Operational Issues

Understanding the relationship of court operations to the functioning of the procedural aspects of the legal system is necessary to identify possible causes of delay. When we review all the operational aspects of the court process, we discover numerous areas which must be evaluated to understand their contributions to an efficient system. In this section of the paper we will review aspects of the system most frequently cited as being problematic. One of most frequently cited causes of delay in legal systems of the

<sup>75</sup> This information was presented by Dr. Luis Torello, Minister of the Supreme Court of Uruguay, at the International Conference on Oral Process, NCSC/CPU, Santiago de Chile, 1995.

hemisphere is the function of notifications.<sup>76</sup> The organization, structure, and function of notification have not changed much since the creation of existing legal systems.

#### *a. Notification Procedures*

The function has been the responsibility of individual judges, so that it has been common to have *notificadores* from judges offices in the same area, or even in the same office. The absence of coordination through a centralized pool of *notificadores* remains a problem in numerous countries. Another problem is the concept of notifying through an office outside the court system. In the case of Peru, there are plans to privatize this function.

Among the most common problems of the notification system are poorly prepared documents, inadequate numbering of streets, illegible signatures, and the absence of public confidence and faith in the mail system.<sup>77</sup> "The system contributes to one of the most common problems faced in the procedural labyrinth," writes Dr. Carranza. The author also cites the "ease with which individuals can manipulate this process and create roadblocks as a part of their legal strategies."<sup>78</sup>

Other practices and customs in the notification process that significantly impede the progress of resolving conflicts in a timely manner are:

- Inability to comply with time frames established in codes, creating a *nulidad* because of poor penmanship, incorrect addresses.
- Absence of coordination of notifying function.
- Lawyers who often establish office hours that are outside the working hours of the judicial system, thus making it very difficult to complete the notification procedure.
- Requirements of notification of insignificant formalities adds significantly to the workload (in Costa Rica they are up to 20-22 notifications in each case which is equivalent of 420 days).
- Inadequate use of judicial bulletins in cases where there is uncertainty about the location of the individual or organization.
- Use a fictitious place for notifying individuals.
- Inability to use modern technology to transmit notices.

Several other problems surface when there is an attempt to develop alternatives to improve the system. There are logistical conditions and demographic concerns which must be addressed, such as location of office, the level of financial support available to the office, and whether or not the functions have been centralized under a single coordinator.<sup>79</sup>

#### *b. Inadequate Records Management System*

The current record management practices in Latin America are seldom the subject of review and analysis. The practices include, for example, the stitching together of records by hand. There are few

---

<sup>76</sup> Costa Rican study, Taller para la modernización del sistema de notificaciones, cuadernos para el sector Justicia, No.2, 1995, Dr. Carlos Carranza, p. 36.

<sup>77</sup> Ibid, p. 36.

<sup>78</sup> Ibid, p. 40-47.

<sup>79</sup> Ibid, p. 53.

examples of comprehensive analysis of the records management system – with a view to improving the mechanics of the records process or accelerating the ability to manage cases pending into courts.

To illustrate the central importance of records (*expedientes*) to the processing of cases, one must not look further than to see what information is yielded by the record. The statistical reports, the case status information, names of litigators, attorneys, and witnesses are all derived from the records. In the written, as well as the oral process, the record is the evidence of the cases existence, status, etc. The judge and the staff must work with this element in the process of deciding the case.<sup>80</sup> This has been repeatedly cited as an area needing attention, but very little has been done in the way of project development.

### *c. Case Tracking Systems*

The inability of the system to track the status of cases contributes directly to delay in processing cases. The norm is for all the civil and criminal procedure to have time frames for the accomplishment of events, or stages in the process; yet, the case tracking systems do not have the capacity to measure compliance. Case tracking implies that there is a management process for moving cases through the system. The author is unaware of any judicial system in Latin America that has developed such procedures. El Salvador has made the most advances in this area.

### *d. Measurement of Extent of Backlog*

In El Salvador there was a 100% audit of all pending cases in the judicial system. Teams of lawyers and students visited every court site (18 appellate courts, 120 trial courts, and 304 justices of the peace) in the country and developed a comprehensive statistical profile of all pending cases in the system. This comprehensive inventory measurement provided the Supreme Court with sufficient background information to develop a comprehensive strategy to combat delay.

At this writing, El Salvador is the only country in the entire region with a comprehensive approach to delay. The elements of the Salvadorian approach are: measurement of existing backlog; establishment of improved judicial statistics program; improved automation of case flow systems; development of a records management plan; and introduction of the common administrative secretary to serve all judicial officers in a single location.

The comprehensive statistical survey provides the justice system with the ability to identify those cases which were not active and could be purged. As a result, they were able to purge 45,000 cases (or 45% of the total cases pending) which have been in the system two years or longer. The purging process enabled the courts to focus their energies on active cases requiring attention. Similar purging programs have been successfully used in U.S. courts for a number of years.

### *e. Statistics*

Statistics are used for measuring performance by assessing compliance with the achievement of certain goals. The design of statistical reporting systems most frequently begins with identifying the information needs of those with the highest rank. The tendency of statistical reporting systems is to “control” the lower courts.

This emphasis on “control” represents a major organizational development question for judicial systems. By emphasizing control, the reporting unit (the judge) understands the concerns of performance to be limited to these items which are included in the statistical report.

---

<sup>80</sup> Evaluation of El Salvador Pilot Courts, Judicial Reform II, Project No.519-0976, USAID El Salvador, Steve Urist and Robert Lovato, February 1996.

The primary user of statistical information should be the judge and court staff who are providing the services to the public. Ideally, they should be reviewing the pending cases, and setting dates for activities to be completed, such as follow up with lawyers, etc. Designing statistical information systems from this perspective radically changes the kind of information collected, and the frequency of collection and reporting. Delay must be addressed at this level, i.e. the delivery of services.

In Latin America, very few countries publish or report statistical information. The amount of business entering the public justice system, and the resolution of this business, is not reported. The judicial systems of the hemisphere complain about shortage of funds, political interference, etc., yet they choose to keep confidential how they are managing the public's affairs.

In several countries (Argentina, Chile, Costa Rica, and El Salvador), the reform projects have discovered that between 45-55% of pending cases do not proceed to final judgment. Even though these cases have become inactive, they still remain in the books as pending cases. A systematic review of the status of pending cases, and regular efforts to purge the pending workload, translates into clarifying the actual workload of a judge. In the absence of this information, a judicial system is unable to organize and initiate a delay reduction strategy.

Another series of problems surface when other agencies are involved in collecting information, such as in the criminal justice system. Police agencies, prosecutors, and corrections offices have their own information needs and, absent of coordination efforts, there often appears duplication or inconsistencies with the information collected. This issue was made clear at the 1995 Conference on Pre-trial Detention held in San Jose, Costa Rica, when representatives of the Judiciary in Ecuador reported on the number of those detained awaiting final judgment, while the executive branch department of corrections reported significantly different numbers.

Special provisions should be made accountable for matters such as the time taken by forensic laboratories in reviewing evidence, or that of examination of juveniles or psychiatric examination. These services, which are not well funded, are frequently the cause of prolonged delay (nine months or more in Venezuela).

Few countries can undertake such a comprehensive statistical audit as El Salvador. However, statistically sound sampling efforts can provide ample information to identify the status of the cases pending in the system. In a sample done on civil courts in Buenos Aires, the study demonstrated how many (45%) had been paralyzed. On pages 50-52, the charts of information derived from the Argentine study reflect how to print the results of a sampling study.

Panama's pilot project in San Miguelito produced similar statistical reports detailing the status of criminal cases pending in the system.

#### *f. Docketing and Filing System*

The docket system provides a building block for an effective case flow management and statistical system. A docket card captures all the basic case information in a summary fashion. The card is used by court staff to maintain control over the status of cases. In those systems where they cannot yet automate, this manual process has proven to be highly successful.

El Salvador's project developed this instrument as a part of the court improvement project. The card also permitted the implementation of a specific case identification number which provides case specific control. Every case in the system has a specific number, thus providing an effective audit trail. This instrument provides the judge and court staff with the ability to assume control over the litigation process, the key to reducing delay.

#### *h. Automation*

An automated case flow management system should be designed to accomplish automated indexing, case action histories from initial filing, case processing, and eventual termination and archiving into central data banks. The design of automation systems must be centered on the basis of a thorough and exhaustive needs analysis.

Merely automating existing systems that are poorly designed, to make them work faster, is of little value. The needs analysis phase of automation system development is frequently skipped (e.g. Argentina Supreme Court purchased an IBM system without previous analysis). In the needs analysis phase, there is a focus on the statistical needs of the judge, the auxiliary institutions (police, prosecution, defense, corrections), and the supreme court or court of appeals. The utility of a court automation project is dependent on the adequacy of this analysis.<sup>81</sup>

The Chilean automation effort provides for an elaborate case tracking system that is not used by judges. There is no information to indicate increases in productivity. The system also produced public access to case status information, a system which has been well received by the public attorneys.

The primary organizational weakness of the court systems in Latin America is the absence of well developed professional management systems. Courts have neither the organizational capacity, nor the facilities to undertake improvement projects, because there are no staff to provide these services.

#### *i. Central Secretary/Clerks Office*

Each judges' office operates individually, without any prescribed organizational structure, and there is no consistent pattern of approaching work. There are no procedural manuals for court staff to follow. Also, there is duplication of functions between judges offices, because staffing formulas make no allowance for centralizing functions, even though every judge must perform similar duties. As a result, judges throughout the hemisphere noted at the Delay Reduction Conference that they were dedicating up to 60% of their time to purely administrative matters. This allocation of time limited the time available for working on cases.

In Chile, Costa Rica and El Salvador they are pursuing the Secretaria Unica as the organizational model for the courts of first instance. The Secretaria Unicas functions are the following:

##### **Public Reception**

- Attend to the public
- File new cases
- Receive comments for cases within the system
- Notification

##### **Records and Evidence**

- Receive and maintain evidence
- Return evidence
- Auction
- Records management
- Receive and maintain all financial accounts
- Correspondence with court
- Records management of case files

---

<sup>81</sup> Diagnóstico Organizacional para la Especificación para la Gestión, Invertec, 1994.

## Operations

- Identify ways to improve performance of the system
- Conduct analysis of how courts are working and make recommendation to judges for improvements
- Coordinate with national and or regional judicial authorities
- Develop annual plans of action

## Financial Management

- Manage appropriated funds for the court
- Maintain supplies for court
- Develop budgetary needs for the court

## Physical plant

- Maintain and clean building
- Develop capital improvements programs

The transference of these administrative tasks to an individual with management training provides the foundation for addressing the critical demand these tasks place on judges. In Chile, the Court of Appeals of Santiago created a coordinator position to provide the President of the Court with administrative assistance. The coordinator, in conjunction with the President of the Court, designed a successful delay reduction program. The program had all of the requirements of a well-designed delay reduction program: measurement of existing delay, and identification of performance issues, such as the absence of case tracking systems. This provides the coordinator with the ability to identify problem areas and publish results to all judges and key staff.

### *j. Culture of Delay*

Perhaps the most difficult aspect of confronting delay in the court system is the culture of delay. This cultural factor was repeatedly cited at the Delay Reduction Conference as a major problem to be overcome. This same issue became the critical concern of the National Center for State Courts work in the state courts in the U.S., where delay in the system had become the accepted norm by both judges and lawyers, and was incorporated into the local "legal culture."<sup>82</sup> Such culture, more than any other factor, controls the pace of litigation; any effort to address delay in the legal system must confront this reality.

When the operators of the system accept a certain level of performance, they conform their behavior to the accepted level. This accommodation to delay becomes the most demanding challenge that must be overcome in a delay reduction program. It is this factor, perhaps more than any other, that explains why so many legislative reforms aimed at reducing delay have not succeeded.

## **B. Educational Strategies to Reduce Delay**

### **1. Judges as managers of the litigation process**

Judicial education programs have traditionally focused more on substantive law than operational concerns. Thus far, these education programs have not provided an emphasis on the judge as manager of the litigation process. The one exception is in Uruguay, where the judge in the civil process has assumed this role, and training by CEJU, the Uruguayan judicial school, has emphasized the case management role.

Judges who have accustomed themselves to attorneys managing the litigation process must receive education programs directed at training them to change this outlook.<sup>83</sup> Having the statistical information on the duration of cases is essential background material for the design of the education program, in order to

---

<sup>82</sup> Justice Delayed: The Race of Litigation Urban Trial Courts, National Center for State Courts, 1978, p. 53.

<sup>83</sup> Carlos G. Gregorio, Investigaciones Sobre la Demora en el Proceso Judicial, Centro de Estudios Judiciales de la República Argentina (CEJU), 1995, p. 36.

build in the reality of the situation and overcome the tendency of judges to individualize any discussion of systematic concerns.

In Costa Rica, the presiding judge of the supreme court's criminal division selected 10 criminal judges to meet regularly and discuss how they could change the local legal culture by asserting more control over the litigation process. These judges were also responsible for supervising other judges, and were charged with the responsibility of promoting the same attitude with other judges.

In Chile,<sup>84</sup> a select group of judges received training on being a manager of the litigation process. The participants reported that they were applying these concepts and gaining more control over their workload.

## **2. Focus the process on resolving conflict and not exclusively on the process itself**

The case file "*expediente*" has become more important than the conflict.<sup>85</sup> The operative focus has been on complying with the technical requirements of a code. Perhaps because the codes of procedure give so much leeway to lawyers, judges have not found it fruitful to engage the lawyers and litigators in conciliation or other alternative dispute resolution measures.

The lawyers are not accustomed to judges exercising control over the litigation process. When judges begin to exercise role control, they confront resistance from the Bar. The judicial leadership must be fully supportive of the delay reduction initiatives, or the Bars' resistance will be detrimental to the effort.

## **3. Education of the Court Staff**

Delay reduction is a comprehensive effort of collaboration between judges, court staff and the Bar. Educational efforts that fail to include all these groups in the effort will not be effective, just as simply approving a new law does not translate into the automatic change in the system.<sup>86</sup> In Uruguay, the Supreme Court delayed on two occasions the implementation of the oral process: one of the foremost reasons was the lack of prior training and education of those charged with implementing the new code.

---

<sup>84</sup> Evaluation of Judicial Training Seminar, Corporación de Promoción Universitaria (CPU).

<sup>85</sup> La situación de Costa Rica, Reducción de Atrasos, Alfredo Jones, Director de Planificación, 1993.

<sup>86</sup> Dr. Luis Torello, El Caso Uruguayo, Implementación del Juicio Oral: Corporación Promoción Universitaria, 1993.

#### **IV. CONCLUSION**

Successful delay reduction programs have a variety of characteristics, but none is more important than the political will of the leadership of the system to push for change. The strategies that must be included in successful programs have been reviewed above. A piecemeal approach to the subject matter is ineffective and produces only modest results. Proponents of delay reduction programs must include in their strategic focus all those elements if they are to achieve any significant results.

Prior to initiating delay reduction projects, the first efforts must lay the empirical foundation for the effort. This effort translates into producing a reliable set of statistics clarifying the exact condition of court system. Secondly, extensive efforts will be required to educate judges and court staff in order to overcome the delay culture. Efforts should be highly participatory and involve those responsible for initiating the activities with the most active rates. Externally imposed programs have not been successful.

Initiatives such as the development of case tracking, records management systems, case cards, or automation systems all contribute to establishing the necessary basis for launching a coherent, sustainable delay reduction program.

Successful delay reduction programs are essential to regain the credibility and public confidence of the judicial system.

DEMORA EN EL PROCESO JUDICIAL

TABLA 12  
Duración entre pasos procesales Comercial (quiebras)

paso procesal	media	mediana	s	mínimo	máximo	N
cesación de pagos	400.7	297.0	308.2	7	845	12
sentencia declarativa del concurso	15.6	15.0	9.8	1	42	14
síndico (aceptación cargo)	72.4	69.0	32.9	10	160	15
término de verificaciones	44.7	51.0	18.7	21	67	15
síndico: informe individual	24.3	21.0	8.2	20	52	15
síndico: informe general	143.9	22.0	275.3	16	1031	15
resolución del juez	249.1	162.0	253.2	1	782	13
conclusión						
total	515.6	379.0	436.5	162	1922	15

TABLA 13  
Duración entre pasos procesales Federal (Civil y Comercial)

paso procesal	media	mediana	s	mínimo	máximo	N
hecho	692.0	362.0	1204.4	6	5111	41
demanda	158.1	102.0	154.8	28	629	38
traba de la litis	233.9	98.0	360.8	1	1404	28
apertura a prueba	802.3	547.0	728.8	21	2911	24
conclusión	176.6	56.0	332.0	8	1547	27
sentencia 1	28.3	16.0	28.2	2	111	25
apelación	218.1	198.0	136.4	49	606	24
sentencia 2						
1 instancia	1232.7	749.0	1070.2	133	4226	23

**TABLA 14**  
**Duración entre pasos procesales**  
**Federal (Contencioso Administrativo)**

paso procesal	media	mediana	s	mínimo	máximo	N
hecho	1393.5	708.0	2015.9	21	9410	54
demanda						
vista al fiscal	71.0	22.0	101.7	1	386	46
contestación	142.1	123.0	113.0	11	552	50
apertura a prueba	115.6	77.0	107.5	1	399	38
conclusión	612.0	573.0	501.7	1	2074	46
sentencia 1	177.2	91.0	249.1	1	1141	46
apelación	26.5	15.0	50.7	1	320	37
sentencia 2a	137.5	106.0	101.8	25	531	33
1 instancia	920.9	875.0	738.5	1	2614	26

DEMORA EN EL PROCESO JUDICIAL

TABLA 15  
Duración entre pasos procesales  
Federal (Penal)

paso procesal	media	mediana	s	mínimo	máximo	N
hecho	49.7	6.0	117.8	1	504	19
auto cabeza de la instrucción	129.2	42.0	160.3	1	453	11
indagatoria auto de procesamiento	348.3	225.0	333.4	24	1316	19
vista al fiscal	132.3	32.0	266.8	2	1085	15
auto de elevación a juicio	34.5	40.0	25.0	29	40	2
auto cabeza del juicio	56.8	53.0	29.1	22	128	20
auto de admisión o rechazo de la prueba	83.6	98.0	36.5	42	106	8
audiencia producción de la prueba	200.2	138.0	237.5	10	882	21
sentencia 1	150.8	133.0	109.9	29	558	24
recursos	30.9	23.0	35.9	6	139	13
sentencia 2						
1 instancia	780.5	854.0	291.4	513	1360	11

## COMMENTARY

The two issues are interrelated, with delay reduction a desirable outcome of improved/efficient caseload management, and they are driven by similar sets of principles. Over time, conventional responses (increasing budget and the number of courts and judges, or providing equipment) have proven to be inadequate: they deal with symptoms, rather than root causes and operational issues. But for one exception, no example exists of an integrated strategy to improve case management in Latin America. This issue is a serious one for, aside from corrupt practices, delay is most often cited as a factor of public discontent.

A well structured case management program requires a rigorous analysis of underlying problems, and the development of a statistical data base for diagnostic purposes. A strategy to address and reduce delay must begin with measuring it and developing a structured plan to reduce it. In brief, any reform must be preceded by a rigorous, informed understanding of how the system currently (mal) functions -- to determine, for example, the relationship between backlog and delay.

Further, any such reforms require attitudinal changes among judges, administrators, and court personnel. This holds true, in particular, for civil law systems<sup>87</sup> where the judge is responsible for driving the investigation and, thus, the case. Too often, timely and efficient processing of cases is affected by a "culture" of delay, one that favors process over substance, and does not recognize timely dispensation of justice as a public service obligation. The situation is exacerbated further if there are no penalties for delays, and no incentives or rewards for developing effective case management systems.

Reforms in this area are not simply about procedures. They require changes in the judicial system infrastructure, a re-definition of policies, judicial and court personnel responsibilities and assignments, and programs of training and education. Components include: structural and procedural reforms, court automation and statistics, civic education and coordination with other justice system entities, education in law schools, decriminalization of some cases, and use of alternate methods of conflict resolution where appropriate. They must be driven by a commitment to improving the judicial and justice systems, and thus to judicial reform, and reflect a political will to achieve such reforms.

They must be grounded in reality, and factor in the time needed for implementing change, as well as the level of resources available. For example, the costs of judicial specialization -- while a potentially useful tool for streamlining case management -- can be prohibitive. An over-ambitious agenda (wholesale reform) is less likely to succeed than one which begins with discrete pilot programs which, after testing and fine tuning, can over time be replicated system-wide. Examples range from simplified procedures, to individual judge calendar, to quotas.

---

<sup>87</sup> The situation is somewhat different in common law systems where the judge is more dependent, during the investigation phase, on the prosecution and police schedule.

Opinions differ, however, on some questions. For example, how might one define the “reasonable amount of time” needed for a final decision to be rendered? What might parties, whether plaintiff, victim, or defendant, expect? The definition of “speedy justice” for some may equate with “speeding justice” for others, who fear that the full benefit of due process may then be denied. A careful balancing of these competing views must be achieved if the reforms are to succeed.

Regardless, the over-riding principle is that the judiciary, to be credible, must manage cases efficiently, address problems of delay by all means possible, and incorporate an on-going assessment of its progress in these areas. There exists a universal public interest in more efficient justice. This area of reform remains largely under-developed, but fertile for future experimentation and study.

### **III. ORAL PROCEDURES**

#### **LESSONS LEARNED: INTRODUCTION OF ORAL PROCESS IN LATIN AMERICA**

*Juan Enrique Vargas*<sup>88</sup>

##### **I INTRODUCTION**

Over the past ten years, the idea of changing our legal proceedings from a written system (notarized, recorded), to a public and oral one, has been at the center of justice sector reforms in Latin America. Both in civil and criminal matters, the banner of orality has been brandished as one of the most efficient weapons to attack many of the harms attributed to our judicial systems.

While the motivation to do so appears to be homogeneous, a careful analysis is required. The so called public justice ("justice for audiences") works well for civil matters; but in criminal matters, the trial is only one aspect of the entire procedure. There, the search for truth begins at an earlier stage -- instruction, the signaling hallmark of an inquisitorial system. As a result, reform attempts to establish an accusatory system in Latin America often fail, because they limited themselves to the trial stage.

In contrast with the introduction of orality for civil cases, the criminal justice arena is more complex politically and practically, for it involves, for instance, the establishment of a new type of institution -- Public Ministry or Prosecutor -- now in charge of the search for evidence, while the trial is limited to examining such evidence and pronouncing judgment/sentence. Nonetheless, most reforms in orality focus on criminal proceedings as a means to establish their legitimacy, because they affect a large number of citizens directly.

For these reasons, the introduction of orality must be handled with more care, and requires an on-going distinction between civil and criminal matters.

Also, the level of orality achieved through various reforms differs. In some instances the old system has prevailed in some form, and the oral trial becomes, in fact, a "theatrical" presentation, including an endless reading of evidence and other information. This suggests that a careful reading of new regulations is needed, because many still rely on a written process, even though they claim to be oral. It also calls for an attentive review of institutional applications, since written codes continue to dominate legal practices in our region.

It is premature to draw broad conclusions and make comparisons at this stage of oral reforms in Latin America, for many initiatives are very recent, and their methodology often lack the sophistication required by multiple and complex factors, each singular to the specific country.

In the context of the above remarks, this paper aspires only to provide a brief discussion of the topic, drawing on publications and official reports, site visits, and the author's participation in conferences and symposia -- such as that organized in 1995 by the National Center for State Courts (NCSC) and the Corporación de Promoción Universitaria (CPU), with support from the US Agency for International Development (USAID).

##### **II PRINCIPAL REASONS FOR INTRODUCING ORAL TRIALS IN THE CONTINENT**

This paper does not propose to review at length juridical reasons in support of change from a written to an oral system. Briefly these are: direct contact by the parties with the judge; transparency and control; cross examination, presentation of evidence and rebuttal; case consolidation and speed -- all of which have

---

<sup>88</sup> Mr. Vargas is the Executive Director of Corporación de Promoción Universitaria - Centro de Desarrollo Jurídico Judicial (CPU/CDJ), Santiago, Chile.

been documented over time by legal experts who tolerate little dissent. Then, the question is: if orality is such a convenient system, why hasn't it been incorporated into our laws? Or, alternately: why wait until now to introduce this process if it is held in such high regard? What follows is an analysis of key answers to these questions.

#### **A. Democratization and Human Rights**

A renewed appreciation for the value of democratic government systems, and their ability to provide a "rational" avenue for solving conflicts inherent in the social compact, are clearly determining factors in the growing attention to judicial systems in Latin America, their operations and procedures, and in the introduction of efforts to modernize the justice system.

The legacy of the past decades -- such as the disappearance of thousands of persons, among many brutal violations of human rights -- has led to a reformulation of checks and balances for acts of the State, particularly on internal mechanisms, such as those provided by the judicial branch.

#### **B. Governance and Economic Development**

In the meantime, our economies are in a period of development and growth, and subscribe to more open and competitive forms of transactions, both within the country and abroad. These changing circumstances quickly highlighted institutional weaknesses throughout the region and, in particular, those presented by systems of justice that are archaic, slow, unstable, and costly (including high transaction costs).

Several studies documented, for example, a preference for dealing with known persons, so that disputes can be resolved informally and easily, over entering in transactions with unknown parties, even if they offer a better price.

Similarly, the harmful consequences of institutional instability are well proven, and discourage foreign investments -- a problem well known to the judiciary.

Further, economic development itself creates new legal issues, for which there is no redress or access, because they have yet to be incorporated in the justice system.

#### **C. Increased Problems of Safety**

Even as oppressive governments give way to more democratic ones, and the economy improves, one is witnessing increases in criminality and urban violence at a level unknown to date in the region. In turn, this generates an increased demand for punishment. Traditional tools of criminal sanctions are being discredited as inefficient, when not counter-productive. More sophisticated forms of intervention are called for, including changes within the judicial system.

#### **D. Crisis of the Judiciary, within a Context of Reform and Modernization of Government**

As governments become more democratic, the judicial system is viewed by citizens as foreign, obscure, and tremendously inefficient. The public does not understand what the system does and, even less, how it functions. It is described as a bureaucratic structure that uses a language, a technology, and a process that are old fashioned and outdated. By contrast, citizens believe that, in other areas, public administration is undergoing serious and consistent reforms, to modernize and provide rational management, despite the many problems it still must confront. This argues for the necessity of over-hauling the judicial sector.

#### **E. Attempts at Judicial Unification**

Attempts at re-unifying the juridical systems of Latin America also helps to drive changes in management and administration, toward goals of transparency and efficiency. In the area of legal

proceedings, such efforts are led by the Instituto Iberoamericano de Derecho Procesal (Ibero-American Institute of Procedural Law). Under the Institute auspices, and as part of its academic activities, experts have drawn on modern theories to draft model legislation -- the Civil Procedural Code and the Penal Model for Ibero-America. These models are being used as incentives and guidelines for many of the recent reforms.

Other unifying and motivating factors include: economic inter-dependence among nations, adherence to international treaties that promote free trade, and international problems of organized crime (drug trafficking and terrorism).

#### **F. Presence and Participation of Agencies for International Cooperation**

Finally, much credit should be given to international cooperation agencies and their increasing interest in justice reform in Latin America. Led initially by USAID, these efforts have been joined, more recently, by the multilateral banks -- the Inter-American Development Bank (IDB) and the World Bank (WB), the European Union (EU), and other countries in this hemisphere. A common denominator among these efforts has been their contribution to national initiatives to introduce orality in court proceedings.

Judicial unification and international cooperation help explain why, for the first time in Latin America, there exists such a coherent policy on judicial matters in the region, and why the strategies for changes are so strikingly similar among various countries. This has also helped to produce an unprecedented collaboration among the judiciary, Ministers of Justice, and NGOs in the region.

### **III. CURRENT STATUS OF THE REFORM: ACHIEVEMENTS**

What follows is a description of several oral process reforms in Latin America. The description does not exhaust the topic; rather, it attempts to summarize those experiences which, in our opinion, are exemplary.

#### **A. Argentina**

In Argentina, oral procedures were first introduced in provincial courts. The Argentinean system is federalist, with national definitions of substantive rights. Still, innovation in procedures and judicial organization can take place at the provincial level, without prejudice to federal jurisdiction, and without incurring the difficulties inherent in a nation-wide reform. Revision of the Code of Criminal Procedure in the Province of Cordoba took place in 1938, led by Sebastian Soler and Alfredo Veléz Mariconde, authors of the new code. This initiative had considerable impact on the region, and was used as a model by Costa Rica, as one example.

Since then, most provinces have adopted oral procedures, with the notable exceptions of the Province of Buenos Aires and the federal system.

A strong reform movement, led by jurist Julio Maier and aimed at establishing the accusatory system, undertook to reverse this situation under the Raúl Alfonsín government. In Argentina, such system is consistent with the Constitution.<sup>89</sup> A commission headed by Maier drafted a new Code in 1986; later, it was charged with developing a new judicial organization that would include a Public Ministry.

While the House of Representatives (Cámara de Diputados) did not ratify the draft Code, a substitute draft was introduced during the Carlos Menem government. This earlier draft had been authored by Ricardo Levene (jr.), and introduced in 1975 by the then government to the National Congress. Levene had become President of the Supreme Court in 1991, when his draft Code was re-introduced. This version uses the Cordoba Code as a model, and features a written procedure for the issuance of summons by a judge, and

<sup>89</sup> The constitutional text of 1853 prescribes trial by jury.

orality at trial. This version was adopted on September 4, 1991, and took effect one year later -- Law No. 23,984.

The Code has been incorporated into Law 24,050 (Organization and Jurisdiction of National Criminal Justice), and into law no. 24,121 (Implementation).

When the new Code went into effect, the accused against whom proceedings had already begun could chose, within a 15 day period, between the old and the new system.

The reform had a principal impact on the organization of the national criminal justice system, corresponding to the Federal Capital. It stipulated that investigation and preliminary hearing courts would operate with only one of the two existing secretariats; and that ten of the twenty trial courts would become investigation and preliminary hearing courts under the new system, while the other ten would follow the old system during the transition period. One of the two secretariats who had worked with trial courts joined the Prosecutor's Office, which had to increase its number of offices. And some employees, who had worked at the trial courts, were transferred to the courts using the new orality system. Two of the seven rooms formerly used by the Court of Appeals were converted into oral courts.

The implementation of these changes encountered some difficulties. A Commission, appointed by the Ministry of Justice, oversaw the administration of the reform. An attractive judge apprenticeship program was created to promote the reform in provinces where orality already existed. This program represents one of the most interesting training related experience in Argentina, even though the program did not include administrative staff, who simply attended workshops on the topic, and even though it was suspended once implementation of the reform was completed.<sup>90</sup>

No plans helped guide implementation of the reform. It developed, on a case by case basis, in each service or department affected by the reform, using existing resources, and without coordination. For example, the Bureau of Architecture (La Dirección de Arquitectura) appointed a group of architects; they, in turn, realized that physical space would be needed, and obtained contribution of space from other ministries; the Bureau of Procurement (La Dirección de Abastecimiento) concerned itself with equipment, etc.<sup>91</sup>

As is the case in other countries, implementation of the Code was not preceded by any preparations. There were pressures to postpone implementation, but these were over-ridden by Supreme Court resolutions.

Resistance to the reform came principally from attorneys. Judges, on the other hand, showed little opposition, for the reform was accompanied by promotions and increases in salary.

Preliminary results are in favor of the new system, although some areas require attention.

For example, in the national system,<sup>92</sup> sentencing judges saw their workload increase. Their jurisdiction changed from hearing cases with possible sentences of up to one year, to cases with possible sentence of up to three years in prison. The chart below reflects increases in 1993 -- after the reform was implemented -- over the situation in 1991 -- prior to the reform.<sup>93</sup>

---

<sup>90</sup> Correa Sutil, Jorge. "Diagnóstico de los Poderes Judicial y Legislativo de la República Argentina," (Diagnostic of the Judicial and Legislative Powers of the Republic of Argentina). Inter-American Development Bank. 1994. Not published.

<sup>91</sup> See Aldea, Rodolfo; Haeussler, Maria Josefina; and Valdivieso, Carlos: "Consideraciones Sobre la gestión del Sistema Penal en Buenos Aires y Córdoba" (Considerations on the Administration of the Criminal System in Buenos Aires and Cordoba). FPC and CDJ/CPU. Santiago, 1994. Not published.

<sup>92</sup> Subsequent comments relate to the national system, which shows more definitive results for reasons of volume.

<sup>93</sup> See Caminos, Miguel Angel: "El Código Procesal Penal y la Implementación de Proceso Oral" (The Criminal Procedure Code and the Implementation of the Oral Process). In "La Implementación de la Reforma Procesal Penal" (The Implementation of The Criminal Procedures Reform). CDJ/CPU - NCSC. Santiago, 1996. Page no 63 et al.

YEAR	PROCESSED	SETTLED	PENDING	TRIED	SETTLED/TRIED
1991	24,216	18,610	5,606	7	2,659
1993	78,901	55,593	23,308	10	5,559

In May 1994, Law No. 24,316 was passed, to help redress this problem -- suspension of evidentiary trials to divert minor crimes, committed by first offenders, from the system. This law, however, has had little impact, due to implementation problems. Regardless, these findings support a critical element of successful reforms, i.e. the need to identify, in an objective and logical fashion, those cases that require priority attention, so that finite resources can be distributed accordingly.

Experience with investigative magistrates is different, since they transferred some of their responsibilities to the sentencing courts.

YEAR	TRIED	SETTLED	PENDING	TRIED	SETTLED / TRIED
1991	110,298	99,846	10,452	32	3,120
1993	66,953	57,344	9,609	39	1,470

In 1993, 2,516 preliminary hearings were held in twenty one criminal courts in the national system, and 1,693 were disposed of, 727 of which were sanctioned by (?) a sentence.

One of the principal problems faced by the use of an oral process is the paucity of public defenders. There is only one available for every three courts, leading to serious problems of delay (bottleneck of cases), a problem exacerbated further by the limited availability of private attorneys. Ten additional public defender positions have been created to address this problem.

Other examples of important change, stemming from the reform, are the creation of: a new position, "Judicial Administrator," the Juridical Data Processing Bureau, responsible for maintaining a jurisprudential data bank for the National Chamber of Criminal Cassation and the Lower Courts; and an office of Counseling and Assistance to Victims and Witnesses, staffed by a multidisciplinary team.

Principal operational problems include: lack of waiting room facilities for witnesses, and non-reimbursement of their travel and per diem costs; absence of delegation mechanisms for clerks charged with handling court calendars; courtroom security; and lack of management information systems.

No studies exist on length of proceedings under the new system. Anecdotal evidence suggests that, for cases in lower courts, the average time is nine months from initial filing to disposition, a figure considerably lower than that of the old system. This improvement, in turn, has had a positive impact on the number of detainees awaiting trial.

The reform has changed public perception of the justice system both substantially and positively, and has greatly increased its interest in court room proceedings: for example, TV coverage of trials are the most highly rated programs on Argentinean television.

Other criminal justice reforms are on the horizon, given the constitutional reform of 1992, which established the independence of the Public Ministry. Previously, the Ministry reported to the President of the Republic in such areas as appointments and instructions, while it reported to the Judicial Power on budgetary matters.

Finally, there have been on-going discussions, since 1993 in the legislature, on reforms of the civil Code, currently in draft form. The draft was prepared by a Commission appointed by the Ministry of Justice, and follows the Model Civil Procedural Code, including procedures for public hearings.

## B. Uruguay

While the Argentinean experience in criminal matters has had an influential role on the rest of the region, civil proceedings in Uruguay have played the same determining role. The General Code of the Proceeding (CGP) establishes an oral procedure for civil, commercial, family, labor, and administrative disputes.<sup>94</sup> The code has been in effect since November, 1993.

The new Code (Law No. 15,982) was designed to replace the written procedure used since 1876, as has been the case in neighboring countries. Its text follows and adapts the Model Civil Procedural Code for Ibero-America, hardly a coincidence since its authors -- Adolfo Gelsi Bidart, Luis Torello and Enrique Vescovi -- were also the progenitors of the Ibero-America initiative.

Criticisms of the written code were due to two factors: the frequent use of mediation, or delegation of functions; and the chronic sluggishness of the proceedings. Studies showed that in the lower courts (first instance), the average civil trial lasted 989 days (almost three years) as of the conciliation stage, and 864 beginning with initial filing. In higher courts, which processed a lesser number of cases, the average was 455 days. In brief, the life of a case, including appeals, was on the average 1,444 days -- exclusive of possible petition for cassation before the Supreme Court.

A return in Uruguay to democratic forms of government created a favorable climate for the reform.<sup>95</sup> As an important anecdote, the Vice President of the new government, Enrique Tarigo, who was also President of the General Assembly and the Senate, was an outstanding member of the Institute mentioned earlier, and a fervent advocate of the reform. These and other factors generated a strong political consensus and will to carry out the reforms.

The draft Code was submitted to the Parliament in February 1987, and extensive hearings provided for testimonies from a variety of institutions, including representatives from the Supreme Court, the Bar Association, Judges Association, Association of Court Officers, Prosecutors, Auctioneers, Employees, etc.

The draft was first scrutinized by the Commission of the Constitution and Codes (May, 1987 to March, 1988), and later approved in closed sessions by the Senate and the House of Representatives (April, 1988). The draft text sailed intact through final vote, despite the introduction of a number of proposed amendments.

---

<sup>94</sup> In this section, we draw on one of our papers, "Diagnóstico de los Poderes Judicial y Legislativo de la República Oriental del Uruguay." (Diagnosis of the Judicial and Legislative Powers of the Oriental Republic of Uruguay), 1994 Inter-American Development Bank. Not published.

<sup>95</sup> Curiously, "... in Uruguay, despite its few dictatorial periods, no Code had been approved by a democratic government using the procedure foreseen in the Constitution." Vescovi, Enrique and Ruecco, María del Carmen: "Los primeros Resultados de la Reforma de la Justicia en Uruguay. Un balance a los dieciocho meses de la entrada en vigencia del Código General del Proceso." (The First Results of the Justice reform in Uruguay. An assessment of eighteen months of GCP implementation), IDEA Editorial. Montevideo, 1991. Page 13.

At the same time, several parallel actions were taken: an increase in the number of judges;<sup>96</sup> the Supreme Court received authorization to assign judges in response to projected caseloads and territorial considerations; and, budget allocations were provided to support staff where needed by the new courts, locally, and, more generally, to cover new expenses generated by the revised procedure.

A transition period of approximately one year was set between passage and implementation of the law.<sup>97</sup> During that year, an intensive training program was offered to new and experienced judges, to brief them on the logistics and capacities required by the new procedure. Two institutions were critical to the provision of such training: the Uruguayan Institute of Procedural law and the Center for Judicial Studies (CEJU) – an entity created specially to assist in the implementation of the new law.

New judgeship positions were assigned implementation of the CGP, while existing (old) courts were charged with processing and concluding cases that had been filed under the former procedure.

These latter courts were authorized to begin implementation of the new procedure, to the extent permitted by the workload. And by 1992, the number of old pending cases had been reduced to such a level, that the Supreme Court ordered that all courts become familiar with, and begin to apply, the new Code.

Attorneys and Bar Associations strongly opposed the new code once it was passed. This was in contrast with their initial, enthusiastic endorsement; for they became concerned by losses in their large trial portfolio. They mounted an intensive public campaign that predicted catastrophic consequences -- none of which came to pass. With time, fears diminished.

In terms of speed of proceedings, data showed that 18 months after the reform began, "on the average, the handling of a civil case takes 8 months, many of them reaching settlements before the trial which explains the low number of sentences."<sup>98</sup>

Background information prepared in 1995 by the Statistics Section of the Supreme Court<sup>99</sup> documents these improvements

COURT OF LAW	DURATION
Justice of the Peace Courts of Law	5 months
Civil Courts of Law	6 months
Labor Courts of Law	3 to 8 months
Family Courts of Law	4 to 9 months

### C. Colombia

Recent procedural reforms in Colombia are all related to the criminal justice process. The new Colombian criminal procedure was developed as an outcome of the Constitution of 1991, which introduced profound changes in the judicial system. The Constitution created new institutions, and radically modified many existing ones. To bring legislation into conformance with the Constitution, two laws were passed in 1991, establishing the General Prosecutor's Office of the Nation (Fiscalía General de la Nación - Law No 2,699), and the Penal Procedure Code (Código de Procedimiento Penal - Law No 2,700).

<sup>96</sup> In Montevideo, 10 new Civil Courts were created, (4 labor, 18 family, and 19 peace courts). Factoring in this increase, Uruguay had 16 judges per 100,000 – ranking third in the world.

<sup>97</sup> Initially, Law No. 15,982 had to take effect on July 1, 1989, but that date was postponed until November, 20 of that year.

<sup>98</sup> "Los Primeros Resultados de la Reforma de la Justicia en Uruguay..." Op. Cit. Idem, Page 17.

<sup>99</sup> Delivered by Torello, Luis, Minister of the Supreme Court, at the International Conference on Oral Proceedings. NCSC-CDJ/CPU, Santiago, 1995.

This legislation stems from acute problems of security, which have plagued Colombia in the recent past. The criminal rate in Colombia is among the highest in the world, although its rate of incarceration is among the lowest, as shown in the chart below.<sup>100</sup>

COUNTRY	MURDER RATE PER EVERY 100,000 PEOPLE	NUMBER OF PRISONERS PER EVERY 100,000
GERMANY	1.2	77
BULGARIA	4.0	160
CANADA	2.7	94
COLOMBIA	77.5	1
USA	12.4	426
FRANCE	4.6	41
ITALY	4.3	27
POLAND	2.5	204

Given this situation of apparent impunity, it is understandable that most of the reform efforts concentrate on the instruction stage, to increase its effectiveness, while relatively little attention is given to trials *per se*. Thus, a system which was conceived initially as an accusatory one, retains, for the most part, an inquisitory structure; and while prosecutors are to replace investigative magistrates (*instrucción*), judges retain many of their jurisdictional prerogatives since they can affect fundamental rights -- by depriving liberty through arrests, for instance -- without any major control.<sup>101</sup> Such over stepping of jurisdictional boundaries helps explain why the General Prosecutor's Office of the Nation reports to the judicial branch, even though it has administrative and budget autonomy.

The level of orality during the trial is limited<sup>102</sup> because the reading of the charges, as well as other parts of the procedures, are permitted, per request, by the parties or the judge.

The new procedure has not been given the opportunity to help reduce case delay. On the average, case processing takes 806 days, up to 919 in the most acute situation (Municipal or City Hall Criminal Courts).<sup>103</sup>

The new Code offered other provisions, such as alternative conflict resolution mechanisms for minor cases. Thus, conciliation was made available for misdemeanors and infractions that involve special violations, such as bigamy, statutory rape, and libel -- that require the parties to bring charges or abandonment of cause.<sup>104</sup>

Other interesting changes affect the administration of the judiciary: such as management information systems; and pilot management programs, such as a single secretariat.

In civil matters, following the Decree to Reduce Backlogs (1991), the most successful and well coordinated efforts are those which divert disputes from the litigation track, and substantially increase the use of conflict resolution mechanisms.

<sup>100</sup> See Martínez, Néstor Humberto. "Justicia para la gente. Una Vision Alternativa" (Justice for All. An Alternative Vision), Santafé de Bogotá, 1995. Page 25.

<sup>101</sup> Even appeals of decisions at the instruction stage remain under the jurisdiction of the hierarchical superior within the Fiscalía (Prosecutor), not the courts.

<sup>102</sup> Public hearings are not foreseen for trials held before regional judges, when cases involve drug dealing or the security of the State.

<sup>103</sup> Martínez, Néstor Humberto. Op. Cit. Pages 24 and 26.

<sup>104</sup> "Hablemos de Conciliación" (Let's Talk about Justice). Republic of Colombia. Ministry of Justice. Santafé de Bogotá, 1991. Page 15.

#### D. Guatemala

In the region, Guatemala is the only country which uses a pure form of the oral accusatory system, following reforms that were passed in 1992, and put into effect on June 1, 1994.<sup>105</sup>

Implementation of the reform required the marshaling of considerable energy and efforts, and is too recent for any assessment, even in preliminary form. The reform spawned the re-creation of the Public Ministry, the development of a Public Defender office, and the restructuring of criminal courts — a complex set of changes, all the more difficult to implement in a multiethnic country such as Guatemala, with diverse languages and a high illiteracy rate.

Implementation was not preceded by any systematic planning, and operational progress in the newly created institutions has been slow. The Public Defender office had yet to be established on the date when it was to begin operations and, at the Public Ministry, only 305 of the projected 1,350 officers had been appointed, and none had been trained in their new functions.<sup>106</sup> The judicial branch is in a similar situation, despite efforts by the Judicial School to prepare materials and provide courses in this area.

The effective starting date for enforcement of the new code was extended by six months from the original one-year “legal vacancy,” (sic) because of deficiencies in the phase prior to implementation, and fears of change, particularly among the judiciary. In 1995, however, it was decided to begin the program massively, for fear that further delays could lead to a rescission of the reform.

Many observe that problems associated with the implementation of the reform are due, largely, to the scarcity of resources allocated for this purpose. In the first year, the prosecutor’s office had a budget of less than \$4M (US). In the second year, the budget provided only for salaries, not for the capital investments urgently needed by the reform.

Those budget limitations were particularly harmful in areas of infrastructure and equipment, needed by institutions charged with making the reform operational.

Transition guidelines were such that, from the beginning, the new process called for an increased workload: all criminal cases which had not been declared ready for trial, as of June 30 1994, were to be processed under the new system.

In the first year of operation, only two public trials were held. By mid 1995, only 30 of the more than 500 accusations filed with the Prosecutor’s Office had been executed, a telling sign of the problematic and growing backlog of cases. On the other hand, hopeful signs exist when parties deal directly and attempt to resolve their dispute, a procedure made permissible by law for certain crimes. In 1994, 7,500 cases were handled in this manner, a result which augurs well for improving the efficiency of the system.

#### E. Other countries

The chart below is a synopsis of the status and progress of reforms in the remaining countries in the region. The starting date of the reform is in parenthesis. Countries not listed have not initiated oral process related reforms.

COUNTRY	INITIATED REFORMS	REFORMS PENDING	APPROVED REFORMS
---------	-------------------	-----------------	------------------

<sup>105</sup> In the meantime, a constitutional reform was passed in 1993, granting complete autonomy to the Public Ministry.

<sup>106</sup> See presentation of the General Prosecutor of the State of Cuestas, Ramses, in the International Conference on Oral process. NCSC-CDJ/CPU. Santiago, 1995.

		APPROVAL	
<b>BOLIVIA</b>	Penal (1994)		
<b>BRAZIL</b>	Penal (1993)		
<b>COSTA RICA</b>		Penal (1995)	
<b>CHILE</b>		Penal (1995)	
<b>EL SALVADOR</b>		Penal (1994)	
<b>ECUADOR</b>		Penal (1993)	
<b>HONDURAS</b>		Suspended	
<b>NICARAGUA</b>	Penal (1996)		
<b>PANAMA</b>	Penal (1996)	Public Ministry (1995)	
<b>PARAGUAY</b>	Penal (1994)	Penal - Accusatory - (1995)	Penal - Oral Plenary (1991) Civil (1992)
<b>PERU</b>			
<b>VENEZUELA</b>	Penal (1995)		

#### IV. PRINCIPAL OBSTACLES TO SUCCESSFUL REFORMS

##### A. Political will

The introduction of orality is designed to provide greater transparency of proceedings, and increase citizens' control of judicial decisions, with expectations that this will improve the independence and predictability of such decisions. When such reform also contains provisions for accusatorial, rather than inquisitorial proceedings, the change has a direct impact on key aspects of the governmental structure and, even more important, on the exercise of power.

Unfortunately, the region has a tradition of a judiciary subservient to the executive, and its independence is relative, as demonstrated by the level of political interference in judicial appointments. The concept of reciprocal controls among the branches of government has yet to become part of the mainstream.

In the criminal justice area, the judicial power seldom exercises its prerogatives over the punitive powers of the executive government. In fact, rather than function as an independent institution, entrusted with safeguarding the rights of the citizenry, the judicial branch is part of this punitive exercise of power, because it is responsible for criminal investigation -- a hallmark of the inquisitorial system.

Procedural reforms are looked upon as change agents of last resort. As we discuss below, to be effective, they require strong commitments from the executive branch principally, but also from the other branches, if implementation is to take place. Governments which support these reforms tend to simply transfer some powers to Public Ministries, which are independent in varying degrees, and to the courts. It is not surprising then, that Governments have attempted to stall the reform which they supported initially, once they realize its implications.

Public will, needed for these reforms, must be accompanied by the allocation of resources necessary for their implementation. A telling indicator of the importance, or lack thereof, of the judicial branch can be found in the level of budget allocated to the judiciary. The allocation of resources by the State should increase considerably if the reform is to succeed.

Similarly, Governments that support reforms must be prepared to participate in lengthy struggles with the legislature, reach out to the citizenry to elicit public support, and face criticisms and serious problems that accompany all significant changes and reforms.

## **B. Weakness of the Judiciary**

In our countries, the judiciary is historically unfamiliar with any type of planning efforts, a situation easily understandable given the traditional motto "things have always been done this way." Changing the judiciary is an extremely difficult enterprise. All of these factors inhibit the will to provide resources to a judiciary with poor management capabilities, and relatively little legitimacy.

Paradoxically, judges are seldom conscious of the increase in power that will be fostered upon them through those reforms, or are not interested in such changes because they are comfortable with the *status quo*. Thus, advocates of change must not only convince the citizenry of the desirability of reforms, they must also persuade the judiciary, which seldom realizes that these changes can operate in their self interest.

## **C. Resistance to Change**

Another element is the traditional resistance of the judicial environment to change in general. We are accustomed to learning the law by rote, a methodology which does not stimulate creativity, or provide tools for easy adaptation to a changing environment.

As another idiosyncratic element under the written system, attorneys must unite to manage their profession, an approach which is not financially efficient in an oral system. The latter requires the creation of law firms with larger numbers of professionals, who must handle less cases, given that they should personally attend the oral hearings, rather than delegate their tasks to subordinates, as is done in the written system. These organizational changes have an impact on the profession, as well as on the cost of defense.

It is not surprising, then, to find that Bar Associations are strongly opposed to orality.

Other strong and influential opponents can be found in Police Departments who, under the written process, have a level of power and independence unthinkable under oral procedures.

## **D. Deficiencies in Implementation**

As noted above, a principal impediment to reforms can be found in the lack of planning capacity in the judicial branch, all the more since the judiciary is able to "create reality," and seldom concerns itself with trivial matters. This is exacerbated by institutional and cultural improvisation: delays in appointing officers; scarce training; inadequate physical space and facilities; and a very limited understanding of problems which will surface through the implementation of reforms.

## **E. Insufficient Attention to Some Elements of the Reform**

As another common problem, there is insufficient preparation for the provision of quality legal assistance to the many citizens unable to afford private counsel -- most of whom are not prepared for the new system anyway.

Traditionally, our public defenders are poorly paid, little prepared to offer quality services, and too few; this in the face of prosecutors offices which have increasingly better structures and capacities in criminal matters.

The alternative of institutionalizing public defense, through corporations with large numbers of employees (as is the case in Chile), for example, is not satisfactory either, because of management deficiencies and internal politics.

The provision of appropriate legal assistance is linked directly to the level of resources allocated to this function. It calls for efficient management and use of such resources, a question for which good solutions have yet to be formulated.<sup>107</sup>

Finally, police departments remain the stepchildren of reforms in criminal procedures. Police procedures need to be adapted to standards of the new procedural code, an assignment which have yet to receive proper attention.

## **V. ELEMENTS OF A STRATEGY OF CHANGE**

Reforms to introduce an oral process, particularly if they embrace the accusatory system, do not fall in the category of legislative changes routinely adopted by our legislatures. They involve not only structural changes in the judicial system but, even more important, a profound modification in the institutional and political system of a country. If we are to rate the level of reforms toward orality, we would equate them with a constitutional change, not merely a procedural one – particularly since traditional definitions of procedures involve simply regulations of time and process.

However, another dimension far surpasses that of jurisdictional issues; oral procedure reforms imply, or should imply, a totally different form of the organization and management of the judicial and justice system.

Given the magnitude of such change, a successful reform requires a sound and finely tuned strategic plan, one which adequately incorporates the reality of the country for which it is being developed. It needs to include a clear overview of the internal juridical culture – a factor determinant to the success of change – of its allies, the functioning of the political system, and level of human and material resources available. The simple exporting of models from one country to the next does not suffice. It is true that a number of common elements exist among countries, as is demonstrated by the usefulness and success of the Model Procedural Codes. The methods and time lines needed for implementing the reforms, however, can be quite diverse.

Another critical element is the availability of a management of reform capacity, for even a team of experts will have to face multiple actors and scenarios, and will need to develop in a short time frame a vast array of legislative proposals, studies, advocacy and media campaigns, etc.

A set of criteria follow which, in our judgment, and beyond the peculiarities of each case, should be integrated in any change strategy if it is to be successful. It draws on a variety of reform experiences with which we are familiar, particularly those currently underway in Chile.

### **A. Consensual Reform**

In our region, many judicial reforms have been advanced by a particular political interest – in the narrowest sense of the term – affected the governance of the third branch, and often been interpreted, correctly or incorrectly, as ways to restrict judicial independence. These types of debates or controversies are not helpful to a reform such as the introduction of orality and, in fact, may be counterproductive.

Rather, the reform should reflect solid, consensual political support by sectors of society that will be affected by it, and be advanced as a matter of national significance, alien to typical susceptibilities that relate to conventional power struggles. The importance of the topic and the magnitude of changes which it implies require such an approach.

The Chilean example might be used as a paradigm in this area. The first attempt at judicial reform began in 1990 with a return to democracy, and dealt with revisions of the internal power structure within the

---

<sup>107</sup> In order to complete implementation of criminal procedure reforms in Chile, work is underway to create a public defense system through a fund, to be managed centrally, to which legal entities skillful in providing legal assistance and willing to work under strict monitoring, will have access to through an open competition.

judicial branch, i.e. the creation of the National Justice Council (Consejo Nacional de la Justicia), and changes in the method, number, and process for appointments to the Supreme Court – which resulted in a confrontation between the government and the opposition, surely a contributing factor to the failure of the reform. During the second government of the Group of Political Parties for Democracy (Concertación de partidos por la Democracia), the strategy was entirely reformulated, focused on endemic problems of the judicial system, and proposed that orality be introduced in criminal matters. This helped encourage discussions of political structures and fostered an alliance among different political forces in the legislature, leading to the passage of the only bill of such magnitude with consensual support in the Chilean Parliament.

## **B. Participation**

A common saying is that reforms should be advanced with, rather than against, the judiciary. Yet, how can such a saying be translated from words into action, when most judges are resistant to change? In our opinion, perhaps in this fashion:

- a gradual but constant collaboration between the academic and judicial communities, so they become familiar with and understand each other.
- identification of leaders within the judiciary who are favorable to change, and assisting them in their career development to strengthen their influence in the system.
- the establishment of informal opportunities for dialogue with judicial leaders, toward eliciting from them expectations and sensitivities -- information which is seldom obtained in more formal environments.
- involving representatives of the Supreme Court in dialogues at a higher level.
- including members of the judiciary who are open to changes so they may elaborate on their ideas.
- judicial exchanges programs, so that magistrates meet their peers, become familiar with justice systems abroad, and assess the results, both good and bad, of other reforms.
- an ongoing and active continued education program, to sensitize other judges to issues of change, using methodologies that are sophisticated and participatory.

It would be utopia to believe that there is unanimous support for these reforms; yet it is possible and necessary to gain such support, at least from a majority within the judicial community. It is useful to remember that the judiciary may not be able to oppose reforms imposed by a majority in Parliament, but has the capacity, even if it is weak, to prevent it from becoming a reality.

Therefore, when judges who favor change are not supportive of a reform effort, such effort becomes a failure -- an element of the reform strategy which requires particular focus.

Beyond the participation of judges, however relevant, the strategy must also include an outreach to the trade and bar associations, to the academic community specialized in related legal areas such as procedural and criminal law, and to police departments which, notwithstanding their reluctance to enter a dialogue, should be included for their ability to counter the proposed reform.

Participation must be encouraged and seek to meet two objectives: augment the support base for reform, and strengthen its technical content. For both of these reasons, it is critical that civil society be included, as demonstrated in countries where dedicated non governmental organizations (NGOs) have played an important role in reforms. Foundation SER (Fundación SER) of Colombia; CLD of Ecuador; the Citizen Peace Foundation (Fundación Paz Ciudadana), and CDJ/CPU of Chile are good illustrations of such participation. All bring the advantage of continuity and follow up over time. In our countries, our political leadership changes constantly, a problem which contributes to the abandonment of previous projects, and the

emergence of new ones every time there is governmental turn over. In addition, governments are often limited in their access to technical expertise or must be mindful of other contingencies -- all of which reduces their capacity for overseeing long term projects that are technically complex, as is the case for the introduction of orality.

In Chile, the reform began with the joint action of the two Chilean NGOs mentioned above. At a later point, they associated with the Ministry of Justice, so that the three parties, together, could lead the ongoing process of change. This ground breaking experiment proved to be an enormously effective approach to administering various components of the reform. It also ensured political pluralism in support of the reform, and a management capacity to implement it.

Universities are another important sector -- even though their institutional role in justice reforms in Latin America remains somewhat limited. A salient problem in our justice systems results from the type of teaching and training provided in judicial education. Changes in the curricula and teaching methodologies are an important component of reforms, if they are to be successful. Furthermore, while the academic community shows little interest or capacity in promoting change, it can be an obstacle to such change if it maintains its traditional approach and biases, by forecasting catastrophic consequences for example.

Finally, the most important sector of all is public opinion. Generally, the public neither understands nor shows interest in justice matters. This indifference shows in polls where citizens rate social actions, such as health, education, and housing, at the top of the list, while justice is viewed of secondary importance. As a corollary, judicial institutions receive meager budgets. To countervail such opinion, justice issues should be placed at the center of the public discourse, to highlight and build support for reforms. When such reforms are explained properly to citizens, they can easily understand the role played by the justice system in their own life, how it can affect its quality, and how acute problems in the justice system affect society overall -- in the area of safety, for example.

Carrying such a campaign through the media is not an easy task: the topic is seldom considered as "news," and the media is fearful of manipulation. Yet, tangible experiences show that such campaigns can be viable and lead to helpful results. In Chile for instance, we have been able to place justice system related articles in the press every two days for the last couple of years.

### **C. Reforms are highly technical, yet essentially political in nature**

Sometimes it is quite difficult to reconcile the technical and political aspects of the reform. Experts in this area have a natural tendency to focus on the technical aspect of the reform -- such as drafting codes that are academically sound -- while forgetting that the legislative task is a political, not an academic one. On the other hand, the political community often negotiates issues without a full knowledge or understanding from a technical point of view: of what is essential, and what is secondary.

It is critical that these two elements be merged. The proposed reform should involve an analysis by a highly skilled team of experts, that includes the perspective of justice system officials and employees, and draws on sound empirical knowledge of the environment it wishes to change. This background information, as a whole, proves essential when the reform, a new Code for example, has to be documented and defended. Further, there should be an on going evaluation of the progress and implementation of the reform, as a guarantee that the reform meets expectations of those who are affected by it, and have the power to destroy it -- rather than end up as a technically perfect but irrelevant product.

In Chile, this was achieved by creating a Panel in charge of the Criminal Procedure reform, including representatives from the Supreme Court and the Judges Association, judges known for their interest in the reform, illustrious members of the academic community who specialize in criminal law and procedure, and prominent practicing attorneys. The Panel composition also reflected pluralistic political points of view. A Technical Commission was formed to assist the Panel in day to day tasks, and consisted of outstanding young lawyers with special expertise in the subject matter. The Technical Commission regularly presented draft

proposals and progress reports to the Panel, which met initially on a bimonthly, and later on a weekly basis. At any given time, a Panel member was charged with guiding the development of a specific proposal. Following its review and discussion by the full Panel, the proposal was then revised by the Technical Commission, where Panel suggestions were incorporated.

Once the Code was drafted, Panel members made outstanding contributions to the promotion of, and public education about the new Code, particularly with the Parliament.

This structure proves to be a good alternative to more traditional commissions established by Ministries of Justice, for these often lack the time or necessary expertise to carry out such an assignment through its conclusion.

Finally, solid knowledge of comparative law and institutional experiences in other countries is indispensable. It helps inform the proposed reform, avoid the repetition of failures, and increase the likelihood of success.

#### **D. Importance of Administrative and Interdisciplinary Aspects**

The introduction of orality affects not only the basic judicial function of "what the courts do," but also "how they do it" within the justice system.

One key element is a new relationship between the judicial system and citizens. Rather than be considered as mere instruments in a "production" line that processes plaintiffs, witnesses, etc., the citizenry should be viewed as recipients of a service -- in other words, a "consumer" who should be satisfied. As a result, the justice system needs to become not only efficient, but also "user friendly."

This can be achieved:

- Increase the professionalism in the management of the court which should be in the hands of professional administrators or engineers, while ensuring that this creates no prejudice to the relationship which judges should have with those whom they serve.
- Produce economies of scale and avoid duplication of efforts, by consolidating operations or functions that can be handled jointly, such as: contacts with the public, filing of legal writs, storage, handling and filing of documents, financial and budgetary matters, etc. A modern court should not longer be modeled after a quasi feudal concept, where each court is a separate fiefdom with its own space, staff, etc.
- Decentralize administrative decisions by allowing various departments to make their own decisions, including those involving budgetary matters.
- Delegate tasks that are not judicial in nature, particularly those which can be handled more efficiently by other parties or institutions -- for instance, notifications and citations.
- Establish a system of management control and incentives to evaluate and reward judicial officers' performance. Currently, the situation is perversely reversed -- those who work best and most efficiently are "rewarded" with an increased workload.

Proper use of human resources can be a highly visible aspect of a successful reform. It needs to ensure that employees believe in and apply the concept of efficient management, and understand that it fulfills their own self interest. It must also provide for clear rules of the game -- such as appropriate rewards for merit, career ladders/promotions, appropriate salaries, and an adequate work environment.

Success of this aspect of the reform will be achieved more easily by using multidisciplinary teams -- to incorporate the expertise of administrators, engineers, management information system specialists, and economists.<sup>108</sup> A team is not multidisciplinary if, for example, an economist is recruited after the fact, to calculate the cost of the proposed reform after it has been drafted. Rather, the economist, or any other expert, should be brought into the team from the beginning, to identify, for instance, cost incentives and "escape valves" to the proposed reform, and to help define whether expected results can be achieved and, if so, at what level of magnitude. Such an approach does not work to the detriment of the legal aspect of the reform but, rather, helps enrich its content and empower its results.

To summarize the Chilean experience, these economic studies were conducted during the elaboration of the new code, and are an intrinsic part of the final product:

- Costs analysis of the existing criminal justice system, broken out into separate components, particularly in areas where information was confusing -- as was the case for lower courts. This helped reveal, for example, that of the total \$90M judicial branch budget, \$38M (US) was spent on criminal justice.

- Organizational flow chart for the new system, including estimates of peak demand in relation to various institutions at different stages of the process. This study provided the necessary background to develop the organizational structure for the Public Ministry and the criminal courts, and helped project the level of human and other resources necessary for an efficient system.

- Budget and costs analysis of the new system, drawing on the organizational design. The analysis helped project yearly costs of the new system, including the creation of a new Public Ministry, financing of the Public Defender's office, increment in the number of judges, and the courts' infrastructure -- for a total of \$119,224,008 (US).

- Social profitability studies, to help justify the increase in costs of the new system, which in Chile was projected to triple those of the system it planned to replace. It was critical that proper arguments be found that would demonstrate projected improvements to society. The study was able to do just that, and concluded:

- . the old system, if it were to show investigation results at the same index of productivity as the new one, would cost \$156,894,645, or \$721 per case (contrasted with \$548 per case under the new system). The difference could be attributed to features in the reform which functions more selectively, and screens out cases without merit early on.

- . the introduction of a new, abbreviated process (advanced waiver of trial) helped save \$152,387,114 (US) in public and private funds.

- . an improved system of detention led to savings of \$204,167,810 (US) in public and private funds.

A computerized simulation model was developed, to incorporate the organizational design and sequence of activities, factoring in real time and time lines. Using different scenarios, the simulation model helped anticipate future operations in a precise manner, including level of production and various solutions, and time needed, to resolve possible problems. The model helped design, for example, a rotation schedule (judges and prosecutors), to optimize use of human resources and avoid bottlenecks.

The above studies, together, provided for a solid and technically rigorous series of budget negotiations with Treasury officials.

---

<sup>108</sup> Binder points out that it is necessary to create a belief that "in matters of judicial systems, what is good for attorneys is good for the rest of society." "Reflecciones Sobre el Proceso de transformacion de la Justicia penal" (Reflections on the Process of the Transformation of Criminal Justice) Op.it. page 50.

This experience demonstrated that often, the underfunding of the judiciary results from a lack of attractive and technically sound proposals. It is not sufficient to simply argue that the third branch is important, particularly when it functions inefficiently, and limits its rationale to requests for "more of the same," i.e. more courts and increased salaries.

This argues for linking, not only in rhetoric but also in action, judicial reform with socioeconomic development of the country, including a quantification of the projected economic and financial gains. At a time of financial retrenchment of the public treasury, any sector or agency, however critical to society, must be prepared to provide justifications for its budget -- all the more so when it requests a budgetary increase. For these reasons, it is advisable not to implement a reform which is under-funded, because it is likely to fail. And, when it does, this failure erodes the legitimacy of the system for reasons beyond its control.

#### **E. Dimensions of Change**

From the onset, reform objectives should be clear, for this will help guide and focus the reform through its various iterations. Otherwise, proper perspective may be lost, and the reform will be compromised. Flexibility must be built in, to incorporate differing interests and points of view in the reform -- rather than allow it to be hostage to a few; yet, at the same time, non negotiable elements of the reform must be kept as such, and reformers must have the strength to preserve the integrity of the reform. Put another way, the introduction of orality leads to a dismantling of the former system; and, if such dismantling does not take place, the old system will re-emerge quickly, an outcome apparent in so many botched reforms in our region. This perspective (i.e. what comprehensive change really means) should not lead us to conclude that, as a result, the punitive aspects of the state apparatus will disappear. Many believe that reforms of the criminal code will achieve little, unless they are accompanied by changes in the substantive criminal law, in legislation affecting minors, in the management of corrections and police, etc. While such a view may be correct for the long term, it would be naive to assume that sea-changes of such magnitude can take place in the short term, given the level of technical capabilities, resources, and political will they would require simultaneously.

Clearly, criminal procedure is one of the most defective piece of the entire justice system machinery, and can act as a catalyst for reforms in other areas. This certainty, coupled with a good understanding of how to manage such reform, should urge us to pursue it. The reform advocate should resist the temptation of reforming everything at once, for this will surely increase the time line, and endanger the political consensus which supports the introduction of orality.

Introducing reforms gradually seems to be the most rational alternative. In other fields, new products are routinely tested before they are sold to the consumer. The justice sector should not overlook this healthy approach, which provides for limited and contained experimentation, helps anticipate problems, and permits mid-course corrections before the product is made available on a nation wide basis.

The General Prosecutor of Guatemala suggested this very methodology when the new Code was about to be implemented, but his proposal was rejected. On the other hand, it has been used in Chile, where implementation of the reform began in one of the 13 regions of the country, then gradually occurred in the rest of the country, following an established calendar to ensure against delays.

#### **F. Differentiating Between the Stages of Change**

As noted by Alberto Binder,<sup>109</sup> criminal procedure reform includes a number of distinct stages which are particular to this reform in terms of methodology and tactics. Binder outlines these phases: sensitizing; awareness and design; involvement of, and struggles with, the legislature; planning and start up; implementation; and finally, an "adjustment stage." All represent a "temporary judicial policy" leading eventually to judicial policy as such, with the understanding that improving efficiency should be an on-going concern in the administration of justice.

---

<sup>109</sup> Ditto, p. 45 and following.

Characteristics of this process are that it is lengthy, tedious, and moves through various emphases and problems. It also calls for differing sources of support at different times.

Binder points out, for example, that the parliamentary stage seldom follows an ideal model, involves technical commissions, and often takes place behind closed doors. This "tortuous and complex" process of convincing and negotiating takes place, in real life, in the midst of lobbying by many different special interests. During this phase, this may require a shift in alliances and technical teams working on the reform.

Binder indicates also that, in addition to an appropriate transition plan that helps ease in the new reform, a period of adjustment is required after the reform is in place. While such follow up is the norm in other disciplines, its absence in justice system reform suggests that the reform was not well thought through, and portends the possibility of serious problems.

#### **G. Significance of Minor, Yet Determinant Aspects of Successful Reforms**

While they may appear to be trivial, a number of elements in the reform are critical to its proper implementation, and to its eventual success. Often, these matters, when left unattended, have impeded operations of the new system, and contributed to a negative perception about the reform. They include:

- the management of notifications and citations could be transferred to private organizations and the use of modern technologies such as telephone and fax should replace the more inefficient methods in place.
- offer good physical accommodations, travel expenses, and per diem to witnesses as incentives for them to cooperate with the new system.
- create more efficient, fast and secure methods of transportation for the accused.
- establish security for the courtrooms to protect the seriousness of the trial, and the privacy of the people; all these without interfering with the public right to know.
- the court's calendar should be kept in a precise manner to avoid wasting the valuable time of the judge, prosecutor, and defense lawyer, and to also avoid important evidence from becoming useless.
- at the time of allocating resources, transcripts and other records of the hearings should be a top priority, an important issue that few countries have handled well to date. For example, in Italy, orality was introduced while there was not a sufficient number of stenographers to cover all the courtrooms. Today, there are many modern recording devices at a reasonable cost which provide a quick and quality response to this need.
- another problem encountered in the application of the new system is that of imposing automatic sentences at the conclusion of the hearings. This is not justifiable, for the new system requires quicker decisions concerning the fate of the accused; further, this expeditiousness aims at restraining the judge's tendency to review all aspects of the case and its documentation...something that would denaturalize the central idea of oral process.
- continuing education of judges, lawyers, and prosecutors is a must if the reforms are to succeed. The most appropriate tools are workshops, simulations, role play, casework, and the discussion of practical cases. Isolated seminars or conferences are insufficient for providing the necessary skills.

## COMMENTARY

The introduction of oral procedures, or adversarial procedures, or both, in civil law systems, is the single largest reform in the region. Severe criticisms about the opacity and secretiveness of the written process led to these experimental programs. These initiatives, however, have been hampered severely by misconceptions, lack of planning, and paucity of resources; as a result, experiences vary greatly from country to country. The results are uneven, and most remain at the margin of changes in the process. The reasons are many.

The civil law and common law traditions have more in common than is usually perceived. An oral process, for example, does involve written records, including transcripts, and maintenance of records and physical evidence. Further, while the introduction of elements of common law in civil law countries is well known, relatively little attention is given to the adoption of some written processes in common law countries (to streamline procedures for minor cases, for example).

Yet, the two communities remain far apart. They are separated principally by a lack of knowledge about each other's systems, cultures and traditions. This gap exists in part because of their differing origins. In contrast with the community based, problem solving function of common law, the purpose of civil law was to organize society. This difference manifests itself, among many examples, in why and how juries are, or are not, used.

There exists also some confusion on what orality means. For some, this translates as a reading of the evidence in court, or, there is an expectation that oral procedures, or "public" court procedures, will provide transparency, or help reduce delay, automatically. Misunderstandings also develop when orality and adversary processes are linked. The fact that less than 10% of all filings (criminal and civil) are adjudicated in some common law systems (the US for example) is seldom known; its implications are poorly understood.

Some proponents of the common law system argue that orality will not succeed unless adversarial procedures are introduced, and call for a complete overhaul of the system. In the context of civil law and tradition, the magnitude and implications of such change can be drastic. The roles and responsibilities of all functions within the system (judges, prosecutors or investigating magistrates, defense counsel, administrative personnel) become radically different. Such reform calls for preliminary assessments and multidisciplinary studies, a well planned transition period that goes far beyond procedural changes (cost projections, economic studies), and an educational effort to build support for the reform and inform/involve the public.

Other factors have also affected reforms in this area: insufficient funding and preparation/transition from the former to the new system; resistance from the bar, and from the judiciary itself; confusion of roles and responsibilities when the military continues to assume police functions; lack of political will; and public indifference (absence of support and coalitions). Several countries have faced great difficulties because they opted to introduce orality in criminal proceedings as a first step -- an area fraught with many more complexities

than that of civil proceedings. Further, the introduction of oral/adversarial procedures goes far beyond a mere technical/legal change. It involves a change in values -- a profound institutional and social commitment, for example, to transparency.<sup>110</sup>

Given the magnitude of efforts, and the unevenness of results in this area of reform, a new level of inquiry is required. Next steps warrant the development of goals and criteria to evaluate progress. For example: What would the inclusion of some form of adversarial procedure achieve? more accountability to the public? speedier processing of cases? Or, should the next stage involve the adoption of a full accusatory model, or some form of hybrid similar to the German code? Can available resources support systemic overhaul (for training, management systems, development of new procedures, etc.)? As the region, and each country, assesses these next steps, results in the few countries which have experimented with adversary systems should be examined carefully. Many noted that the Donor community can play a useful role in helping generate political support for these reforms.

---

<sup>110</sup> Some attendees argued that the use of a written process precludes a public understanding and participation in the process of justice, while oral/public procedures encourage popular participation; in contrast, others expressed concerns about the adverse impact of oral procedures on indigenous people who do not speak the official language.

## **IV. ALTERNATIVE DISPUTE RESOLUTION (ADR)**

### **LESSONS LEARNED: EXPERIENCES WITH ALTERNATIVE DISPUTE RESOLUTION**

*William E. Davis and Madeleine Crohn*<sup>111</sup>

#### **I. ADR AND THE RULE OF LAW**

Social conflict is the defining characteristic of modern society. If left unresolved, it becomes a significant obstacle to peaceful interaction among individuals, the state and individual organizations and, thus, to sustainable development.

Worldwide, the primary emphasis on methods for resolving conflict in recent times has been to strengthen the institutions of justice and the formal systems of the state.<sup>112</sup> Such an approach is being re-assessed, however, because of the recognition that the formal systems are not always those best suited for resolving all complaints. In the 1980s, the United States and, to a lesser extent, Great Britain, Australia and New Zealand, have witnessed a proliferation of dispute resolution programs as alternatives to courts and other institutional processes. In Latin America, for the past ten years, justice reformers have advocated the use of ADR to help increase access to justice, as a means for reducing court delays, or both. ADR, and more broadly conflict resolution, are being tested to address regional unrest (South Africa, Middle East for example), create alternate fora (Western and Eastern Europe), or streamline dispute resolution processes (within international treaties, such as GATT). These trends are not without their critics, however, who challenge the net accomplishments of ADR, or raise such questions as the possible development of second class justice, to the detriment of rights acquired over the years.

##### **A. Formal and Informal Justice**

Legal systems are created to provide for the application of law to a set of circumstances, and give force to the values embodied in constitutions and statutes. In an attempt to identify all nuances and possible variations in a problem area, prescriptive procedures are developed to help implement statutory provisions, and deal with every imagined circumstance covered by law. Further, during the past 40-50 years, there has been a marked growth in the number of new laws to address the perceived needs of a modern society.

Increased expectations that the state should resolve ever expanding numbers of cases coincide with a decline in status, if not in real capacity, of informal means of conflict resolution. In most societies, these processes preceded the establishment of formal justice. For example, the traditional figure in Central America of the "amigable componedor" (friendly arranger) was relied upon to settle neighbor dissensions and intra-family disputes; in some cases the local clergy has similar functions. In Valencia (Spain), water disputes are still handled through ADR processes that date back 500 years.

---

<sup>111</sup> Mr. Davis is senior advisor with the National Center for State Courts/International Programs, and Principal in DPK Consulting, a firm specializing in public policy and justice reform programs throughout Latin America. Mr. Davis is former Director of the Administrative Office of the Courts (California), former Circuit Executive for the 9th Federal Circuit, and former Director of the Administrative Office of the Courts (Kentucky). He holds a law degree from the University of Kentucky.

Ms. Crohn is Project Director and Senior Advisor with the National Center for State Courts/International Programs, former founding President of the National Institute for Dispute Resolution, and former Director of the Pretrial Services Resource Center. She holds a degree in International Public Law from the Faculte de Droit, University of Paris.

<sup>112</sup> Néstor Humberto Martínez, then Assessor of the Inter-American Development Bank, at the 1993 First Inter-American Conference on Alternative Dispute Resolution, cited these reasons as justifying the need to look for alternatives to the legal system: 1) failures of constitutional reforms; 2) limitations on availability of funds; 3) increased litigation; 4) inadequate response to the demand for resolution of conflicts; 5) a more rational use of resources. Also, the Rule of Law strategies developed by USAID in 1994 contemplate the use of ADR mechanisms to promote greater access to justice, including increased access to justice systems (*Weighing in on the Scales of Justice, Strategic Approaches for Donor-Supported Rule of Law Reform Program*, USAID Program and Operations Assessment Report No 7, Office of Evaluation, Center for Development Information and Evaluation, February, 1994).

While the loss of prestige of traditional, informal mechanisms stemmed from a belief in the superior value of formal institutions, the shift from the informal to the formal arena contributes, ironically, to a crisis in justice systems throughout the hemisphere.

The movement towards more regulation, greater formality and, often, towards an ever increasing role for the state has resulted in severe stress on all the legal institutions charged with providing timely and costs effective responses to all types of disputes and conflicts. Judicial officials are presented with novel questions, and with volumes of cases that would stagger their predecessors who lived and worked in more contemplative times. These judges must address thousands of conflicts legitimated by a regulatory society.

In the US, for example, the federal and state justice systems are under constant pressure to respond to increasing volumes of case filings, and to provide timely justice. In an attempt to understand what happens to cases, research shows<sup>113</sup> that nearly 50% of cases are settled, and do not progress past the initial filing stage. And, in the US, less than 10% of all cases proceed to trial.

More research is needed to understand the reasons and consequences of these numbers. Yet, such findings raise these questions: should an ever increasing number of judges be appointed to deal with an ever increasing number of cases? Are there limits on financial support to formal justice in a fiscal environment that says we must do more with less, or in countries that are resource poor?

## B. Formal System in Crisis

The historic role of the state as the omnipotent provider of all services in Latin America and, to some extent in the US, is changing. The state is shrinking in size, and attempting to restructure itself into a less dominating influence in the lives of its citizens. In turn, citizenry is asked to be more self sufficient, less dependent on state services, particularly in capitol cities that are growing exponentially.

Throughout the hemisphere, legal systems are confronting unprecedented levels of challenges, a situation exacerbated by the low level of citizen confidence in their justice system.

In Latin America, the eradication of dictatorial regimes, followed by a return to democracy in the late 1980s, led to efforts at restructuring economies, rapid promotion of free trade between and among neighboring countries, and down-sizing of the state apparatus. Simultaneously, throughout the hemisphere, the public has begun to look more critically at the justice sector. Contributing factors include:

- media scrutiny that chronicles the flaws and inadequacies of the system, and stories about corruption of justice officials;
- ineffective law enforcement and prosecution, coupled with judicial systems that take years to process even the simplest of causes; and,
- the physical insecurity (physical threat) surrounding the life of every urban dweller, which has become a principal concern and a topic of public discourse.

The impact of ineffective law enforcement cannot be underestimated. Three public opinion surveys<sup>114</sup> regarding the justice system indicated that most people base their perceptions of the justice system from their

---

<sup>113</sup> *Justice Delayed - The Pace of Litigation in Urban Trial Courts*, National Center for State Courts, 1978; *Managing to Reduce Delay*, National Center for State Courts, 1980. These percentages coincide with those found in court systems in Argentina (*La Demora Judicial en Argentina*, CEJURA, Fundación la Ley, 1993), Costa Rica (*Estadísticas Judiciales*, Poder Judicial de Costa Rica, 1995) and El Salvador (*Encuestas Nacional de Estadísticas Judiciales*, Poder Judicial, 1993).

<sup>114</sup> *Dispute Resolution: Quantitative Benchmark Study*, prepared by the Wirthlin Group for the National Institute for Dispute Resolution, June 1992 - *Estudio de Opinión Acerca de la Justicia en Argentina*, Instituto Gallup, Marzo 1994 - *Encuesta Popular - CID Gallup*, San Jose, Costa Rica, 1994 (Contrato con la Suprema Corte de Justicia).

contact with the police -- a powerful argument in support of community based justice strategies, including citizens' access to justice.

These problems have existed for a long time. What is new is the public demand for better performance of the system, and a growing recognition of the link between sustained democratic development and strong systems of justice.

## II. COMPARATIVE EXPERIENCES IN LATIN AMERICA AND THE UNITED STATES

Conflict resolution, taken broadly, covers actions and procedures that range from avoiding conflicts, to negotiation, conciliation, mediation, arbitration, judgment, violence, and many other hybrids. Settings within which these processes are used, and subject matters that they cover, occur at all levels of human interaction, and their ensuing possibility for differences and disputes. For purpose of this discussion paper, experiences below review principally community based and court related initiatives -- grouped as "Alternatives to Dispute Resolution" (ADR).

### A. What Research Shows

In Latin America, as well as in the United States, research findings tend to be inconclusive on the merits or weaknesses of ADR. The reasons are many and, while they vary from one country to the next, some general trends can be identified:

- There is a lack of common terminology for the various ADR processes, and of uniform understanding of their purposes and goals. For example, in the US, a process presumed to be mediation in a particular study might actually be another ADR process such as case evaluation, or some mix of mediation and arbitration.
- Databases for evaluative purposes, and research that studies ADR programs through rigorous methodology, are wanting. Few studies have used randomly assigned experimental and control groups to examine differences in cases using ADR and those that follow traditional formal processes. As a contributing factor, most courts do not wish to withhold promising new processes for litigants, nor do they want to limit potentially positive effects on the courts' workload by holding some cases out of the program.
- Rules, procedures, and jurisdictional contexts vary, leading to discrepancies in findings, and mask possible benefits or drawbacks of a particular ADR technique.

Nonetheless, research tends to show some saving (time and money) to litigants and, to a lesser extent, to the courts, if ADR is tightly integrated within a well run system. In Latin America and in the US, ADR can help improve access to justice for minorities and poor defendants who otherwise would have nowhere to turn for solution of their disputes.

Further, opinion surveys in the US, Argentina, Bolivia and Costa Rica<sup>115</sup> point to similar findings. Such surveys clarify the level of awareness about ADR, and highlight areas where the introduction of ADR would be most responsive to interests expressed by the public. In Argentina, these surveys were instrumental in the design of public information programs sponsored by Fundación Libra and the Ministry of Justice; in Costa Rica, they helped identify family dispute as a priority concern area which the Costa Rica Supreme Court responded to by initiating family ADR pilot programs; in Bolivia, public response was instrumental in shaping program initiatives in La Paz. And, in the US, the 1992 survey commissioned by the National Institute of Dispute Resolution provided a comprehensive understanding of how litigation and ADR are viewed by the public, and where or why the citizenry supports ADR initiatives (family/child custody or divorce

---

<sup>115</sup> *supra* at 114.

predominated, and preference was expressed for mediation over arbitration, along with concerns about time and delays).

While they differ on specifics, these surveys can help guide decision makers as they formulate programs responsive to public perceptions and needs. They reveal a generally uniform, negative response to the formal system of justice. Concerns exist about impartiality, bureaucracy, costs and delays. ADR *per se* is not familiar nor well understood but, when it is explained, respondents tend to favor ADR -- to save money and time, or to participate actively in a fair and just conclusion of their dispute. Many of those interviewed show preferences for conciliation mediation over arbitration (because it is more judgmental).

## **B. Experiences in Latin America**

Initiatives described below have been supported variously by Supreme Courts and Governments within the country, the Agency for International Development (AID), the Inter-American Development Bank (IDB), the World Bank (WB), or the Inter-American Bar Foundation (IABF).

### **1. Argentina**

a. *Community Mediation*: begun in 1988 through the office of the Secretary of Justice (later the Ministry of Justice), it sponsored initiatives in Buenos Aires (4 centers) and eventually integrated legal services and ADR -- to promote democratic values through larger civil participation, put an emphasis on human rights, and to increase access to justice. Buenos Aires now counts 7 neighborhood centers. Reviews/research are mixed regarding the number of cases reaching successful resolution, project management, and follow-through.

b. *Court System*: in 1991, a group of judges, lawyers, and social workers/psychologists established Fundación Libra, an NGO designed to promote ADR through training, with special emphasis on mediation. Libra also developed a project annexed to civil courts in Buenos Aires, which helped create an environment in support of ADR initiatives and access to justice. In 1994 the Ministry of Justice sponsored pilot programs annexed to civil courts, using 10 of 100 judges to refer cases (Buenos Aires). These new programs showed that the ADR process could be integrated within the court system, and that participant satisfaction was high. These efforts have led to a new law (adopted late '95, effective April '96) that requires mediation for certain legal conflicts prior to civil lawsuits. Also, provincial courts have requested ADR training (2/3 of 23 provinces, with assistance from Libra and the Ministry of Justice).

c. *Other*: projects are underway in the business community, with assistance from some US firms (American Arbitration Association, Conflict Management Group); at the community level, Libra, in collaboration with the US Community Boards and the Archdiocese of Buenos Aires, is developing comprehensive community based programs in the city's most populous sections. Similar initiatives are taking place in schools, churches, and neighborhood centers, with attendant consequences on legal culture.

In brief, the legal framework has been altered by the ADR initiatives described above.

### **2. Bolivia**

a. *Community*: a study of 4 neighborhoods in El Alto helped identify informal ADR mechanisms being used by citizens -- 90% of whom had relocated in search of employment. The study showed that most were receptive to ADR in light of allegations of corruption in the judiciary, delays, and other operational problems. Disputes of most concern included: family, housing, property encroachment, and robbery/fraud. A pilot program surfaced positive results (low cost, swifter disposition, confidence and respect), some concerns (enforceability, "morality" aspect, need to coordinate with neighborhood association), and suggested that the Ministry of Justice should incorporate informal systems into its operations.

b. *Legal System:* a new Bolivian constitutional provision requires that the government validate and incorporate traditional justice systems, and make them compatible with the formal system. This was echoed in parallel workshops in Cochabamba. As a result, the MOJ is financing a multidisciplinary communal justice system, to identify indigenous conflict resolution initiatives in rural and marginalized urban areas, and interested in establishing pilot programs.

c. *Chambers of Commerce:* centers have been created to provide conciliation and other ADR forums to the business community, with technical assistance from the Inter-American Bar Foundation.

### 3. Brazil

a. *Courts of Small Claim:* drawing on positive results in a pilot program in Rio Grande do Sur, the Brazilian Congress approved a law requiring courts to develop and implement a new system of processing civil, and certain limited criminal cases, using volunteer lawyers as conciliators. Judges are to review agreements to ensure fairness and compliance with the law. Pilot programs have begun in Brasilia and Sao Paulo, and planning is underway in other states. Results from Rio Grande do Sur indicate that 150,000 cases per year are resolved using this process.

b. *Other:* a March 1996 seminar in the Tribunal Superior in Brasilia demonstrated that high ranking justice officials are committed to pursuing ADR strategies within the legal system; notably, this endorsement was based on an acknowledgment that early roman law supported the ADR concept. Other initiatives include: Casa de Justicia in Sao Paulo, to facilitate the early resolution of cases with favorable results; Cámara de Arbitraje and Mediación, for ADR in civil cases just beginning; and Instituto Nacional de Mediación and Arbitraje (INAMA), that promotes/trains individuals in ADR, with special focus on labor.

### 4. Chile

a. *Community:* legal assistance offices, sponsored by the Ministry of Justice in low income areas of Santiago, offered first-level contact for citizens in the area. Initially, the goal was to increase access to justice locally, with assistance from social workers (first line), and legal counsel to help resolve disputes. More recently, the MOJ, with assistance from the Corporación de Promoción Universitaria (CPU) and from Fundación Libra (Argentina), has offered training toward developing a nucleus of support services, adapted to the Chilean environment, and toward inclusion of ADR in law school curriculum. The neighborhood mediations Centers will open in May 1996.

b. *Other:* the Chamber of Commerce in Santiago has created an ADR center, involving lawyers and business leaders, modeled on other similar efforts in the region. The project is just starting.

### 5. Colombia

The first country to adopt ADR as part of a national strategy to make justice more accessible, Colombia's Ministry of Justice created conciliation centers nationwide in the early 90s; at that time, Colombia had the first fully active center for conciliation and arbitration. Thus Colombia has had the longest, and most informative ADR history in the region.

a. *Community:* the MOJ launched Casas de Justicia in 1994, beginning with pilots in Ciudad Bolivar and Aguablanca. The objectives were to increase access, with particular focus on densely populated areas; decentralize use of resources; address lack of confidence in justice system; promote use of ADR, along with dialogue between state and needs of citizenry; and offer alternatives to violence -- the most common form of handling conflicts. The effort, an ambitious one, had to confront issues of institutional culture and staff resistance (including resistance to training), inter-organizational conflicts, community distrust, and operational issues (ability to gather statistics and follow up on implementation of agreements).

The projects are "a work in progress," and draw upon the results of the first two centers (Ciudad Bolivar and Aguablanca), which show a 2 to 3 fold expansion of cases, and a 70-80% resolution rate.

b. *Other:* i) There are 103 Centers of Conciliation and Arbitration, which vary widely in terms of operational levels. The most active are sponsored by the Chamber of Commerce (Bogota, with 600 + cases/month), followed by the North and Atlantic areas. Most were developed in the mid 1990s, but remain somewhat marginal, due to lack of research and community acceptance and/or support. ii) Colombia has created the only program in the region for conciliation of administrative conflicts. During its first year, the center helped settle conflicts for a demand value of \$50M.

## 6. Costa Rica

Costa Rica has used a distinct approach. Beginning with a public opinion survey, commissioned by the Supreme Court, the court identified court delay as a principal problem facing the justice system, and found that changes in civil code had NOT achieved desired results (accelerating resolution of cases). As a result, the Supreme Court adopted 3 strategies: 1) identify public opinion concerning ADR; 2) determine legal framework for possible use of ADR in family, labor, civil, and criminal cases; 3) assesses experience from other countries. The study helped highlight these concerns:

- the citizenry believed that the court system was in crisis due to excessive volume of work -- therefore too slow; limited capacity of judges, bureaucracy, and corruption;
- less than 6% knew what ADR meant (such as mediation, conciliation and arbitration), but many thought that family disputes were suitable to mediation; however, less than 50% were comfortable in having their case handled by someone other than a judge;
- conciliation (or mediation) inspired more confidence than arbitration.

The Supreme Court decided to support an 18-month nationwide program to increase awareness of ADR -- through articles, seminars, and regional plans throughout the country; 10 regional conferences considered how ADR concepts should be applied to community and justice systems. A national conference helped identify a broad consensus on the issues; and the President of Costa Rica announced that ADR was of national interest, and that it must be promoted in all aspects of Costa Rica society. Since then, a national committee has been appointed to pursue application of ADR in all sectors of society.

## 7. Ecuador

a. *Community Mediation:* the project was designed to improve the capacity of community based groups (including low income urban and rural areas, with emphasis on indigenous communities) to manage disputes using their own notions of fairness and justice, and with a focus on improving access to justice. 53 leaders from 40 communities were trained as mediators, to serve neighbors and members of their community.

An evaluation by the National Endowment of Democracy (NED) showed that older mediators were preferred over younger ones, and that few women were called upon, particularly young women. Also, expressed preferences were influenced by the level of education and experience of mediators. A decision was made to educate future generations of leaders, and to reinforce latent, traditional conflict resolution skills.

b. *Urban Projects:* centers in Quito, Guayaquil, and Ibarra are to help resolve issues of access to justice for marginal urban populations. Community groups nominated mediator candidates who were trained by community leaders. The Centro de Investigaciones Sobre Derecho y Sociedad (CIDES) sponsored public education efforts (such as posters and community meetings), and assumed responsibility for management and follow up training. Typically, disputes brought to the centers in Guayaquil, Quito and Ibarra

involved family and community conflict or fights, in addition to labor/thievery (Quito), or drugs/assaults (Ibarra). Inadequate comparative statistical studies exist on the effectiveness of the programs, but anecdotal reports show that the community views the projects positively, and sees them as means toward the unification of neighborhoods; on the other hand, some criticisms are leveled at the availability of mediators.

A climate now exists in support of expansion of ADR with support from AID, along with the emergence of new pilots annexed to the Court (World Bank), or Chambers of Commerce (IDB).

#### 8. El Salvador

a. *Community Mediation*: conflict resolution processes were used to help return and integrate citizens from the village of Tenancingo, who had been displaced during the civil war. The program included attempts at creating a "model" community, and established a Community Council representing all interest groups with the village. The council did not replace existing political bodies, but acted as a parallel institution charged with the resolution of community conflicts. While it has gone through several iterations and difficulties, the Council offers a viable approach, by segmenting conflicts into manageable dimensions, and providing a neutral forum that helps recreate a civil framework of coexistence.

b. *Legal System*: following the regional 1993 ADR conference (AID/NCSC), a Minister of the Supreme Court helped draft ADR legislation for El Salvador. This effort was supported and expanded by another member of the Supreme Court after the 1995 ADR conference (AID/NCSC). The draft legislation is designed to provide alternatives to the formal system, given the system's inability to handle all conflicts brought to the court, and to keep pace with scientific, technological, and social changes in society. Goals of the draft legislation are to increase access to justice for people with low income, help re-establish confidence in the justice and legal systems, speed resolution of disputes, and provide for dialogue and familiarity with new methods. A week long ADR training conference was held in Spring 1996 in El Salvador.

#### 9. Peru

The commission on Alternative Systems of Administration of Justice, Conciliation, Mediation and Arbitration (Ministerio de Justicia, United Nations Development Program, Lima, Peru 1994) has issued a report, and concluded that a traditional, centralized, and rigid system is unable to respond to the needs of modern society (social and economic changes). Other criticisms include delays in processing, or preparing for cases of those charged; inflexibility of procedures; and lawyers' abusive practices. Further, state institutions do not reflect the multiethnic diversity of Peru.

The report notes the historic use of ADR by indigenous communities, its re-introduction in some neighborhoods and small commercial establishments, and its inclusion in procedures used by justices of the peace, juvenile justice judges, and the Ministry of Labor. Further, the report recommends expanded use of ADR in the justice system (civil and criminal procedures and programs, JPs, juveniles and labor courts), and in the private sector (to provide a more responsive and fluid environment for dealing with conflict, and to encourage pilot demonstrations).

A number of ADR activities are currently underway, managed by APENAC, an IDB sponsored program. Separately, USAID is pursuing a training program, involving NGOs, who provide legal services to a variety of groups and populations.

#### 10. Uruguay

The Uruguayan Constitution mandates that conciliation be a first step, prior to litigation, for all civil cases. The new civil code calls for the use of oral procedures, and incorporates a conciliation phase. These reforms are supported by the creation of 100 additional judgeships, and aim at swifter case disposition and delay reduction.

Other related reforms include the integration of ADR training by the judicial school (CEJU), collaboration between the Supreme Court and the National University toward the training of law and other students in conciliation, and a well received pilot project in greater Montevideo.

### C. Experiences in the United States

Tools of negotiation and dispute resolution, such as mediation and arbitration, have long been known in the fields of international diplomacy and labor relations. Historically, US courts in some states favored a conciliation step for certain cases (divorce, for example); judges or justices of the peace acted informally as mediators to encourage settlement; and often voluntary, binding arbitration is incorporated in contracts.

A systematic introduction of alternatives to courts, and within other institutions or settings, is a relatively recent phenomenon, however. In the 1970s, community activists, with support from private foundations, advocated the direct involvement of the community in resolving local disputes (grassroots mediation or conciliation centers). Separately, judicial leaders, including Warren E. Burger, then Chief Justice of the United States, looked to ADR as a way to divert a substantial number of cases ("minor disputes") from the court docket, and thus, reduce delay. The Dispute Resolution Act of 1979 was voted by the US Congress to provide financial support and accelerate the development of pilot ADR programs and research, but funds were never appropriated. Instead, a consortium of private foundations created the National Institute for Dispute Resolution (NIDR), which seeded over a ten year period (early 80s - early 90s) the development and expansion of ADR within and outside the US courts.

By the mid 1990s, some form of dispute resolution program existed in each of the 50 US states, and more than half of the states had adopted, or were exploring, comprehensive court annexed ADR programs using a variety of procedures (facilitation, early neutral evaluation, mediation, conciliation, arbitration, mediation-arbitration or mini-trials). Developments in state courts were echoed at the federal level. Further, federal agencies have been using collaborative and inclusive processes to craft regulations; local and state agencies routinely turn to statewide mediation centers to solve complex, multiparty disputes; a number of individuals, and private, local, or national centers offer "private judging" for cases that often involve commercial or corporate interests; ADR is taught in most law schools and schools of business and planning/public policy, while mediation is used and taught in elementary and secondary schools. Experimental programs as varied as dealing with homeless persons, providing alternatives to placement hearings for foster care, facilitating the development of medical ethics guidelines, or handling disputes in nursing home facilities, are underway. ADR and conflict resolution are a part of virtually every facet of the private and public sectors in the US.

In the US, two of the better known, and most widely used programs, function as complements to the justice system: court-annexed arbitration and community mediation. While research and evaluation findings remain somewhat tentative,<sup>116</sup> the literature does provide information helpful to policy makers and administrators in charge of ADR programs. As a key finding concerning state courts, "...in most ADR processes, litigants believe they are treated fairly and they are satisfied with the manner in which their disputes were resolved. In the face of open questions such as whether ADR saves time and money for courts and litigants, this seemingly modest conclusion is perhaps the most significant to date. If people like ADR even though it may not save them time and money, then why should courts not try ADR?"<sup>117</sup>

Separately, in the US federal system, following adoption of the federal administrative Dispute Resolution Act of 1990, 56% of federal judges indicated that ADR produces fairer outcomes than litigation;

---

<sup>116</sup> Reasons include: lack of common terminology for ADR processes and uniform understanding of their purposes and goals; differences in rules, procedures and jurisdictional contexts; difficulty in applying rigorous research methodologies, such as random assignment – for more information, refer to *National Symposium on Court Connected Dispute Resolution Research, A Report on Current Research Findings-Implications for Courts and Future Research Needs*, National Center for State Courts and State Justice Institute, 1994.

<sup>117</sup> *Síntesis de los Resultados de la Investigación sobre Programas de Resolución de Disputas Anexos a tribunales en Los Estados Unidos*, Presentation by Susan Keilitz at the Second Inter-American Conference on ADR in Santa Cruz de la Sierra, Bolivia, March 1995.

and 86% thought federal courts should assist parties to resolve disputes through whatever procedure is best suited to the case.<sup>118</sup>

### 1. Court-Annexed Arbitration

A quasi adjudicatory process, court annexed arbitration is used for routine civil cases, typically up to \$50,000, to speed up their resolution through a process that is fair and satisfactory to litigants and their attorneys. Program design and procedures vary,<sup>119</sup> but all provide for the possibility of a trial *de novo* if one of the parties rejects or wishes to appeal the arbitrator's decision (award).

Courts play an important role through oversight and control of the program, to ensure against delay of arbitration hearings and a final decision. Further, less than half of the cases referred to arbitration proceed to a hearing -- a finding which affects program design (number of arbitrators and caseload projections). Program effectiveness is not affected by the number of arbitrators assigned (one or three), nor by arbitrators' payment (by the court or the parties).

Integration of the arbitration program into the case management system helps ensure that all cases targeted for arbitration are actually referred to the program. And, when resources are limited, referrals should take place after a decision has been filed, to avoid expending resources on cases that will result in default judgments anyway. Either way, arbitration has little or no impact on the processing time of the remaining court caseload.

Its principal value lies in participant satisfaction -- by providing them with a third party review of a dispute that would otherwise settle without intervention. Programs that show a greater proportion of cases actually handled through an arbitration hearing tend to have greater support from litigants and attorneys.

The key to program success lies, then, in establishing a proper balance between "...encouraging settlement before an arbitration hearing is held, and promising an expeditious forum in which the litigants can air their disputes."<sup>120</sup>

### 2. Civil Case Mediation

In mediation, parties reach a binding, or non binding, agreement to settle their dispute through a consensual process, assisted by a neutral mediator. The mediator might help frame issues in new ways, and make suggestions, but the ultimate agreement is reached by the parties themselves.

The use of mediation in civil litigation has grown rapidly in the past few years, with varying results: for instance, settlement rates for medical malpractice and product liability is low (less than one in ten); higher for automobile injury and breach of contract cases; and viewed as particularly suitable for family and child custody cases. Concerns specific to civil mediation include whether the parties have equivalent bargaining power; how mediation -- an intensive process -- compares with others, such as early neutral evaluation; and whether subtle pressures are placed to encourage parties to settle, and thus detract from a truly consensual process.

Features associated with successful programs are: program and process rules are well described to the disputants, and are uniformly and consistently applied; deadlines are enforced; a balance is established between reducing extensive discovery, and providing some limited, informal discovery useful to resolution; and the program has a capacity for training, supervision, and monitoring of the mediators, who are often community volunteers. It is also desirable to integrate the program within the court's case management

<sup>118</sup> *Survey of Federal Judges*, Federal Judicial Center, cited in FJC Directory, Issue No 7, December 1994, p. 2.

<sup>119</sup> For example, number of arbitrators (1-3); their selection, qualification and compensation; jurisdictional limits; and, nature and timing of the hearings.

<sup>120</sup> *Supra*, Keilitz.

system, for purposes of tracking, while letting the mediation program handle screening of cases and scheduling of appointments.

Of these, the selection, training, and retention of neutrals (mediators) is perhaps the most crucial feature to ensure program success and quality. The mediation model, by providing a forum where disputants attempt to reach an agreement, differs considerably from an adjudicatory model. The parties have to assess their respective needs, interests and options, rather than accept or reject someone else's proposal. The mediator must be skilled, strive for uniformity of the process and rules, be familiar with legal and ethical considerations that may surface in the mediation, and maintain flexibility for the particular needs of individual cases.

Mediation's greatest asset, or potential, is to produce lasting agreements, likely to be respected and implemented by the parties, since they crafted the agreement themselves. The process can be time and labor intensive; and results are questionable when parties are urged to settle through, what may appear to be in their view, "assembly line" justice.

In summary, dispute resolution has become an integral part of the system of justice in the US,<sup>121</sup> but it requires further documentation and research. In a special edition of the Federal Judicial Center (FJC) publication on ADR, former FJC Director William Schwarzer summarizes these policy questions:

- Does ADR lead to a speedier, more satisfactory, and less expensive outcome, or does it create another layer of litigation?
- Does ADR improve access to justice for those who are not well off and cannot afford the cost of litigation, or is it second class justice?
- What are the trade-offs between advantages of ADR -- such as privacy, speed, and reduced adversarial process, and the advantages of traditional litigation? and,
- Does ADR lighten the burden on the courts, or does it divert judicial court staff resources?

#### **D. Comparative Analysis**

Historically, and throughout the hemisphere, communities have turned to various options (individuals or organizational structures) for resolution of their conflicts. Such options are often flexible and responsive to the unique features of the community, in contrast with formal structures that process legal conflicts through a series of linear steps.

It is not surprising, then, that court and formal systems of justice tend to favor ADR techniques, such as arbitration and similar hybrid processes, that incorporate some degree of formality, or function, under control of courts and related institutions, or both.

By contrast, community based mediation often operates outside the institutional mainstream. Its processes are fluid and client based, and its results are less easily controlled by formal institutions. Community based mediation strategies offer access to persons who otherwise would find no forum for resolution of their conflicts -- for reasons of cost, fees, time, and difficulty for the lay person to understand the complexities and language of the formal process. They help respond to the public's demand for alternatives to the existing system, as documented in opinion surveys (US, Argentina, Chile, Costa Rica -- cited above). And, they are consistent with modern organizational development practices that promote user-based designs and provision of services.

---

<sup>121</sup> As stated by current Chief Justice of the US, William H. Rehnquist, "...the future may require dramatic changes in the way disputes are resolved...(many litigants) may have a greater need for an inexpensive and prompt resolution of their disputes, however rough and ready, than an unaffordable tardy one, however close to perfection."

Notwithstanding these positive features, the use of mediation raises a parallel set of concerns. These were discussed at two ADR conferences (1993 in Argentina and 1995 in Bolivia, sponsored by AID in collaboration with NCSC), which seeded the development of country specific initiatives described above. They also helped sharpen the analysis of ADR and mediation, as well as their potential and constraints. Attendees at the 1995 conference reached conclusions echoing similar analyses made in the United States:

**Advantages of ADR:**

- Helps reduce pressures on the formal system
- Increases and eases access to justice
- Saves cost and time
- Preserves confidentiality
- Fosters an open, non-adversarial dialogue between the parties, and the development of realistic solutions
- Is a voluntary process
- Promotes, because it is informal, flexibility, and allows for more freedom than that provided by traditional methods
- Enables the parties to participate actively to decide the outcome
- Allows the parties to continue relationships

**Disadvantages of ADR:**

Lack of:

- Legal formality
- Norms -- ADR does not yield norms
- Objective power
- Disbursement of information/knowledge
- Qualified ADR professionals and training
- Centralized control/corrective measures over ADR processes
- Sanction of mediation by justice system (as opposed to conciliation and arbitration)
- Danger of privatization of justice
- Uncertainty about qualifications of neutrals (mediators)
- Lawyers' opposition to privatization of justice
- No recourse to mandated system

### **III. LESSONS LEARNED**

Experimentation with ADR throughout the hemisphere provides a lore of information -- through some rigorous studies and, more often, anecdotal evidence. It also surfaces questions that should be addressed to inform and nurture future reforms, and their likelihood of success.

#### **A. Design Strategies**

In a legal environment where there is very limited exposure to the concept of ADR, considerable effort should be invested in orientation and training, to create the environment needed for this kind of reform. The legal community is traditionally skeptical about new ideas, such as ADR, particularly if it is perceived as a threat to the law by legal scholars.<sup>122</sup> Others see ADR as a way for people to negotiate away

---

<sup>122</sup> *Resolución Alternativa de Conflictos*, Cuadernos para el Sector Justicia, Comisión Nacional para el Mejoramiento de la Administración de Justicia, 1995.

their rights, if ADR closes off the court as an independent forum.<sup>123</sup> Further, skeptics tend to overlook ADR as integral to the concept of creating greater access to justice, and to justice systems.

In Argentina, initial orientation and training was directed at the neighborhood centers. In Bolivia, this approach was used by the Chambers of Commerce in La Paz, Cochabamba and Santa Cruz de la Sierra; in Santa Fe de Bogota, Colombia, it was applied by both the Chamber of Commerce and community centers; and, in San Jose, Cost Rica, by the family mediation center. The key ingredients here were common responses to two factors: 1) a need was identified, and 2) there was political support for the initiative.

Since then, each of the project listed above has reached a second phase of its activities, diversified, and responded to new clients and types of conflicts. All have done so, in large part, by broadening their base of support, eliciting information, and tailoring conflict resolution systems to other constituencies, through orientation and training.

A number of steps should be considered when ADR systems are presented to a new environment:

### **1. Build a Base of Support**

Each new program needs to build a foundation of understanding among a number of individuals and organizations that, in turn, become principal supporters of ADR; this is crucial if it is to avoid the wholesale importation of foreign experiences unsuited to local circumstances. The availability of a well trained core of individuals provides the capacity to evaluate experience in other jurisdictions, and to make the needed adjustments in the design of the new program.

### **2. Identify the Area or Clientele with the Greatest Needs**

The introduction of new ADR techniques needs to overcome a) the lack of familiarity with conflict resolution alternatives, and b) opposition from those invested in maintaining the *status quo*. Eliciting support from individuals and organizations with the greatest need can help reduce objections, and increase prospects for success. Increased access to justice is one of the most commonly identified needs. By focusing on community based activity, there is no question of need, and less likelihood of opposition.<sup>124</sup>

### **3. Develop in Stages**

The design strategy should contemplate a series of steps that build on incremental understanding of, and initiative using of, ADR. The rapid expansion goal<sup>125</sup> pursued in Colombia helps explain some of the difficulties encountered by this comprehensive program. Reformers are in a better position to succeed if they promote ADR services in areas that combine the factors of greatest receptivity and lowest risks of failure.

### **4. Account for Leadership Role**

Any strategy should include and identify institutional leaders willing to champion ADR programs. These leaders help open doors, and overcome a natural resistance to change -- whether the program is institutional or community based. In Argentina, Colombia, and Chile,<sup>126</sup> the Minister of Justice played a key role in promoting ADR related reforms. In Costa Rica<sup>127</sup> and El Salvador, such leadership came from the Supreme Court.

---

<sup>123</sup> *The Disputing Process - Law in Ten Societies*, Laura Nader, New York, Columbia Press, 1979.

<sup>124</sup> *Evaluation of Mediation Center*, DPK Consulting, San Jose, Costa Rica, Dec. 1995.

<sup>125</sup> *Evaluation of Conciliation Centers*, Ministry of Justice, Colombia, 1995.

<sup>126</sup> *Evaluation of Neighborhood Centers for Ministry of Justice, Argentina*, Hilda Baldaquin, Convenio DPK and Community Board Program of San Francisco, 1995 - *Evaluation of Conciliation Centers*, Ministry of Justice, Colombia.

<sup>127</sup> *supra* at 124.

## **B. Assistance Models<sup>128</sup>**

In addition to strategic designs, tactical ones help inform the development of ADR. Who are the potential leaders, and what functions do they hold currently? How much time is available, including that needed to forge consensus?

### **1. Consciousness raising initiatives**

They include speeches, conferences, discussion groups -- all toward educating the public about concepts and ideas. The focus is on changing attitudes (though it rarely leads to changes in behavior).

### **2. Skill based workshops**

Through these workshops, a core group develops skills in negotiations and conflict management, with an average from a few hours to a week. Attendees become agents of change, i.e. responsible for implementing and applying the information to their organization or institution.

### **3. Institution focused workshops**

These workshops involve individuals who are members of existing organizations or groups. Most have a particular substantive and institutional interest. Such workshops seek change in attitudes, and development of skills and procedures. Examples include Chile and Peru.

### **4. Issue focused workshops**

Substantive areas of concerns are at the core of these workshops. While participants come from a variety of organizations, they share a common focus, for instance, environmental or educational concerns.

### **5. University based initiatives**

This tactical element focuses on creating a capacity within local universities or academic circles for teaching or developing ADR programs. A number of universities in Latin America (University of Buenos Aires in Argentina, Los Andes in Colombia, Catolica in Peru, ITAM in Mexico, and other universities in Santafe de Bogota and in La Paz) are all pursuing this avenue. Abilities to advocate for and educate, as well as assess implementation of ADR, are built in as a result.

### **6. Issue specific interventions**

In this case, the issue(s) has been defined, and a constituency already exists. Experience builds upon intervention and, when successful, resolution of the dispute. This approach can be helpful in fostering training and advocacy/public education.

### **7. Dispute systems design interventions**

This is the most comprehensive approach, for it includes planning, training, and implementation of new systems. It calls for the development of an infrastructure to handle recurring conflicts, rather than addressing each dispute in isolation. Good examples are the Casas de Justicia in Colombia, and the National Law of Mediation in Argentina.

---

<sup>128</sup> *Developing Democratic Decision-making Procedures Abroad*, Wildau, Moore and Mayor, *Mediation Quarterly*, Vol. 10, No 3, Spring 1993, pp. 303-320.

## **8. Capacity building in existing institutions**

This tactic calls for an outreach to institutions and organizations, by helping them develop an internal capacity to anticipate or handle differences and conflicts, and by teaching democratic and collaborative decision-making. In Argentina, Poder Ciudadano has used conflict resolution skills development to train young people with leadership potential; and Conciencia has developed a similar program to train women political leaders.

## **9. Free standing institutional building**

Training and information sharing can be helpful to individuals or groups who initiate independent centers, in such matters as democratic decision-making, conflict management intervention, and toward creating or informing constituencies. Examples include initiatives with indigenous communities in Ecuador, and provincial judiciaries in Argentina.

The decision to adopt one or several approaches, such as those listed above, should be tailored to specifics and the local context. Key variables include the level and awareness of ADR, likely opposition to such initiative (and its source), existence of supportive leadership or constituencies, windows of opportunities, legal contexts that favor or discourage alternative programs, and the availability of financial or other resources.

## **C. Statistics and Other Points**

There has been a paucity of investment in building the statistical foundation to evaluate ADR initiatives and programs -- with the exception of the Costa Rican project, the pilot court annexed project in Argentina, and a few individual and national studies in the US. As further impediments, comparative data on the operation of justice systems are seldom reliable, and ADR terms are often used interchangeably, so that comparisons cannot be made.

It is clear that ADR is promoted throughout the hemisphere as an alternative to the court system, and that it responds to perceived and real needs in legal systems. Too often, however, justice systems are not held accountable systematically: few publish statistics on the performance of judges and justice system institutions or groups; or, when the will exists, resources and capacity are insufficient to the task. While AID-sponsored projects have encouraged the development of statistical information bases -- a practice pursued by others donors -- reliable data remains scant.

This argues for support of small incremental projects, encouraging them to build a sound foundation of information. In turn, this data will be helpful to future reforms.

## **IV. CONCLUSION**

A monopoly by the formal judicial system of all enforceable remedies has weakened informal processes, which have historically been used to resolve conflicts. This, coupled with public expressions of discontent (about delays, excessively expensive processes, and inadequate procedures to solve disputes), explains why ADR has come full circle. ADR methodologies can serve the purpose of integrating a balanced approach to the provision of access to justice.

The issue is not WHETHER to reinforce the legal system, or to create ADR mechanisms, but rather HOW to design strategies that are complementary. Two concerns -- how to increase access to justice, and how to improve access to justice systems -- should inform such strategies, and draw upon experiences in North, Central, and South America.

Neighborhood mediation centers and the training of mediators in indigenous communities in Ecuador; a dozen neighborhood centers in cities such as Buenos Aires, Quito, and La Paz; the training of lawyers and social worker in Chile's legal assistance program; and the family mediation center in Costa Rica - are all activities that respond to the need for building stable democracies by improving access to justice. Court annexed ADR programs in Argentina and Colombia serve to demonstrate the viability of this strategy inside the legal system. Independent, private sector ADR efforts, through chambers of Commerce, for instance, help open private centers for dispute resolution in a variety of areas, such as the commercial arena.

While it may be too soon to pronounce success with these efforts, it is likewise too early to reach negative conclusions.

In brief, Rule of Law strategies should integrate ADR as a means toward access to justice and structural reforms, and should include systematic assessments. Strategies should foster local mediator programs, school initiatives, associations, the private sector, and be placed within the justice system -- all multiple avenues that complement the formal legal system.

A combination of broad vision, courageous experiments, patient and sustained suppose, and rigorous evaluations are needed, if we are to understand where and how ADR can improve access to justice, systems of justice, and institutions that provide justice in our societies.

## COMMENTARY

ADR, to reach its promise, requires sound planning, training, and education (of the formal justice community as well as the general public). Ignorance about ADR handicaps the ability to assess benefits which can accrue from using alternate mechanisms for solving conflicts. Traditional methods need to be acknowledged and incorporated in alternatives to the formal system.

Concerns surface, however, when implementation of ADR programs is undertaken:

- When a customary method is used, which contravenes the state's requirements, tensions develop between the community and the formal system, and between community leaders and judicial or government authorities; questions of double jeopardy arise.

- While ADR is often touted as a useful tool in reducing delay, such promise is seldom fulfilled if ADR, alone, is used as a delay reduction strategy.

- Terms are used inter-changeably, or have differing meanings from one country to the next -- leading to misunderstandings, and affecting useful dialogue in an adverse way.

- Legal and institutional frameworks are needed to pre-empt misdirected ADR developments.

- All cases are not amenable to conflict resolution, and guidelines are needed to identify those which should be "dejudicialized," and those which should not.

Some noted that ADR does not bring closure to a dispute, similar to the binding nature of court decisions. Others remarked that ADR can be more binding than court decisions when the conflict is brought to customary authorities in the community, thus to public view, and the whole community holds the parties accountable for adhering to the agreement reached.

As long as these issues are addressed in thoughtful ways, ADR provides an opportunity for increasing access to justice, where no such access exists. It offers alternatives to the judiciary so that it may avoid "technical justice," and legitimizes solutions reached by community based organizations. It contributes to the market place of conflict resolution techniques, and, as such, can place some pressure on the formal system, and judicial reforms, when the formal system no longer has a conflict resolution monopoly. Finally, it helps broaden the understanding, and expands the definition of conflicts.

## **V. COALITION BUILDING**

### **RECENT EXPERIENCES IN COALITION AND CONSTITUENCY BUILDING**

*Robert J. Asselin, Jr.*<sup>129</sup>

#### **I. INTRODUCTION**

##### **A. The Need for Coalition and Constituency-Building in Support of Judicial Reform**

###### **1. June 1993 NCSC Judicial Roundtable**

At the Judicial Round Table Conference hosted by the NCSC in June 1993, it was generally agreed that although a growing consensus existed among the majority of judicial sector leaders in the Hemisphere, that legal and judicial reforms were needed, greater national recognition of the need for reforms, and active support for them, would be an indispensable element to their eventual success. Participants at that Conference felt strongly that leadership for reform efforts must come from the justice sector itself, both to strengthen judicial independence, and to help ensure consistency in implementation of the reforms themselves.

Those attending the Conference three years ago said very little about what actions they might be able to take to promote more public support for judicial reform efforts. There was mention of the need for the establishment of "study groups" of interested and influential national leaders, that might counter-balance the resistance to change which was expected to arise within the judiciary and the broader legal community. Another possible action which was mentioned was the need to collect more data on the operations of court systems, and problems encountered, in order to better design and defend specific reform initiatives. Other than these two suggestions, however, those who attended the Conference returned home more aware of the consensus they had reached among themselves regarding the need for public support than they were, perhaps, of possible ways in which justice sector leaders might work to generate such support for judicial reform.

###### **2. Reasons for Coalition-Building**

Reforms are made in organizations and procedures because the people involved in, or affected by those organizations and procedures decide that changes are needed. In February 1994, USAID's Center for Development Information and Evaluation issued a study entitled, "Strategic Approaches for Donor-Supported Rule of Law Programs," with the intention of providing an analytical framework for the design of administration of justice programs receiving support from donor organizations. A major finding of that Study echoed the consensus which had been reached earlier by Latin American judicial leaders at the June 1993 NCSC Conference. The Study's authors concluded that there needs to be a good balance struck between "supply" and "demand" efforts in judicial reform programs; that is, that substantive reforms to improve court administration, access to justice, and other elements of the "supply" of justice need to be complemented by coalition and consensus-building efforts to generate public "demand" for judicial reforms, and public support for specific initiatives taken by politicians and special interest groups with a stake in their outcomes.

The Report's authors reminded readers that rule of law reform efforts need to be viewed as political processes, and not simply reduced to "supply-side" activities designed to improve legal system structures and institutional performance. Justice sector leaders have long recognized this, even though few are accustomed to "acting politically" in their professional lives as judges and court officials -- regardless of however much they have had to "act politically" as individuals, in the best sense of that term, to reach personal objectives. "Acting politically" refers to the processes of coalition and constituency-building which are part of everyday life. The CDIE Study's authors describe these terms as follows with respect to judicial reform:

---

<sup>129</sup> Mr. Asselin is an independent consultant who was the USAID representative for Argentina and Uruguay from 1991-1995.

- Coalition-building is forging a commitment to judicial reform among society's leaders from various sectors. Coalition-building activities lead to increased public demand for reforms to deal with specific problems affecting the delivery of justice.
- Constituency-building is seen as the process of mobilizing support from non-governmental interest groups and concerned government officials for specific reforms.

### **3. Factors Affecting Coalition and Constituency-Building**

The authors of the above-cited Study pointed out several conditions which affect the prospects for success in coalition and constituency-building for judicial reform. They recommended that these factors be considered carefully by those intending to lead reform efforts, given the fact that each country presents its own distinct set of political conditions. Among the most important factors to consider are: the degree of freedom enjoyed by the media, and the professionalism and effectiveness of journalists; the extent to which civil society organizations have developed; the level of political will in favor of judicial reform which exists among executive and legislative branch officials; and the readiness of justice sector leaders to lead or cooperate with reform efforts.

The timing of reforms usually depends on how long it takes for coalitions in favor of change to form among a sufficiently large number of those involved with (or affected by) the *status quo*. Since justice systems affect such a broad variety of individuals, significant time and effort normally needs to be devoted to building coalitions for reform, which include interest groups that might impede reforms if they are not convinced they are needed. The most important groups which must be addressed for judicial reform are citizens (and their organizations and businesses), political leaders, government officials, and the judges and other participants in the formal justice system.

Political support for making reforms is particularly important. In democracies, political leaders respond to demands from the general public and from interest groups. So both politicians and the general public are important constituencies whose support is needed. In addition, in order for desired reforms to be implemented effectively, those individuals working within the judicial system who are responsible for them must also be convinced they are worthwhile. Therefore, constituency-building efforts in favor of reform must also target the professionals working within the justice sector itself.

#### **B. Purpose of Discussion Paper**

One of the key problems confronting justice sector leaders wishing to pursue reforms is to identify how, specifically, they might try to build coalitions and constituencies. The purpose of this paper is to review recent rule-of-law reform experiences in two Latin American countries, in order to identify different types of coalition and constituency-building actions, and the factors which contributed to their success. This paper is intended to serve solely as a basis for further discussion at the May 1996 NCSC Conference, and does not pretend to present definitive conclusions in an area which will surely continue to deserve close attention, as judicial reform efforts proceed.

The paper is divided into two sections. The first briefly summarizes particular coalition and constituency-building experiences in Argentina and Bolivia over the last five years, with a view to informing the reader about how specific efforts were undertaken, what their results were, and why. In the concluding section of the paper, an attempt is made to derive tentative lessons learned from the coalition and constituency-building actions described, and a list of illustrative actions and recommendations for building coalitions and constituencies is presented.

## II. COUNTRY EXPERIENCES IN COALITION AND CONSTITUENCY-BUILDING

### A. Argentina

This section very briefly describes some of the coalition and constituency-building efforts made by public officials and private, non-profit organizations, beginning in late 1991. In order to appreciate the relevance of these efforts to the judicial reform process in Argentina, it is necessary to describe briefly the conditions affecting the judicial sector at the time.

Argentina has a federal judicial system. Its provinces have three-level court systems which operate under the authority of provincial supreme courts. The federal judicial system functions in parallel, under the authority of the National Supreme Court, which also has jurisdiction over the Federal District of Buenos Aires, and the authority to review cases decided by provincial supreme courts. Given Argentina's already well developed legal system, and the long tradition of excellence enjoyed by the country's legal community, by 1991, many judicial reforms had already been implemented successfully, but almost all of them were made by the provincial courts, rather than at the federal level.<sup>130</sup>

By 1991, public discontent with the poorly functioning federal judicial system had begun to be expressed, but there was, as yet, no consensus for reform, or much public pressure for change. With seven years experience under elected government, civil society organizations were operating openly and effectively, and new NGOs concerned with civic education and national democratic development had been established. Argentina's media was, and remains, free. The press kept the public informed, but tended to focus on reporting scandals involving corruption, to which it itself was not immune. Neither the public nor the press was especially aware of the specific problems encountered by the courts, nor about judicial procedures in general, although discontent over the lack of judicial independence from the executive branch was clearly expressed. Concern had also begun to be expressed by business leaders, who by then had to compete in more open markets, about the lack of a reliable legal system for regulating business affairs and resolving commercial disputes.

The federal court system suffered from inattention to management, high operating costs, and delays. The Executive Branch appeared more concerned with avoiding judicial impediments to its economic and public sector reform programs than with improving the functioning of the court system. Within the judicial system itself, some members of the National Supreme Court were concerned with the need for judicial reform, but felt they could not take action due to serious disputes within the Court. The Minister of Justice at the time was well disposed toward sponsoring reforms, but his Ministry lacked power.

To improve the environment for reform, public education efforts were carried out by civil society organizations. Concurrently, a few public sector officials attempted reforms, many of which failed for lack of firm constituencies in their favor. Actions taken by public sector officials and civil society organizations overlapped, and oftentimes influenced each other, but to simplify this presentation, they are described separately below.

#### 1. The National Supreme Court

*a. Design of a National Judicial School.* During the second half of 1991, two Supreme Court Ministers hired a consultant who had worked at a well known Argentine legal research and education foundation - FORES - to design a program to establish a national judicial school. This effort was initiated with the creation of a committee composed of judges and court staff, which worked to define training needs. Based on these needs, a curriculum was developed and pilot courses were planned. The program developed to establish the School was comprehensive and ambitious. As it was being completed, the Supreme Court sponsored an international conference in October 1991, to discuss different countries' experiences with

---

<sup>130</sup> For instance, in several provinces, oral processes had been adopted for criminal cases, and procedures for disciplining judges had been institutionalized.

judicial education, to which an audience of Argentines interested in the issue was invited. Then, no further action was taken to establish the School. The main reason for this was that (now former) members of the Court were quarreling amongst each other, and were preoccupied with poor publicity, resulting from judicial system scandals. There was no political will to proceed.

The judicial school planning effort still proved to be very useful. Starting in 1993, several provincial courts became interested in establishing or improving their schools. The same methodology which was followed earlier for the National Supreme Court was used to develop a consensus within these provincial court systems, on how the schools were to be developed. Seven provincial schools have been established or rehabilitated so far.

*b. Visit of Two United States Supreme Court Justices.* Late in 1993, the Supreme Court invited Justices Sandra Day O'Connor and Anthony Kennedy to discuss issues of their choice with the Court and Argentine legal scholars. The Court arranged a private visit with the President of the Nation as an important part of this trip. This initiative, made by the leadership of the Supreme Court, succeeded in exposing both the President and other members of the Court to the idea that reforms were needed to improve the delivery of justice, and preserve the principles upon which the national judicial system were founded. The visit was a positive, though small step in building a coalition for reform.

*c. Diagnosis of Administrative Problems.* In 1993, the Supreme Court engaged the Buenos Aires office of an international management consulting firm to carry out a comprehensive study to identify and analyze the federal court system's key administrative problems, and to suggest an action plan to begin to address them. This study and its financing were arranged by the President and Vice President of the Court, in collaboration with business leaders who had offered to work with them. The information collected by the management consulting firm was comprehensive and reliable. It also proved to be controversial, because it documented examples of an out-of-control and costly administrative system. The release of the final report generated immediate resistance, both from Court staff members who feared reform, and from a few ministers of the Court, who were surprised not only by its findings, but also that the study had even been commissioned. Soon after the report's release, a scandal broke out concerning actions taken within the Court on a case involving the Executive Branch. Changes were made in Court leadership positions, and the report was buried.

Even without the ill-timed scandal, this well-intentioned initiative by the Court's two chief officers, to begin to address long-standing administrative problems, would have had a difficult time succeeding, because the report and action plan were prepared exclusively by a team of outside experts. Their managerial expertise was undoubtedly needed to do the job well, but they were not requested by the Court to work with Court staff in an effort to generate input and commitment to the reform process. Such a strategy would undoubtedly have delayed issuance of the report, but action on its recommendations might have been more likely.

## 2. The Executive Branch

*a. Ministry of Justice (MOJ) Mediation Program.* In 1991, the MOJ began cooperating with a local foundation, *Fundación Libra*, to introduce the practice of mediation into the country. The Foundation was created by two appellate court judges after they paid their own way to the United States to study mediation at Harvard Law School. Under the program, a group of pilot courts were selected to initiate the use of mediation in cases where judges decided it might be helpful in resolving disputes more expeditiously and satisfactorily. Mediators were trained, and a permanent center was set up for case resolution as well as training. As a result of the Ministry and *Fundación Libra*'s efforts, mediation became an accepted alternative dispute resolution method in Argentina, so much so that it was recently made an obligatory step in most civil cases.

The MOJ also collaborated with another local foundation, *Fundación La Ley*, and USAID, to establish eight pilot neighborhood justice centers, where recently graduated volunteer lawyers worked to help

make the justice system more accessible to individuals and families not accustomed, or able, to use the courts. The pilot neighborhood centers succeeded in involving young lawyers in efforts to increase access to justice, but they have not yet been expanded at the federal or provincial level. It might have been useful to try to build upon these efforts, by encouraging volunteer lawyers to join in broader coalitions for other reform efforts, which could take advantage of their enthusiasm and personal knowledge of the problems encountered by citizens in accessing the justice system.

In both of these programs the MOJ found it very advantageous to cooperate with local NGOs, and thereby help build constituencies in favor of the reforms they were promoting. These experiences have also shown that leadership in reform efforts need not come only from the justice sector's formal leaders, and indeed, that individual judges and lawyers can make a big difference.

*b. Minister of Justice Participation in Public Fora and the Media.* Over the last two years, as public interest in judicial reform has grown, the Minister of Justice has routinely accepted invitations to speak in public fora (business associations, civic organizations, and the media), and discuss the Government's judicial reform ideas and plans. These efforts have not only kept the public better informed about the Government's plans, but they have also facilitated dialog among interested parties, and helped keep the MOJ itself in touch with public sentiment.

*c. Procurador del Tesoro Interest in Reform.* In Argentina, the *Procuraduria del Tesoro* is responsible for defending the executive branch in disputes involving the public interest. The former *Procurador* involved himself and his organization in reform efforts by investigating issues of relevance to his office -- such as the possibility of contracting out cases to private lawyers -- and by participating in discussions of reform issues with civil society leaders and donor representatives. His efforts were noticed by the President, who asked him to lead negotiations with the opposition party on reforms to the Constitution dealing with the justice sector. This experience showed that successful leadership for judicial reform can be exercised by public officials outside the Ministry of Justice and the courts.

*d. MOJ Project Preparation Study.* By late 1994, both the World Bank and the IDB had expressed interest in cooperating with the Government in judicial modernization projects. To begin the process, the MOJ requested the World Bank to finance a comprehensive diagnostic study of the problems affecting delivery of justice in Argentina. Over half a million dollars was spent for the preparation of a report by a team composed of Argentine lawyers selected by the MOJ, and international experts assembled with World Bank support. Team members worked under the authority of the Ministry, and made contact with a wide variety of individuals and organizations concerned with judicial reform, but they worked in isolation. Not only did many of the experts not have much contact with other experts on the Team, but they were not encouraged to bring interested Argentine parties directly into the study process themselves. When the Team's report was presented to the public by the MOJ, it was criticized for not having taken adequate account of reform efforts already underway, and not being internally consistent. The MOJ did not maintain the support of the Ministry of Economy and Finance, without which the World Bank and IDB could not proceed with the project design. By neglecting to carry out the investigation in a more inclusive fashion, the MOJ missed an opportunity to begin building coalitions for reform, and generating support, within the Government and with the public.

### **3. The Supreme Court of the Province Buenos Aires**

The Supreme Court of the Province of Buenos Aires (SCPBA) supervises Argentina's largest court system. Its reform efforts have been carried out in a much less politicized atmosphere than those at the federal level. One of the first steps officially taken by the Court was to create a Planning Office. That Office was able to use very modest donor financial support to plan and facilitate a series of reforms. The availability of this funding enabled the Planning Office to organize pilot projects. The Office's relationship with the donor gave it more stature within the Court and access to technical expertise. One of the consistent features of the programs the Office has implemented on behalf of the Court has been its reaching out to those to be affected by particular reforms, to include them from the start. This was done in programs to reorganize court

personnel, train public defenders, decentralize both planning and administrative responsibilities to district judges, carry out public information campaigns, and improve the provincial judicial school. Reforms presented to the full Court for its approval were already developed in a participatory manner, and agreed among representatives of those to be most affected; once approved by the Court, they were then implemented with less difficulty.

#### 4. Civil Society Organizations

Beginning in 1991, leaders from two sectors of civil society took action to increase demand for judicial reforms. Their interests were sparked by different sets of concerns, but they found they could collaborate. The interest of business leaders in judicial reform began with their concern that the legal environment for business development needed to be more stable. The interest of many civic leaders had its origin in their desire for stronger democratic institutions, and a fairer and more accessible justice system for individual citizens. Both groups went to work to increase public demand for change, and to cooperate with public sector reformers trying to implement specific reform programs.

*a. Business Associations.* The first Argentine business association to voice its concern publicly about the condition of the Argentine justice system was IDEA, the *Instituto de Desarrollo Empresarial Argentino*, when it introduced what it called “judicial security,” at its 1993 annual conference. By “judicial security,” the business leaders belonging to IDEA meant to refer to a more stable rule of law under which business firms could be confident that laws governing commerce would not be modified by executive branch fiat, and could depend on a court system which would settle disputes fairly – including those with governments and public sector entities. Broaching this issue publicly succeeded in raising the Government’s sensitivity to it, and increased public awareness of the need for judicial reform. IDEA and its leaders complemented their initial action by holding regular breakfast meetings, to which IDEA invited a variety of individuals from the justice and business sectors, to discuss reforms carried out in other countries, as well as Argentine reform proposals. They also met individually with officials from both the National Supreme Court and the MOJ, to offer private sector assistance for reforms, should those organizations decide to undertake them.<sup>131</sup>

In 1994, another business organization, FIEL – the *Fundación de Investigaciones Económicas Latinoamericanas* – decided to prepare a comparative study of the financial costs of operating court systems in Argentina and other countries. This study was presented at the annual meeting of the Argentine Bankers Association (ADEBA), and resulted in extensive press treatment of the extremely high cost of Argentina’s justice system, relative to those of other countries, where courts are perceived to operate with fewer problems. FIEL’s study also produced a wealth of information which could be put to good use later on to justify and help design specific reforms.

These experiences showed that business leaders can be very effective, both in helping build coalitions to increase demand for judicial reform, and in collaborating with judicial sector leaders willing to push ahead with reforms.

*b. Civic Organizations.* Six Argentine NGOs have been especially active in efforts at coalition and consensus-building. Almost since its beginning, *Poder Ciudadano* has sponsored programs to inform the public about the importance of judicial reform, and how specific reforms affect their interests as citizens. Its programs have included seminars, publications, and press briefings designed to increase public debate of judicial issues. One notable example concerned how judge candidates needed to implement new oral procedures for federal criminal trials were being selected by the Government. Also, in its interest group awareness efforts, *Poder Ciudadano* ran an anti-corruption program, which included cases concerning judicial sector independence.

---

<sup>131</sup> The National Supreme Court accepted an offer which was facilitated by business leaders to have an international management consulting firm do the study and action plan for administrative reform mentioned above.

Other NGOs which took their own initiatives to help build coalitions in favor of reform were:

- 1) *Fundación Libra*, whose initiatives in working with the MOJ in mediation programs were mentioned above.
- 2) The *Centro de Estudios Institucionales (CEI)*, which facilitated collaboration between Palermo University and Yale University for the establishment of a Masters of Law degree program, one of whose goals was to promote research and greater involvement by law students in reform issues.
- 3) *FORES*, which implemented a successful legal aid program to train public defenders, law professors, and bar association officials.
- 4) *Conciencia*, a women's civic education NGO, which included justice awareness issues in its activities.
- 5) *Fundación La Ley (FLL)*, which collaborated closely with USAID in efforts to support various Argentine judicial reform efforts.

One of FLL's most successful programs involved extending invitations to judicial experts from the United States to speak in Argentina. Topics included ADR, judicial education, courts and the press, and the advantages of forming court associations, among others. The speakers made presentations to different audiences, assembled by a variety of public and private organizations interested in judicial reform. Their visits to Argentina helped spark more discussion of judicial reform topics, and exposed leaders from various sectors to reform experiences in other countries.

FLL also arranged a number of orientation trips to U.S. courts and judicial institutions for groups of Argentine judges with particular interests in judicial reform. An example of this was a trip made by leaders from five provincial supreme courts to the National Center for State Courts in mid-1994. In 1995, a special program was arranged for a member of the National Supreme Court and other federal judges. In addition to enabling judicial leaders to become more familiar with the operation of U.S. court systems, making the trips together helped form coalitions among Argentines interested in reforms, which remained intact after their return home.

One of *Fundación La Ley's* most successful coalition-building initiatives was to call together representatives of all the organizations, public and private, which had been collaborating under the FLL/USAID Administration of Justice Program. This group included *Poder Ciudadano*, *Conciencia*, *Fundación Libra*, *FORES*, the *CEI*, *IDEA*, the *MOJ*, the National and Province of Buenos Aires Supreme Courts, and the *Procurador del Tesoro*. Originally, FLL's idea was for members of the group to share information about each others' reform efforts, but as the representatives talked, they generated enthusiasm for working together on common initiatives. Their first joint effort was to commission a poll with the Gallup Organization in late 1993, to collect specific data on public attitudes regarding the justice system, and what citizens might do to promote judicial reform. Each organization contributed questions to the poll, and used the poll's results in its own public information programs.

The efforts by civil society organizations described above greatly increased public dialogue and knowledge regarding judicial reform. Coalitions in favor of reform and public demand for judicial improvement grew as a result. By mid-1993, when the Government decided to agree with the main opposition party, that constitutional reform should include creation of a *Consejo de Magistratura* to administer the Federal Court System and nominate judge candidates, the Argentine NGO community was prepared to respond by helping to ensure public involvement in this important reform initiative. *Conciencia* and *Poder Ciudadano* each sponsored seminars, and worked jointly to encourage media attention to ongoing negotiations regarding the details of the *Consejo's* establishment.

Nevertheless, efforts to implement the national-level structural reforms called for in the amended Argentine Constitution are taking considerably more time than anticipated. This would appear to provide further evidence of the need to promote more public demand for reforms. Meanwhile, judicial reform continues in the provinces, where numerous mediation programs, judicial education, and administrative reform efforts are underway.

## **B. Bolivia**

By the early 1990s, Bolivia had experienced more than seven years of unprecedented political and economic stability. The country enjoyed a free press, and a wide variety of civil society organizations were operating. Nevertheless, the press was unfamiliar with the technical and systemic problems of the justice sector, and while several Bolivian and foreign NGOs were working in the area of civic education, none focused specifically on the problems of the justice sector.

The impetus for judicial reform did not begin with actions taken by the press or civil society leaders, nor did it arise from within the justice sector itself. It came about as a result of concerns expressed by individual political party leaders, and then grew into a political consensus for reform as the press and the public discussed judicial problems more frequently. Significant reforms within the justice sector began to be implemented in 1993. To date, they have consisted mostly of structural and legal changes needed to enable the judicial system to operate in a more institutionally sound, and fairer, manner.

### **1. Start of the Judicial Reform Process**

Bolivia's judicial reforms have their roots in debates which occurred in 1991 among political party leaders in Congress. These debates concerned the possibility of making various amendments to the Bolivian Constitution. Congressional leaders -- one of the most prominent of which is now the President of the Republic -- were responding to public discontent being expressed about judicial corruption. They were also aware that Bolivian citizens had become accustomed to seeing improvements in the operations of the Executive and Legislative Branches, as the country's democracy steadily became stronger, but that these improvements had not yet been matched within the Judicial Branch. A few political leaders saw a need for across-the-board changes, to address not only the justice system's structural and legal framework, but also to begin to improve access to justice for the majority of the population, and to significantly strengthen the System's institutional capabilities.

Currently, the judicial reform process in Bolivia is moving ahead briskly under the leadership of the Ministry of Justice. The successes being achieved are due in large measure to the fact that close attention has consistently been paid to coalition and constituency building as an integral part of the reform process itself. In fact, this has characterized Bolivian reform efforts from their start.

### **2. Work of the *Consejo Nacional de Reformas del Poder Judicial (CONARE)***

In mid-1991, CONARE was established by Presidential decree. Its creation followed activity within the Bolivian Congress to mobilize opinion in favor of the Constitutional amendments mentioned above. The discussion of the need for constitutional changes created an opportunity to initiate a judicial reform process, since the Executive Branch, at the time, was anxious to respond to growing public demand for judicial reform. The idea to establish a council came from a Bolivian attorney, who was the Representative of ILANUD in Bolivia, and a Bolivian officer of USAID/Bolivia. They decided to visit Costa Rica, to find out about their experiences using a judicial council, from a few years earlier. That Council succeeded in beginning to build a coalition for reform, by facilitating a shared effort to define priorities. These two individuals returned to Bolivia enthusiastic about what they had learned in Costa Rica, and encouraged the Government to create a council.

The *Consejo de Reformas del Poder Judicial* was intentionally composed of both technical and political representatives from a broad group of organizations within the executive, legislative, and judicial branches, the Bar Association, the Attorney General's Office, and others. The Vice President of the Republic, who is also President of the National Congress, was appointed as the Council's President. Broad legal sector representation on the Council was expressly sought for two reasons: first, to increase the chances of reaching a consensus agenda for reforms, which would serve as a basis for a construction of a coalition in favor of

judicial reform; and secondly, to avoid excessive focus on internal court operational issues, in favor of considering sector policies and institutional structures.

The Council developed an agenda of seven items, and completed work on two of them via two subcommittees, which elaborated two draft laws: the *Ley de Organización Judicial* and the *Ley de Ministerio Público*. The first draft law included provisions to unify the court system, establish procedures for disciplining judges and lawyers, and provide staff support for judges. The second initiative called for constitutional amendments to transform the Attorney General's Office into a strong and independent Prosecutor's Office, which would be responsible for all criminal investigations and prosecutions, and which would have its own investigative police force. It also called for the establishment of a Public Defender's Office. Both of these initiatives were successful because they were developed in an open and participatory manner (several seminars and public events were held), and because of the effective political leadership provided by the Vice President, who was determined that the Council would obtain results before the next national elections in 1993.

### **3. Creation of a Ministry of Justice and Amendment of the Constitution**

During the 1993 election campaign, all the major parties agreed that judicial reform would be a priority for the next government. This consensus was another successful outcome of the Council's work, and it set the stage for the newly elected Government to move briskly to begin the process of implementing reforms.

One of the most active members of the Council, a former senator belonging to the same party as the President-elect, convinced him to support the creation of a Ministry of Justice to pursue the judicial reform agenda. With the assistance of a donor organization, the ex-Senator consulted the statutes of other countries' ministries of justice, and outlined MOJ responsibilities.

The new judicial institutions established by the 1994 constitutional amendment were: 1) the Attorney General's Office and the Defender of the People (Ombudsman), which are to operate independently of the courts; 2) a *Tribunal Constitucional* to operate separately from the Supreme Court; and, 3) a *Consejo de la Judicatura*, which is to nominate (and discipline) judges, and administer the Court System.

### **4. Early Reforms Led by the Ministry of Justice**

In early 1994, after creation of the Ministry of Justice as part of the overall restructuring of executive branch ministries, the President appointed a respected lawyer, and political independent, as his second Minister of Justice, in an effort to help ensure technical consistency in the reforms to be developed. The Minister decided to focus first on urgent problems with the criminal code, and then to later turn his attention to addressing structural problems in conformance with the recently ratified constitutional amendments.

The Ministry's first successful initiative was the *Ley de Abolición de la Prisión por Deuda y Apremio Corporal*, which eliminated the imprisonment of debtors, a procedure which had been greatly abused in the past. The Bar Association initially opposed changing the law. The Minister recognized that both political leaders in the Congress, and the public at large, would need to learn more about the draft measure in order for it to become law. He therefore decided to work on several fronts to build a constituency in favor of the new law. He held press conferences designed to explain to the public how the proposed law would affect individual rights and interests, and met with journalists to discuss the significance of the proposed reform. A series of breakfast and luncheon meetings was held with Congressional party leaders, at which Ministry personnel sought suggestions which they were careful to use to improve the draft legislation. Prominent lawyers were also convinced by the Ministry to argue with their colleagues in the Bar Association in favor of changes in the law. Finally, after these efforts had succeeded in developing a coalition in favor of the draft law, the Minister formally presented it to the Cabinet for discussion and approval, prior to submission to Congress. The Congress approved the draft law as presented, something rare in Bolivia, given the right of members of Congress to change draft laws on the floor up until just before final votes are taken.

After passage of this law, the Ministry moved quickly to another criminal code reform, the *Ley de Fianza Juratoria*, to reform bail and pre-trial detention procedures, which were also perceived to have been abused in the past. For the first time in Bolivia, the new legislation would allow pre-trial release in appropriate cases without payment of monetary bail. The Minister and his staff employed a strategy similar to the one that they had used in building a constituency for the *Ley de Abolición de Prisión por la Deuda y Apremio*. As a result, it too was unanimously passed intact by the Bolivian Congress.<sup>132</sup>

Following passage of this law, the Ministry obtained donor support to hold a training workshop in Santa Cruz for its seventy-person Office of Public Defenders. This Office was made responsible for the immediate review of the cases of all detainees, to see if they warranted release, and for seeing that the new law was implemented consistently. The decision to hold this workshop reflected the Ministry's strong belief that its work must extend beyond the drafting of new laws; to include active collaboration with the constituencies it has helped to form, to ensure that reforms are implemented well. As a result of the two new laws, a positive atmosphere regarding respect for human rights and constitutional guarantees has been fostered, which is essential for the pursuit of further reforms.

### 5. Current Reform Efforts of the Ministry of Justice and the Supreme Court

In September 1994, the Ministry of Justice and the Supreme Court hosted a week-long conference to review procedural code reform trends in Latin America, and to discuss prospective changes in the civil and criminal procedures codes. The idea was to decide on an agenda for procedural reform by consensus. Judges, lawyers, politicians, and representatives of other relevant justice-related offices were invited. Argentine and Costa Rican experts reviewed criminal procedure reform efforts being carried out in their countries, and two Ministers of the Uruguayan Supreme Court made presentations on Uruguay's experience in implementing its major civil procedure reforms, including use of the oral process. It was agreed at the Conference to focus first on a new *Ley de Código Procesal Penal*, and to keep discussing future changes in civil court procedures.

To assure careful development of the Criminal Procedures Code reform, the Ministry established an advisory committee of prominent attorneys, judges, and law professors; engaged a young law professor and a judge who had studied criminal law in Costa Rica as principal drafters; and arranged for nine months of donor-financed technical assistance from Argentina and Costa Rica. The Ministry was careful to keep control of the consultation and drafting process itself. Regional seminars are presently underway, and the draft law will soon be sent to Congress.

Despite the Constitutional amendment calling for establishment of a *Consejo de la Judicatura* and a *Tribunal Constitucional*, detailed discussion regarding the structure and procedures of these two new bodies continues. Some of this debate has reflected the fact that the changes are still not welcomed in some quarters. The Supreme Court wants to ensure that its authority is not unduly proscribed by the *Consejo de la Judicatura*; and political parties, traditionally a dominant force in designation of judges, must now adjust to the idea of influencing the selection of judges through participation in processes for gaining Senate approval of judicial nominations, made by the *Consejo*.

In drafting the enabling laws for both new institutions, the Ministry and the Supreme Court naturally have had to work closely together. Cooperation between the Executive and Judicial Branches is proceeding relatively smoothly, due in part to efforts by the members of both organizations to maintain good working relationships. The Supreme Court has established a *Consejo de Reformas Judiciales* to work directly with the Executive and Legislative Branches to facilitate its participation in the reform process.

With donor assistance, the Supreme Court also has actively promoted awareness and discussions of alternative dispute resolution methodologies. The Court initiated a series of workshops around the country on court-annexed alternative dispute resolution processes, in which judges from several districts, Ministers of the

---

<sup>132</sup> Later, the personal efforts of the Minister to improve the treatment of the accused were recognized by the Southwestern Legal Foundation of Southern Methodist University, with a human rights award.

Supreme Court, and law students participated. Mediation trainers from the Bogota Chamber of Commerce were invited to carry out mediation simulations. As a result of these efforts, it has been agreed that a pilot court-annexed mediation project will be developed through joint efforts by the Supreme Court and the Superior Court of Cochabamba.

As for the MOJ, it is now turning its attention to new reform areas: partial changes in the criminal code to incorporate criminalization of computer crimes, money laundering, and other recent criminal phenomena; changes in civil court procedures, and the eventual implementation of the oral process there; modernization of the commercial code; and a law for uniform administrative processes. These areas have been selected as a result of a series of consultations with interested parties. The Ministry decided to keep meeting with civil court judges periodically, despite the reluctance they expressed at the September 1994 Workshop about making procedural changes; some judges now favor making incremental changes. Sentiment within the Bar Association has also changed in this regard. These experiences show the value of making sure coalition-building efforts are carried out on a continuous basis.

Among the factors which have helped make Bolivia's coalition and consensus-building efforts effective are: 1) the successful experience of the *Consejo de Reforma del Poder Judicial* in establishing the basis for a broad and lasting coalition in favor of judicial reform; 2) the full political support of the President of the Republic; 3) the Minister of Justice's commitment to elaborating reforms in a participatory manner, to personally lobbying a wide variety of interest groups to keep the reform agenda moving ahead, and to working with the press, radio, and television media to ensure public opinion is well informed; 4) the importance of generating accurate statistics to use in the Ministry's communication programs; 5) the continuity and permanence of the Ministry's consultations with various interest groups and individuals; 6) the Bolivian authorities' insistence on taking the lead in elaborating the content of reforms, and setting the strategies which will be followed to implement them; and 7) being willing to learn from the judicial reform experiences of colleagues in other countries.

## 6. Actions Taken by the Private Sector

The Chambers of Commerce of La Paz, Cochabamba, and Santa Cruz have worked with the Inter-American Bar Foundation (IABF) since 1992 to establish Bolivia's first three commercial arbitration and conciliation centers. In order to move this initiative ahead, the Chambers collaborated with the IABF, and sponsored visits to the Bogota Chamber of Commerce, to observe its programs. In addition, numerous workshops, study groups, and training sessions were carried out to build consensus among the commercial firms, attorneys, and judicial sector officials involved, to show that arbitration and conciliation programs could be useful in Bolivia, and to decide how they should operate in the distinct business environments encountered in the country.

Two Bolivian NGOs have also been active in coalition-building: *Fundacion San Gabriel* (FSG) and *Capacitacion y Derechos Ciudadanos* (CDC). Some of FSG's female members, who were active in providing free legal assistance to the urban poor, decided to cooperate together to draft a domestic violence law and push for its passage. Mostly by force of their own persistence and determination, these lawyers raised public awareness of the fact that a law was needed, and lobbied the Executive Branch and Congress. With the support of the *Subsecretaria de Asuntos Etnicos, de Genero y de Generaciones*, the *Ley de Violencia Doméstica* was passed in mid 1995. The GOB has been very active in public awareness campaigns regarding the law. Were it not for the persistence of the FSG's advocacy, the law would not exist.

CDC was established with the assistance of a U.S. NGO, the National Institute for Citizen Education in the Law. CDC uses a volunteer staff of law students and professors to educate disadvantaged groups and youth about their rights as citizens. Over seventy current and former law students are volunteering, and some 6000 people (prisoners, poor, and youth) in Bolivia's three major cities have received information. CDC's modest program responds to a commonly perceived problem in the country: a widespread lack of knowledge

by citizens of basic Bolivian laws, and their rights. As in other countries, both developed and developing, the conviction exists that the more citizens are aware of their rights, the better the justice system will function.<sup>133</sup>

### III. CONCLUSIONS

The conclusions given below are intended to serve as a basis for discussion only, and do not pretend to be definitive. The Annex includes tables prepared to facilitate comparison of coalition and constituency-building actions taken in Argentina and Bolivia.

#### A. Lessons Learned

Some lessons regarding coalition and constituency-building can be derived from the experiences in Bolivia and Argentina described above, and may be of use in other countries. Before turning to them, it would be useful to recall the "lessons learned," which were mentioned by the authors of the USAID Rule of Law Study mentioned in Section I:

- A strong civil society is an effective base for launching efforts to mobilize constituencies to support ROL development.
- There are few examples of bar associations serving as major sources for reform initiatives.
- The commercial sector can be an important reform constituency.
- Although NGO coalitions may prove difficult to build, they can form a strong force for legal reform.
- Free and effective media are needed to support constituency-building.
- Reliable court statistics are needed to inform public debate on ROL.
- Opinion surveys are invaluable for assessing public demand for judicial reform.

From the Argentine and Bolivian experiences, we might also conclude:

- Reforms will not occur in the absence of political will on behalf of the courts. Executive Branch/ Presidential support is also very desirable, and should be sought, but it is not essential in today's democracies, especially if court leaders are determined to do the coalition and constituency-building needed to effect reforms.<sup>134</sup>
- Active participation in the reform-making process by a broad spectrum of interested parties is an indispensable ingredient to success. Broad participation in establishing priorities and designing specific reform measures must begin early in the process.<sup>135</sup>
- Individuals and organizations from both the public and private sectors, who are interested in judicial reform, need to reach out to each other and collaborate. Coalition-building efforts should be carried out continuously in order to keep the consensus in favor of reform strong, and to be prepared to take advantage of opportunities for initiatives when they arise.
- Leadership of reform efforts from within the justice sector can come from both its formal and informal leaders.
- Those wishing to promote reform need to ensure they are well informed about how their court systems are functioning, legal and other problems affecting the delivery of justice in their countries, what has been successfully done to address judicial problems in other countries, and what resources can be mobilized, both within their countries and from foreign donors.

---

<sup>133</sup> In this regard, mention should also be made of the fact that the District Court of Tarija established Bolivia's first court public relations office. It is expected that the Courts in La Paz and Cochabamba will soon do the same.

<sup>134</sup> In Argentina, reform is occurring in those court systems where court leadership has taken an interest in reform, and not in others. This is true even though executive branch support for reform, whether at the national or provincial level, is either neutral or not consistently in support of judicial reforms. In Bolivia, the Executive Branch is taking the lead, and successes are being achieved because the courts are cooperating.

<sup>135</sup> The success or failure of several reform efforts cited above was principally due to whether or not adequate participation was sought and achieved.

- Programs to educate sectors of the public regarding their rights as citizens can be useful in most countries in raising citizen awareness about the relationships between the effectiveness of the justice sector and their everyday lives.
- The knowledge gained through the use of polls and focus groups about widely shared public concerns should be used by reform leaders to make sure their reform agendas are demand-driven, thereby generating public support for the reform process itself.<sup>136</sup>

## **B. Illustrative Actions and Recommendations for Building Coalitions and Constituencies for Justice Sector Reform**

### **1. Establish Commissions to Develop Reform Agendas and Task Forces to Elaborate and Promote Specific Reform Measures.**

Successful Examples: Bolivian *Consejo de Reformas del Poder Judicial*; initiatives of Supreme Court of the Province of Buenos Aires; Bolivian Conference to define priorities for procedural code reforms.

#### Keys to Success:

- Ensuring broad participation from all interested organizations and sectors.
- Providing for mixed participation of both technical and political leaders.
- Exercising good committee leadership -- for commissions, preferably a high-level political official or a revered senior citizen enjoying wide public confidence; for task forces, persons with both technical knowledge and "people skills."
- Reaching out to special interest groups and experts to incorporate their inputs on particular issues.
- Balancing time allotted to complete work. Adequate time to develop consensus should be given, but deadlines also have to be set and met.

### **2. Carry Out Diagnostic Studies as Basis for Action Plans.**

Successful Examples: None.

#### Keys to Success:

- Ensuring ultimate supervision by national experts. The use of foreign experts familiar with reforms in other countries, to complement efforts of national experts, should be welcomed.
- Reaching out within country to interest groups to involve them in analysis, thereby incorporating them into reform constituencies.
- Providing for effective cooperation and coordination among team members.
- Getting participants in system to define its problems and suggest reforms.

### **3. Carry Out Public Awareness Efforts.**

Successful Examples: *Poder Ciudadano* (A); *Capacitacion y Derechos Ciudadanos* (B); *Fundación La Ley* (A); *Conciencia* (A); Bolivian and Argentine Ministers of Justice.

#### Keys to Success:

- Targeting various interest groups to learn about their particular problems.
- Using press conferences, formal and informal press briefings, and published interviews to explain reform agendas.

<sup>136</sup> e.g., two new Bolivian laws affecting treatment of suspects.

- Employing qualified volunteers. Their participation helps them learn about the system, and makes them possible reform advocates.
- Being dedicated, determined, and imaginative.
- Taking advantage of foreign experts as speakers

#### **4. Network Among Groups Concerned with Reforms.**

**Successful Examples:** Bolivian Minister of Justice; Bolivian Chambers of Commerce Arbitration and Conciliation Centers; *Fundación La Ley* (A); *Fundación Libra* (A); *Procurador del Tesoro* (A).

##### **Keys to Success:**

- Targeting a wide variety of interest groups: civic organizations; business associations; advocacy groups; officials of other justice sector institutions; employees of the court system; bar associations; donor organizations; colleagues from other countries (directly and through regional associations).
- Taking advantage of opportunities to participate in public and semi-private fora.
- Keeping in regular contact with network.
- Encouraging colleagues within the justice system to contact and cooperate with NGOs.

#### **5. Maintain Contact with Political Leaders.**

**Successful Examples:** Argentine business leaders; Bolivian Minister of Justice; *Fundación Libra* (A).

##### **Keys to Success:**

- Taking advantage of opportunities, both for informal contacts and formal occasions, to address congressional committees and cabinet meetings.
- Staying in touch with donor organizations. (This can help leaders from both NGOs and the justice sector itself to make contacts with national organizations and individuals they would like to influence.)
- Ensuring important political contacts to target are not neglected: the President of the Nation, Ministers of Finance, opposition party leaders, congressional leaders, local government leaders.

#### **6. Promote Partnerships to Implement Specific Reforms – between public and private organizations, two public organizations, or two private ones.**

**Successful Examples:** MOJ-*Fundación Libra* (A) (public-private); MOJ-Supreme Court (B) (public-public); *Fundación La Ley*-Other NGOs (A) (private-private).

##### **Keys to Success:**

- Forming informal groups of NGO and justice organization representatives to interchange ideas. Meeting regularly.
- Making specific proposals for cooperation between NGOs and justice sector officials.
- Avoiding vague agreements for cooperation. Focusing agreements on specific programs.

## **7. Keep Well Informed.**

**Successful Examples:** Supreme Court of the Province of Buenos Aires; Bolivian Supreme Court's court-connected ADR programs; *Fundación San Gabriel* (B); *Fundación Libra* (A); FIEL and IDEA (A).

### **Keys to Success:**

- **Asking those who work in areas of interest to define problems as they see them.**
- **Getting reliable statistics on court operations.**
- **Educating yourself about the specific areas in which you want to advocate change.**
- **Learning what other countries have done to address similar problems – through visiting speakers, visits to other countries, and participation in regional conferences.**
- **Using the information gathered for public awareness campaigns and to defend reforms.**

## COALITION AND CONSTITUENCY-BUILDING ACTIONS COMPARED

The coalition and constituency-building actions taken in Argentina and Bolivia are presented in the tables below, for the purpose of comparing factors which affected their success, or lack thereof. Separate tables divide the actions into two categories: those designed to help create coalitions generally in favor of judicial reform, and those designed to help form constituencies in favor of specific reform measures. Within the tables, very successful actions are marked "VS;" successful actions with less impact are marked "S;" and activities which were not successful are marked "NS."

### 1. Actions by Justice Sector-Related Officials and Organizations to Generate Support for Reform

ORGANIZATION	ACTION	RESULTS	FACTORS
Bol. Consejo de Reformas del Poder Judicial (CONARE)	Agreement on reform agenda	VS - Broad coalition formed; political consensus for reform achieved; two laws drafted	Broad participation, both technical and political; good leadership; learned from Costa Rican experience
Arg. Min. of Justice	Public presentations	S - Interest groups, public, and Gov't better informed	Minister's willingness; NGOs not antagonistic
Arg. Procurador del Tesoro	Participated in discussions with interest groups	S - President requested he lead negotiations to amend Constitution	Interested in reforms; kept confidence of Pres.; stayed in contact with pvt/NGO interest groups
Arg. National Supreme Court	Visit of two U.S. Supreme Court Justices	S - President and Mins. of Court made more aware of reform needs	Similarity of U.S. and Arg. Systems
Arg. MOJ	Cooperation with World Bank for diagnostic study	NS - Results discredited; unable to gain support of Min. Econ.; missed opportunity to construct coalition	Inadequate cooperation among team members; lack of participation by interested Arg. parties

**2. Actions Taken By Non-Governmental Organizations to Generate Support for Reform**

<b>ORGANIZATION</b>	<b>ACTION</b>	<b>RESULTS</b>	<b>FACTORS</b>
Arg. Fundación La Ley	Expert speakers/visits to U.S. courts and judicial institutions	VS - Interest groups informed/engaged; coalitions formed	Speakers invited were practicing professionals; speakers well scheduled with variety of local groups; court officials learned of experiences of colleagues; linkages between courts made
Arg. Poder Ciudadano	Judicial education and corruption awareness programs; media efforts	VS - Increased demand for reforms	Contacts within both justice sector and media; credibility of PC founders; imaginative programs; donor funding
Bol. Capacitacion y Derechos Ciudadanos	Citizen rights programs	S - Over 6000 people informed; over 70 volunteer lawyers involved	Responds to recognized need; dedication of volunteers; donor support
Arg. Instituto de Empresarios Argentinos (IDEA)	Public awareness and seminars on "judicial security"	S - Raised GOA sensitivity re legal environment for business; got business leaders involved in coalition for reform	Prestige of organization; press and foreign contacts; took follow-up actions
Arg. Fund. de Investigacion Econ. Latinoamer (FIEL)	Comparative study of judicial administration costs	S - Generated reliable info to support demand for reform	Reputable org.: good foreign contacts; did thorough investigation

**3. Actions Taken by Justice Sector-Related Officials and Organizations to Promote Specific Reforms**

<b>ORGANIZATION</b>	<b>ACTION</b>	<b>RESULTS</b>	<b>FACTORS</b>
Bol. Ministry of Justice	Pursuit of its legal and structural reform agenda	VS - Two laws passed and others successfully drafted; popular support for reform generated; forward momentum on reforms maintained	Presidential support; groundwork by CONARE; active coalition-bldg. by Minister; participatory dev. of reforms; continuous contact with interest groups; nationals lead effort
Arg. Supreme Court of the Prov. of Buenos Aires	Creation and operation of Judicial Planning Office	VS - Implementation of decentralized planning; personnel mgt. improvements; pub. defenders trng.; public relations program; etc.	Participatory manner in which office operates; full support of Court; availability of pilot project funds from donor; necessary time spent forming consensus
Bolivian Government	Passage of Constitutional amendments	VS - Establishment of new judicial sector institutions	CONARE created consensus for reforms; solid political support
Arg. MOJ and Fundación Libra	Official introduction of use of mediation	VS - Use of mediation as ADR mechanism growing rapidly; disputes resolved more rapidly	Public-private partnership worked well; F. Libra created by practicing judges; their dedication to reform
Bolivian Supreme Court	Court-annexed mediation and conciliation	S - Consensus achieved to pursue program; pilot project being developed	Broad participation sought; learned from experiences in another country
Arg. MOJ	Neighborhood justice centers	S (but only in 8 areas) - pilot projects not multiplied; volunteers could have been used for other reforms	Limited MOJ financial commitment and interest
Arg. Supreme Court	Plan for National Judicial School	NS - No action taken	Infighting and lack of political will
Arg. Supreme Court	Diagnosis and action plan for administrative reform	NS - Report not used	Not carried out in participatory manner with Court personnel whose concurrence needed to implement plan; only two Court Mins. involved

**4. Actions Taken by Non-Governmental Organizations to Promote Specific Reforms**

<b>ORGANIZATION</b>	<b>ACTION</b>	<b>RESULTS</b>	<b>FACTORS</b>
Arg. Fundación La Ley	Sponsored formation of informal group of NGOs and public sector orgs. interested in judicial reform	VS - Gallup poll; Consejo de Magistratura public awareness programs	Organizations with different motives for interest in reforms found they could work as one constituency; participants generated new ideas together; better programs emerged
Bolivian Chambers of Commerce	Commercial Mediation and Conciliation Centers	VS - Centers established in country's 3 main cities; draft law pending	Broad-based efforts; linkage with IABF and another country
Bol. Fundación San Gabriel	Drafting and lobbying for a domestic violence law	VS - Law passed, and public awareness campaigns active	Responded to felt need; successful public-private coop.; perseverance
FORES (Arg.)	Legal aid program	VS - Trained public defenders throughout country; increased awareness of importance or legal aid	Willingness to implement specific reform on own; receptivity of public defenders and courts
Arg. Centro de Estudios Institucionales	Facilitation between Yale and Univ. Palermo	S - Masters of Law Program estab.; law students and recent graduates more involved in reforms	CEI members attended Yale; modest donor funding

## Response from the World Bank

### Argentina

The World Bank financed a small judicial information technology component (US\$7 million) as part of a larger public sector reform loan in 1989. In 1992 an Institutional Development Fund Grant (US\$500,000) was approved by the Bank to review the federal and national judicial system, and provide recommendations for reform. This study reviewed the previous studies that had been conducted on judicial reform, and some for the reforms that had been implemented in the provincial courts. The team of consultants included local and international experts, as well as members of the judiciary, who met weekly as a group. There was also an Advisory Committee composed of two members of the Supreme Court, one representative from the Provincial Courts, one from the Ministry of Justice, and the Dean of the Belgrano Law School, who guided the overall study, and met periodically with the study team to discuss their findings and recommendations.

Upon completion of the study, a two day conference took place to discuss the study's findings and conclusions. It was attended by members of the legal community which included representatives of the Ministry of Justice and Supreme Court, members of the Judiciary, lawyers, academics, and the public. Copies of the study were distributed during the conference, and were sent upon request thereafter. As a result of the conference, it was evident that there was public support for the reform efforts, and that the recommendations made were appropriate. This was an important step in the process of building consensus for the reforms. Some of these reforms have since been implemented. However, there has been no further assistance by the World Bank. The Ministry of Economy requested that the World Bank and IDB wait until the *Consejo de la Magistratura* was implemented to finance a follow-up legal and judicial reform loan. Nevertheless, some judicial reforms have been financed in the Provinces through the Provincial Loans I and II.

## COMMENTARY

Reforms, to be effective, require a strong, broad base of support among constituencies that will be affected by the reform and, desirably, among the general public. In the justice area, this calls for developing some consensus within the judiciary, particularly if resistance to the reform is anticipated, and creating supportive coalitions that involve justice system leaders, the bar, public officials (legislative and executive branch), and civil society constituencies. The emergence of a strong demand for justice system reforms is an integral part of the reform strategy.

There is an acknowledgment that different types of legal, institutional, or procedural changes require different kinds of coalitions and strategies. While *ad hoc* coalitions are common, there exist few, if any, examples of systematically planned coalition or consensus building strategies in the region.

The judiciary can, and should, play an active role. For example, even though it cannot make law, it can use court decisions to encourage legislative action, or to initiate legal change. It operates, however, under a number of constraints which tend to limit its involvement (in the legislative area, for instance, or in dealing with media). These constraints can be mitigated through judicial associations or unions.

Overall, the value of supportive constituencies is being acknowledged, increasingly because a number of reforms over the past decade have fallen short of their objectives when such support did not exist. But the degree of appreciation, or sense of urgency about the critical role of coalitions varies greatly among countries:

- Some reformers believe that the notion of coalition and consensus building remains somewhat vague, and lends itself to generalizations that are not particularly helpful.
- Historically, the judicial branch is defined, or perceives itself, as vested with the power and responsibility to promote change -- the notion of power sharing is still on unfamiliar and untested grounds.
- In Latin America and other regions undergoing reforms, natural allies, such as the Bar or the Third Sector (NGOs and voluntary associations), rarely have the track record, capacity, or reputation to serve as champions of the reform and assist in building supportive coalitions.

The development of coalitions and constituencies is a relatively new development in strategic planning for justice reforms -- and one of the more challenging ones. It requires further studies, testing, and evaluations. Donors and multinational organizations should be aware that they can play a unique, catalytic role in marshaling coalition support for various reforms, by encouraging the development of such coalitions.

## VI. PUBLIC DEFENSE

### LESSONS LEARNED: PUBLIC DEFENSE IN LATIN AMERICA AND THE UNITED STATES

Richard J. Wilson<sup>137</sup>

#### I. INTRODUCTION: *WEIGHING IN*, ACCESS STRATEGIES AND PUBLIC DEFENSE

In 1994, Blair and Hansen wrote a paper for AID entitled, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs*. The paper assessed rule of law programs in several countries, including Argentina, Colombia, Honduras and Uruguay in the Latin American region. It used several discrete categories of strategy for rule of law reform, including the following: "Constituency and Coalition Building," "Structural Reform," "Access Creation," and "Legal System Strengthening." The paper prescribed several courses of action for AID, based on its assessment, and since then has been influential in policy formation within AID.

*Weighing In* lacks relevancy to the issue of whether and where resources should be invested to improve the provision of defense services for the poor. In the context of the strategies under evaluation in the paper, the right to counsel for the indigent in criminal cases, or public defense,<sup>1</sup> is dealt with in the "Access Creation Strategies," discussed in Chapter 7. The question for that chapter was whether there is "full and equitable access to the legal system." (p.35). As used in the context of the chapter, the term "access" generally refers to the ability of poor or other subordinated people to gain legal redress by means of litigation in which they are the plaintiffs. These are issues such as housing, public benefits, family law, or others. International and domestic law, however, sharply distinguishes between the right to counsel in pursuit of such affirmative rights, and the right to counsel when the state uses its force to arrest, prosecute, and incarcerate the poor. In civil cases, the right to counsel is derivative: it only exists to assure that the underlying substantive rights are protected. In the case of the right to counsel in criminal cases, however, the right is specifically delineated in international law and most domestic law. It is, in other words, a substantive right itself. The issue of the right to counsel for the poor in criminal matters is simply different in kind from that dealt with in "Access Strategies."

In Chapter 7, *Weighing In* reaches no conclusions about the lessons from AID's support in the strengthening of public defense, although it obliquely suggests that, in part, "such programs are designed to alleviate the plight of the large number of detainees languishing in prisons awaiting trial or sentencing." (p.39). This conclusion is fundamentally in error, not because it is incorrect – it is true that effective public defense can deal with jail overcrowding – but because it misses the point of indigent defense services. Such services are not provided *principally* to prevent jail overcrowding, but rather, to prevent abuses by the state in the exercise of its penal powers, not the least of which is prevention of the conviction of innocent persons. Jail overcrowding is an effect of the abuse of such powers, one of many such abuses which proper defense may prevent. The issue of public defense, in fact, should have been included in Chapter 6, on "Structural Reform," where other major components of the criminal justice system – the "*fiscalia*" or prosecutor's office, and the courts – are addressed. This lack of treatment of criminal defense as a systemic, structural issue, rather than an access issue, is key to a shift in public consciousness about the place and role of public defenders. Effective defense must be offered on an individual basis in serious criminal matters, and on an effective systemic basis throughout the criminal justice system, or the country in question, as will be shown below, acts in violation not only of its domestic law, but of international law as well. Moreover, *Weighing In*, by not addressing public defense as a systemic issue, underrates the importance of the systemic provision of defense services to the efficient operation of the criminal justice system.

---

<sup>137</sup> Mr. Wilson is the Director of the International Human Rights Clinic, Practicing Law Center, Washington College of Law, American University.

Thus, *Weighing In* widely misses the mark on the essential question of the need for provision of effective defense services. The rest of this paper will demonstrate the crucial relevance of such services to the fair and effective operation of national criminal justice systems, and will focus on some lessons learned from new systems for public defense in both Latin America<sup>ii</sup> and the United States.

## **II. THE RIGHT TO DEFENSE COUNSEL IN THE CONTEXT OF THE CRIMINAL PROCESS: AN OVERVIEW**

This paper addresses the right of the indigent defendant to the appointment of defense counsel in criminal cases. That right is one of a panoply of rights afforded to the defendant when the state brings to bear its coercive power to accuse and punish people for criminal wrongdoing. The array of protections for the accused in the criminal process is among the most detailed in international and domestic instruments, because a charge of criminal activity invokes the state's use of the power to either take away liberty or, in the case of capital punishment, to permissibly take away life itself. Criminal charges alone, even after successful defense, can have devastating economic and emotional consequences for the accused. This awesome power must be carefully constrained; such is the role of the detailed set of rights provided to the accused in the criminal process.

The format of this paper is necessarily long on introduction of the legal bases for the right to defense counsel, since the sources for, and development of that right are relatively recent in origin. Many of those rights have been legislatively or judicially amplified within the past thirty years, and many of the standards for the performance of defense counsel, either in individual cases or as part of a more systematic delivery system, are only decades old. The need for more systemic approaches in the provision of defense services in Latin America is one of the most serious problems in criminal justice reform. With this background, I will review some of the lessons learned in reform of public defense in both Latin America and the United States.

This paper is also narrow in focus. It addresses only the question of the provision of counsel to the indigent in criminal matters. While many developed countries in Europe organize the provision of legal services to the poor through a single delivery scheme, whether the legal issue is criminal or civil, the right to counsel in civil cases is a more complex question of law and morality.<sup>iii</sup> Nor does this paper address the relative merits of defendants' rights versus victims' rights, a heated but unrelated issue which must be left for another forum. Neither does it address, except as they may be related to the right to counsel, other fundamental rights of all accused persons in criminal proceedings: protection against arbitrary arrest, search or seizure; protection from torture or other physical mistreatment; protection against prolonged or *incommunicado* detention; the principles of *in dubio pro reo* and *non bis in idem*; the right to trial by a competent, independent, and impartial tribunal; and the vast array of other procedural rights during the preparation, presentation, and review of charges against a defendant in the criminal process. This is not to minimize these protections in any way, but only to acknowledge that their discussion lies largely outside the scope of this paper.

In this section, the conceptual bases for the right to counsel for legally indigent persons in criminal proceedings are briefly reviewed. Review of these bases looks beyond the explicit right to appointed counsel itself, to the more theoretical bases on which the right to counsel in criminal proceedings is grounded. There are no assumptions here about the type of system being used to determine guilt: the system may be written or oral, inquisitorial or accusatory in nature. These conceptual bases are inherent in the formulation of the modern relationship between the state and the individual.

### **A. The Right to Equality Before the Law**

Perhaps the most easily recognized conception of the right of the indigent accused to counsel lies in notions of equality. It simply strikes us as a fundamental skewing of justice to permit access to counsel for the rich, while denying it to the poor (although, in many countries of the world, that skew is a hard reality). A poor person facing criminal charges is normally helpless to respond, without counsel, to the overwhelming

force of the state. One of the basic tenets of a democratic society must be the maxim that: "Thou shalt not ration justice." Justice William Brennan, writing while a member of the United States Supreme Court, may have put the issue most poignantly when he wrote:

Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law as a doubtful luxury and the poor, when they need it most cannot have it, the threat to the continued existence of free democracy is not imaginary.<sup>iv</sup>

This right to equality must also be said to encompass "equality of arms" in the criminal process, a well-recognized concept in international human rights law. Under this concept, the state and the defendant must be afforded enough equality to insure that the government's actions do not take place in the absence of participation by the defense. The decisions of both the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights,<sup>v</sup> as well as the European Court of Human Rights,<sup>vi</sup> recognize this principle. The European Court deals with the vast majority of countries which, like Latin America, are rooted in the Roman or civil law tradition.

### **B. The Right to Due Process of Law**

Within this conceptual category, we find the right to procedural due process, as well as the related concepts of fair trial, and the right to defense itself. No criminal process could be considered fundamentally fair without affording an opportunity for the accused to participate in a meaningful and effective manner. This right to meaningful participation covers a wide variety of rights, such as presentment of the accused before a magistrate without undue delay, adequate time and resources to prepare a defense, the right to a fair and public hearing by a competent, impartial and independent tribunal, and access to interpretation of foreign languages or dialects. None of this wide range of procedural rights can be effectively protected without the guiding hand of counsel. These rules come into effect from the moment of first encounter by the defendant with the criminal justice system (and sometimes even when the defendant is only a suspect), and apply through all stages of the criminal process, including the trial, appeals, and any collateral remedies which may lie, such as *habeas corpus* or *amparo*.

The right to defense and the right to free counsel for the indigent accused are essential components of fundamental due process, although that right has been limited, in international law, to appointment "if the interests of justice so require;" and certain national crises may constitute a basis for suspension of due process guarantees in criminal proceedings, as when, in the language of the International Covenant on Civil and Political Rights, for example, there exists "a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." Article 4(1). Even then, however, the limits on due process in criminal proceedings must be "strictly required by the exigencies of the situation," and they must not be either inconsistent with other obligations under international law, or applied in a discriminatory fashion.<sup>vii</sup> *Ibid*.

### **C. The Presumption of Innocence**

The presumption of innocence for the accused in criminal proceedings is recognized in virtually all of the relevant international human rights instruments, including the Universal Declaration of Human Rights (Article 11); the International Covenant on Civil and Political Rights (Article 14); the American Declaration on the Rights and Duties of Man (Article XXVI); and the American Convention on Human Rights (Article 8). It is explicit in most Latin American constitutions, but not in that of the United States. A recent study indicates that sixty-seven countries of the world include a right to presumption of innocence in their national constitutions.<sup>viii</sup> The operation of the presumption of innocence might be seen as an aspect of due process in criminal proceedings, but the presumption takes on such importance that it must be seen as a separate conceptual basis for the right to counsel in criminal cases.

The presumption of innocence normally attaches until the defendant is placed in "jeopardy" of conviction, that is, at the moment the trial begins. However, in some countries, such as Ecuador, the presumption may continue to apply until the entry of a final judgment by a court of review. The presumption works in practical ways to allocate burdens of proof, and to guarantee protection of the defendant's liberty rights before trial. In a criminal trial, for example, it is often asserted that the obligation of the prosecution to initially produce evidence of guilt, the defendant's right to stand mute in the face of such accusations, and the burden of proof beyond a reasonable doubt (each of which is a crucial aspect of the US criminal justice system, as well as in some Latin American systems); all find their origins in the presumption of innocence. However, the greatest obstacle to the realization of an operative presumption of innocence lies in the extensive use of preventive detention, or other forms of pre-trial incarceration. Such practices have long been common throughout Latin America, where pre-trial detention rates often exceed two-thirds of all criminals accused. The use of preventive detention is on the rise in the United States as well. Detention of a defendant for prolonged periods without conviction, sometimes in excess of the maximum sentence available for the offense in question, makes a mockery of alleged adherence to a presumption of innocence.

### III. LEGAL BASES FOR THE RIGHT TO APPOINTED COUNSEL IN CRIMINAL CASES

The right to free counsel for the indigent in criminal cases is one of many modern procedural rights which may be invoked against the state, but is a duty which the state is often reluctant to fulfill. This section will explore the sources of the right to counsel in both international and domestic law. It will conclude with a discussion of the all-important question as to the appropriate source for funding necessary to provide effective counsel in criminal proceedings.

#### A. Sources in International Human Rights Law

Twenty-six countries in Latin America and the Caribbean had ratified the International Covenant on Civil and Political Rights (ICCPR) as of January 1, 1995, while 25 had ratified the American Convention on Human Rights. These international instruments contain explicit guarantees of the right to counsel in criminal cases, and the decisions of their deliberative bodies provide greater elucidation of the meaning of the rights.

The ICCPR states, in Article 14(3)(b) and (d), as follows:

(3) In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality:

\*\*\*

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

\*\*\*

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; and to be informed, if he does not have legal assistance, of this right; *and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.* (Emphasis added).

One of the few decisions on the applicability of these provisions is that of the Human Rights Committee, in Reid v. Jamaica, CCPR/C/51/D/355/1989 (20 July 1994). There, the author of the petition had been sentenced to death for the alleged murder of his girlfriend. Pr. 2.1. The Committee found that Article 14(3)(b) had been violated where the government did not contest the assertion, "that the legal aid attorney who

represented the author at the preliminary inquiry was not present at all the hearings, and that the author met the legal aid lawyer who was going to represent him at the trial only ten minutes before its start." Pr. 14.2.

In the American Convention on Human Rights, Article 8(2)(c)-(e) provide:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to the law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

\*\*\*

- c. adequate time and means for the preparation of his defense;
- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e. the inalienable right to be assisted by counsel *provided by the state, paid or not as the domestic law provides*, if the accused does not defend himself personally or engage his own counsel within the time period established by law (emphasis added).

This language, again, has not been the subject of decisions by either the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights. However, two decisions of the Commission, involving trials by civilian and military courts in Argentina and Nicaragua respectively, found those proceedings to be so devoid of any legal safeguards, including the right to counsel, as to violate Article 8.<sup>ix</sup>

#### **B. Sources in Domestic Law**

Domestic law in the region usually gives the right to counsel in criminal proceedings constitutional status, although the specificity of the guarantee of free counsel for the legally indigent defendant is often unspecified, unclear, or developed in codification of the country's criminal procedure, other statutes, court rules, or bar association rules or practice.

The new Brazilian Constitution of 1990, for example, includes reference to "full and gratuitous legal assistance to anyone who proves that he has insufficient funds," (Article 5, LXXIV), then explicitly provides for the creation of a Public Defender Office (Articles 134-135), while the 1980 Chilean Constitution provides only that separate law "shall provide for the means whereby legal counsel and defense may be rendered to those who have been unable to obtain them on their own." The Guatemalan Constitution of 1985 includes a general reference to the right to defense, at Article 12, but develops a "Public Service of Criminal Defense" (*Servicio Público de Defensa Penal*) within the structure of its new Code of Criminal Procedure, which became effective in 1995, while Panama includes its Public Defense Institute (*Instituto de Defensa de Oficio*) within the provisions of the Judicial Code.

#### **C. Funding the Right to Appointed Counsel: An Obligation of the Bar or the State?**

The crucial question left unsettled by the international treaties, and usually not made explicit in domestic constitutional provisions either, is that of who bears the burden for funding the provision of counsel to the poor. In the ICCPR, for example, the relevant language states that the accused is to have legal assistance assigned "without payment by him in any such case if he does not have sufficient means to pay for it." This statement makes clear that the obligation does *not* lie with the accused, but leaves unsettled whether and how payment for the lawyer's services is to be made.

The question is often articulated as one of whether the state has an affirmative obligation to adequately fund the right to counsel, or whether that obligation should fall upon the shoulders of the bar, as part of professional "privileges." Two things are certain in this debate: first, throughout Latin America and in a number of jurisdictions in the United States, the state continues to invoke the *pro bono público* or *pro deo* obligation of the private practitioner, to handle criminal matters without compensation, as a means to justify

its non-funding or under-funding of the right to counsel; and second, where *pro bono* systems are used, defendants receive inadequate or non-existent representation. In most jurisdictions in Latin America where no system for provision of counsel to the poor exists, the right to counsel for the indigent in criminal cases is provided by either law students, practicing with minimal supervision as part of their graduation requirements, or by new and inexperienced counsel who are generally less qualified, less able, and less committed to their clients. Because no compensation is provided by the state for these services, attorneys are understandably reluctant to accept appointments which take time and energy away from paying clients. While no systematic study of this issue has been performed, no attorney, prosecutor, or judge who knows anything of criminal practice in the region can deny its fundamental truth. The poor deserve better.

In behalf of the obligation of the bar to assume a duty to provide such services, it is often asserted that the professional and autonomous status accorded to the attorney affords a basis for the *pro bono* obligation. This argument ignores the reality that other professions are privileged, yet no one expects the doctor to treat the poor, or the teacher to teach the poor, without some reasonable compensation from the state for their efforts. The obligation to provide counsel is not the bar's alone, but rather a burden shared by all of society to assure a measure of justice for all. Another argument is that payment by the state unduly compromises the independence of the legal profession. This argument, too, is unavailing, in that public defenders, fully salaried by the state, have functioned with a great measure of independence in the United States since the early 1960s, when their numbers rose dramatically. Finally, if it is asserted, as it sometimes is, that the burden of financing the right to counsel is too heavy for society to bear, it is absurd to suggest that the burden be assumed by the legal profession alone. It should be assumed, instead, that the cost of counsel for the poor in criminal cases is one of the state's "costs of doing business."

Many recent court decisions in the United States have found an enforceable right to funding from the state for assistance of counsel in criminal cases. In Kansas, for example, a court found that payment of an insufficient hourly fee (\$30 per hour) to appointed attorneys constituted a violation of the US Constitution's Fifth Amendment prohibition on taking of property without just compensation.<sup>x</sup> In Florida, maximum fees in capital cases, set by statute, were struck down as a violation of the Sixth Amendment right to counsel in the US Constitution,<sup>z</sup> and other courts have used equal protection and due process grounds to reach the same results.

#### **IV. CRITERIA FOR EFFECTIVE PERFORMANCE BY APPOINTED DEFENSE COUNSEL, AND FOR SYSTEMIC PROVISION OF DEFENSE SERVICES**

This section will provide a summary of the major criteria developed at the international and domestic levels for the provision of defense counsel to the indigent in criminal cases. Such criteria are important to the articulation of a place for defense services in the system of criminal justice, and not merely an *ad hoc* right to be provided at the pleasure of the individual judge. First, the obligations of individual defense counsel to their clients in every criminal case will be reviewed. Second, an argument regarding the need for systematic analysis of the provision of defense services at a national or regional level will be developed, and the section will conclude with an overview of the major areas of concern in the systematic, institutional provision of defense counsel.

##### **A. Performance of the Individual Attorney**

There are numerous bodies of standards at both the international and domestic levels on performance obligations of individual defense attorneys. At the international level, the most authoritative are the *United Nations Basic Principles on the Role of Lawyers* ("UN Basic Principles"), adopted in Havana, Cuba in 1990, at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders. Other bodies of internationally recognized standards on the role of defense counsel include the *International Charter of Legal Defense Rights*, adopted by the Union Internationale des Avocats in 1987; the *Draft Universal Declaration on the Independence of Justice*, developed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in final draft in 1988; and the *Draft Principles on the Independence of the Legal*

*Profession*, developed by a Committee of Experts of the International Association of Penal Law. Taken together, these principles develop the following:

**Minimum Obligations for Defense Counsel in Individual Representation:**

- Advice to clients of their legal rights and obligations, and as to the working of the legal system, so far as it is relevant to their client's legal rights and obligations;
- Assisting clients in every appropriate way to protect their interests through legal action;
- Assisting the client before courts, tribunals, or administrative bodies, as well as during police investigations, where appropriate.

In carrying out these tasks, the lawyer is to act "with complete freedom, diligently and courageously, according to the law, respecting the client's wishes and the ethics of the legal profession."

These minimum international criteria are supplemented by more detailed guidelines for performance, developed at the domestic level. No organization or governmental entity in a Latin American country has developed performance standards for individual defense attorneys, whether private or public. In the United States, national standards are found in the American Bar Association's *Standards for Criminal Justice, The Defense Function* (3d ed. 1991); the National Legal Aid and Defender Association's *Performance Guidelines for Criminal Defense Representation* (1994); and specialized standards for specific performance areas, such as the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1988). These standards offer detailed suggestions for counsel on performance in such activities as the initial client interview, pretrial release issues, legal and factual investigation of the case, formal and informal discovery of the prosecution's case, pretrial motions practice, trial preparation and presentation of the case to a judge or jury, sentencing and appeal issues, and even the question of tactics and strategies in the possible negotiation of a plea of guilty, a device in US jurisprudence which has begun to see analogs in such countries as Colombia, Guatemala and Chile. Again, taken together, these standards provide counsel with a rich array of tools to assure quality performance in individual cases. These standards are not binding legal obligations of counsel, and are unlikely to ever be held out by US courts as minimum criteria for performance, particularly given the stringent standards for review of counsel's performance, which require that the level of counsel's failures be so grave as to have affected the outcome of the trial; i.e., that the facts show that the defendant would otherwise have been found innocent.

**B. Standards for Defense Services: The Need for a Systematic Approach**

Lawyers are not used to thinking of the defense function in systematic terms. Until relatively recently, defense services have uniformly been provided *de officio*, by court appointment on an individual basis, and without compensation to the attorney. As such, the organized bar has usually welcomed the transformation of the defense function from an official function, to that of a totally integrated public defender program, with full-time staff attorneys. All too often, though, this dramatic transformation of the defense function from a totally individual basis, to a totally institutional basis, is an invitation for repeated failure in the provision of effective counsel to the indigent. There are two principal reasons for this failure. The first is that there are often no lawyers with institutional management experience or expertise; the fact that a lawyer is an excellent legal tactician does not mean that he or she is also an excellent office manager. Second, the expectation is that the new, full-time staff will handle all cases in the system, thus relieving the bar of its obligation of uncompensated representation. This is neither ethically nor realistically possible.

Any institutional defender program, handling hundreds or even thousands of cases a year, is bound to experience ethical conflicts of interest in its representation of the accused. The most common situation is that of several individuals charged with collusion in the commission of a single crime; two men rob a bank, for example, while the third waits in the getaway car outside. If all three men are arrested and charged with the

bank robbery, it is unlikely that the same defender office can represent all three men, particularly if one decides to confess, and thereby implicate the other defendants. How can one lawyer, or even one defender program – legally considered to be “one lawyer,” as all private firms are – ethically provide conflict-free representation in these circumstances? Nor is it realistic to believe that a staffed public defender program can handle all criminal cases in any jurisdiction, regardless of its staffing. The only public defender offices with appropriate caseload levels are those in which a cap is imposed on case intake, either by external regulation, or by internal management devices. Any additional cases above the cap are referred out to individual private attorneys, or attorneys under contract to perform such “case overflow” services. The practical difficulty of such a referral is that there is no funding for public defense beyond that (usually small) sum allocated to the public defender office itself. Thus, any referral out of the public defender office faces uncompensated, and inferior, representation.

When a program providing defense services begins to see its role in institutional, systematic terms, it can begin to organize an institutional response articulating its needs. The program becomes more competitive in seeking limited public funds. The program, however, must begin to articulate institutional needs in a way which projects absolute professionalism, which is based on careful preparation of factual and legal answers to the funders’ questions, and which is grounded in a well-articulated case for protection of the right to equal access to justice for all citizens, whether rich or poor.

The rest of this section will be devoted to a review of the most essential criteria which must be taken into account in the systematic organization of institutional public defense services. There are seven areas which must be addressed: independence, organization, administration, financing, scope of services, caseloads, and eligibility criteria. Each will be addressed in turn.

### **1. Independence**

The question of functional independence of any defender services program is essential to its survival and vitality. “Functional” independence is used here because all governmental entities must make real political judgments as to their leadership and financing. The challenge with indigent defense systems is to insulate the program from political vulnerability as much as possible. The key issues, then, are selection of staff and budget control. In many public defender programs in Latin America, all professional staff of a defender program are selected by the leadership of one of the primary governmental branches: executive, judicial or legislative. This direct influence on hiring invites political favoritism, nepotism, or even corruption in the filling of posts. To insulate the program, the institutional leadership of a defender program should include a relatively small and independent board of directors, composed primarily of those with knowledge about the defense function, such as representatives from the bar association or universities. Prosecutors should not be members of the board; judges should not make up a majority; nor should judges, before whom defenders will appear, take part in the leadership. This board should select the chief defender and approve a budget prepared by the director. The director, or the director’s delegate, should do all staff hiring. Budgetary decisions for the program should not be controlled exclusively by the branch of government in which the program is found, and all budgetary development should be grounded in actual work performed by the office, with projections of future work accounted for. All too often, an arbitrary figure, not grounded in any experience of programmatic need, is assigned to defense services;

### **2. Organization**

Organization of defense services in Latin America tends to gravitate to one of two polar opposites: either there is no program or financing at all, or the program is made into a traditional public defender model: a centralized bureaucracy with staff attorney positions for all services, and no other funding. There are potentially more alternative models for the organization of defense services, but all require adequate funding. There is little question that the classic public defender model is the most cost-efficient model by which to deliver services. There are economies of scale, to a point, which are gained by organizing, centralizing, and training defenders as permanent, full-time staff. Other alternatives exist, however, and should be explored. The contract model is essentially a privatized alternative to the public defender, and eliminates the costs

associated with the civil service status of the defender. Contracts also permit flexibility in administration by allowing more than one organization to deliver services, although careful monitoring and administration are required. In the coordinated assigned counsel model, a panel of private attorneys, selected for their experience and/or interest in criminal matters, is administered by a small central staff. Selection of the attorney to be assigned to the individual case can be done either randomly, or based on the experience and desire of the panel member. This system removes the naming of the attorney from the judge to the panel administrator, thus eliminating extra unwanted work for the judge, as well as the possibility of favoritism. Panel attorneys submit their expenses and fees at the conclusion of the case, and are paid on either an hourly or per-case basis. A variation of this model permits the qualified individual client, screened by the panel administrator, to select his or her attorney from participating members of the panel. Many of the most effective defender programs in the US use a mixed model, which includes components of all of the above, as the peculiarities of the specific jurisdiction require;

### **3. Administration**

To be effective and work efficiently, there must be effective management and adequate support services for the program. This will mean the necessity of some central administration -- though it need not be large -- and support staff, including secretarial and/or computer services; investigative and other assistance, often referred to as *suplentes, ayudantes, or auxiliares*, and a key part to the operation of prosecutorial offices; experts available to the program; and support personnel in the program capable of performing supervision and training functions. Administration also refers to adequate facilities to provide client services, with an eye toward privacy and confidentiality (both in and away from detention facilities and courthouses), adequate research and library facilities for staff attorneys, as well as other potential necessities, such as access to public vehicles or reimbursement for actual expenses incurred in visits to clients, witnesses, and court proceedings;

### **4. Adequate Financing**

This is probably the single-most neglected aspect of defender services, due in large measure to the unpopularity and lack of political voice of the program's clientele. Perhaps the best indicator of the adequacy of financing is a comparison of expenditures -- both salaries and overall budget -- with those made for the prosecutorial function in the same jurisdiction. Such comparisons normally yield dramatic disparities in favor of prosecution, and make a mockery of the theoretical concept of "equality of arms." As noted above, the expenditures for public defense are often made in one lump sum to a single program, usually with little attention to management or support questions. Moreover, such budgetary appropriations seldom account for the additional, inevitable necessity of providing some services outside of the salaried staff, either due to legal conflicts of interest, case overloads, or other unavailability of the defender program. The private practitioner providing defense services is entitled to a reasonable fee for his or her services, and, at the very least, to reimbursement for all reasonable expenses incurred in representation. Adequate financing for defense services must include these often "hidden" budget items, the absence of which makes the availability of services to particular clients a question of random luck, not systematic attention;

### **5. Scope of Services**

The most common mandate for defense services includes the provision of services in serious criminal matters involving adults. The scope of service, even within this limited universe of cases, is important to define. When, for example, will the defense attorney first be appointed to provide services? If a defendant requests counsel before that point in time, say after arrest and during interrogation, or even before arrest, is the defender able -- or required -- to provide services? What are the phases of the trial process at which the law mandates the presence of defense counsel, or requires it if requested by the client? When do the services of the attorney or office end: at the end of the sentencing phase, at the conclusion of all available appeals, during incarceration, or while under supervised release? Are there unusual types of cases, such as charges involving the death penalty, which may require more than one attorney, or extraordinary commitments of resources to the defense? The answers to each of these questions affects questions of allocation of personnel, as well as budgetary allocations. However, the mandate of the office usually extends further. It is common for defenders

to provide services in minor criminal cases, to juveniles, and to mentally unstable persons for whom civil commitment is sought. The mandate of the office, or its historical practices, may bring many other types of cases. The office may assume jurisdiction over civil matters involving potential loss of liberty, such as contempt proceedings for failure to pay child support, or other family matters such as child custody, abandonment, abuse or neglect proceedings, or even purely civil matters, if the scope of the appointing authority is sufficiently broad. Finally, adherence to strict procedural formalism, in countries such as Panama and Costa Rica, sometimes requires the defender to appear for trials at which the defendant himself is absent, and defense counsel may never have met the client! It is important that the program document its efforts in these categories, so that it might effectively assess its personnel needs, and so that additional budget allocations can be justified for the program;

#### **6. Caseloads**

In staffed programs, the major issue, always related to funding, is caseload limitations. In the United States, both national standards and the general ethics of law practice make it improper for a defender, or for an office, to accept more work than that which will permit the program to render competent, effective assistance, or which might lead to a breach of professional obligations. Judges, too, are admonished not to appoint defenders or programs when additional cases would lead to a breach of ethical responsibilities. None the less, defense programs chronically operate with excessive caseloads. The program should develop mechanisms which permit it to either refuse new appointments or, when absolutely necessary, refer pending cases to outside counsel;

#### **7. Eligibility for Defense Services**

One way of controlling caseloads is by controlling the universe of clients eligible for the program. The most common measures of eligibility are poverty or inability to retain counsel in the private market, although most Latin American statutes governing access to defense services place no income limits on eligibility. Occasionally, the program will limit access based on a review of the merits of the case, but such measures threaten the presumption of innocence, and judgments are made without adequate outside investigation. Oftentimes, policy-makers believe that significant savings can be achieved by either reviewing eligibility decisions more strictly, or by requiring some form of client contribution or other nominal payment for services. Generally, these schemes cost more than they yield in additional funding; only those who cannot afford to retain counsel normally seek the services of appointed counsel.

### **V. LESSONS LEARNED IN LATIN AMERICA AND THE UNITED STATES**

In this section, the accumulated bases for measurement of program success developed above are applied to the actuality of public defense in Latin America and the United States today. This review will not be exhaustive, but some of the major successes and failures in both regions are noted.

#### **A. Lessons Learned in Latin America**

##### **1. The Development of Modern, Adversarial Codes of Criminal Procedure**

During the past twenty years, Latin America has undergone a revolution in criminal procedure. Many countries have abandoned the traditional written procedures, with strong judicial control, in favor of oral, public, continuous proceedings, in which the parties have primary roles in the evidence-gathering and proof-offering phases. Costa Rica led these reforms with its Code of Criminal Procedure of 1973, while various states of Argentina modernized through the years. Now, complete reform of criminal procedure codes has occurred in Argentina (1992), Guatemala (1995), Panama (1986), and Peru (1991), while in Bolivia, Colombia, and Ecuador the reforms are extensive, all moving toward adversarial and oral systems. Draft proposals for reform have been made, and are well on the way toward adoption in Chile, Costa Rica, El

Salvador, and Paraguay. For these countries, efforts at modernization are a cornerstone of broader efforts at democratization and re-establishment or strengthening of the rule of law.

These changes in criminal procedure have had a curious, perhaps unintended effect on the right to defense, and on due process in general. The shift in emphasis from inquisitorial models to more adversarial proceedings, in which the defense must play a key role as part of the newly developing institutions, has resulted in an improvement of the institutional presence of public defense in the region. That presence, in turn, presses for protection of other procedural rights, and results in demands for improvement of the prosecutorial and judicial functions. Quite possibly, advancements in the protection of the right to defense are a key to the strengthening of the rule of law in a true criminal justice "system."

## **2. Adoption of Centralized, Salaried Public Defender Programs**

Perhaps the biggest change in the role of defense counsel in the past two decades has been the organization of new, centralized, salaried public defender programs in the region, often modeled on the experience of the oldest and, arguably, most politically successful program -- in Costa Rica. That program, in existence since 1966, and operating with a healthy and expanding national staff, and well-protected independence, provides a wealth of experience for other programs in the hemisphere. Other new programs have been developed in El Salvador, Honduras, and Panama in Central America, with additional programs now underway in Guatemala; and in the Caribbean, in the Dominican Republic. In South America, new programs have been developed or discussed as priorities in Colombia, Chile, Argentina, Bolivia and Peru.

## **3. The Instituto de Defensa de Oficio de Panamá: A Centralized Program with Protected Independence**

Of the new programs which have come into existence in the last ten years, special mention must be made of the program in Panama. That program, which came into existence only in 1991, has a number of features which deserve mention. First, it has a strong measure of political independence, because its employees are protected through their participation in the *carrera judicial*. This insulates the program from outside political attack, and has permitted it to expand significantly in the last several years. (On the other hand, there have been some complaints that less-qualified attorneys, from other offices protected by the *carrera*, have sought to move into the program without significant criminal law experience.) The office's professional staff is well-organized and dynamic, and there is a spirit and morale in the program which upholds the highest traditions of aggressive protection of the rights of the accused. While research and other support facilities could do better, the program creates a good deal of this morale by the holding of an annual training program, which brings people together for several days to discuss tactics, strategies, and programmatic direction in a reflective atmosphere.

## **4. The Corporación de Asistencia Legal de Chile: The Region's Only Comprehensive Program of Civil and Criminal Legal Services for the Poor**

One of the existing models which deserves mention is that of Chile. There, the *Corporación de Asistencia Legal* (CAP) has been in existence for more than 50 years, and provides legal assistance to the poor in both civil and criminal matters, making it unique in the region in this regard. Originally founded by the national bar association as a voluntary effort to provide access to the legal system for the poor, CAP came into formal legal existence in 1981, and has since become an integrated national program. In Chile, all graduating law students are required to perform a six-month period as *postulantes* with the CAP, working under the direct supervision of a staff attorney. The plan also has sophisticated mechanisms to deal with the provision of counsel when the CAP is unavailable, as well as for determination of eligibility for services, there called the *privilegio de pobreza*. The major difficulty with the program lies in the fact that it functions within a procedural system which is extremely antiquated, and in a political system which only recently became more openly democratic. For all of its alleged attention to the poor, the prior regime did little to make access to justice a reality for Chile's poor.

## 5. The Problem of Impunity and Accountability

There are, however, many difficulties which must yet be overcome in Latin America. Among the most enduring is that of impunity for the military, which controls a number of Latin American governments, either *de jure* or *de facto*. When there are attempts to provide for accountability for past wrongdoing, the military assures itself amnesties; when the issue is current wrongdoing, the scope of military court jurisdiction assures favorable treatment of the accused at the expense of civil society. Moreover, the impunity enjoyed by the military often extends to the police and civilian vigilante groups which operate with the full knowledge, and often the active support, of the military command. So long as this impunity continues, one can understand the cynicism of the common citizen, who wonders at the meaning of the "right to defense" in a system in which, for many, there is no fear of prosecution.

## 6. The Corollary of Insufficient Defense: Prolonged Pretrial Detention

Another systemic issue related to the right to defense is that of prolonged pre-trial detention. As noted at the outset of this monograph, the authors of *Weighing In on the Scales of Justice* suggest that effective criminal defense reduces the numbers and time periods of detention for those held in jail while awaiting trial, theoretically presumed to be innocent, but in fact serving time for offenses of which they may not be culpable. This problem seems to be more intractable than the simple provision of defense counsel. A recent study by ILANUD on public defense in Latin America shows that preventive detention may be mandatory, or, as in some countries, controlled by vague or difficult-to-meet criteria, such as proof that the accused is not a "habitual or professional" offender.<sup>xiii</sup> This results in continued high rates of incarceration, such as those in Honduras, where, as of 1992, 80% of the incarcerated population still had not been tried, and the average wait for trial was about two years.<sup>xiii</sup> Pre-trial release has been found, in the United States, to be one of the most important factors in the ability of a defendant to effectively prepare a defense. Until pre-trial release can be accomplished with the payment of a minimal appearance bond -- a routine practice in the United States, with very few problems of flight or re-incidence, the presumption of innocence will remain a theoretical guarantee only.

## 7. Insufficient Preparation for Significant Systemic Change in Criminal Justice Systems

Yet another issue in Latin America is the lack of planning for systemic changes, such as those which occur with radical reform of criminal procedure. Guatemala, which had a new code of criminal procedure in the legislative process for more than six years, was still completely unprepared for the necessary systemic changes when the code went into effect in July of 1995. Reform of the functions of the courts and prosecutor were implemented with some difficulty, but there simply was no means by which defense services could be delivered as contemplated in the reform. Those changes are under way now, almost a year later. Chile, on the other hand, is planning to adopt a new code of criminal procedure, but to delay its effective date until sometime after its formal adoption. This delay will allow much-needed institutional preparation and reform, as well as training for personnel in their new roles under the new code.

## 8. Insufficient Response by the State to Systemic Needs for Defense Services

The final difficulty worth noting involves the interplay of two phenomena in the region. The first is that of the continued reliance on the use of *pro bono* criminal defense by individual practitioners, often referred to as *servicios profesionales honoríficos*. Where there is no organized public defender office, this is the predominant system; the system of *honoríficos* still provides counsel in the great majority of Latin American cases. That system virtually guarantees incompetent representation. The second phenomenon, however, is that creation of a staffed public defender office is seen as a panacea. The office, however, as shown above, can never handle all cases, and those which are not handled by the organized program fall back into the system of *honoríficos*. Thus, the system of public defense normally provides a well-trained, experienced attorney to anyone who has the good fortune to obtain such an appointment, but this system operates side-by-side with outmoded *pro bono* systems, often in the same country. This reduces the right to

appointed counsel to a game of Russian Roulette, a kind of hit-or-miss opportunity for effective representation, depending on the luck of the draw. This provides neither the appearance nor the reality of equal access to justice.

By assuming the obligation to provide adequately funded public defense services, the state has recognized its obligation to provide the resource of counsel to all indigent criminal accused, regardless of the manner in which the attorney is appointed. Governments must recognize their obligation to fully fund the provision of defense counsel to all indigent accused persons. The organized bar is probably the best means by which to make this case to the funding source, both because of its unique position to articulate the case for the right to counsel, and, if for no other reason, because of the self-interest of its membership.

## **B. Lessons Learned in the United States**

The United States is made up of some 53 separate criminal justice systems: the federal and national military systems; the 50 states; and the District of Columbia, the nation's capital. Since the decision more than 30 years ago in Gideon v. Wainwright, in which the United States Supreme Court held that the federal constitutional right to counsel extended to the criminal accused in serious state prosecutions, these 53 jurisdictions have been "laboratories" for the right to appointed counsel, each developing its own unique approach to the issue. In my view, of the many developments in the provision of counsel over that time period, there have been two lessons of paramount importance.

### **1. Flexible Delivery Models Based on Local Needs**

First, the most successful public defense systems are those which provide a maximum amount of flexibility in the delivery mechanism, by using a "mixed model." In the Massachusetts system, for example, a very independent governing body has worked with the legislature to create a system which responds to the needs of urban Boston, as well as the rural western part of that small state. The central program in Boston operates with a staffed public defender program. That same office also administers a system of individual assigned counsel and contracts in the suburban and rural areas. The system provides central back up and training for all lawyers working in the state. In other states, such as Ohio, a small central administrative staff makes budgetary and administrative decisions for the entire state, while the choice of delivery mechanism is up to the counties in the state, which may choose their own delivery model, depending on local need and politics. Funding and monitoring of program quality are done from the central office, as are some issues which require the use of a state-wide strategy, such as death penalty defense. This kind of flexible solution is both cost-efficient and less subject to political attack, because no single model dominates.

### **2. Creative Political and Litigative Responses to Case Overload**

The second major development in the United States has been the response by programs and individual attorneys to the ongoing crisis in case overload. Creative use of case management and litigation have provided solutions in a number of jurisdictions. In some states, the program has opted for an attempt to use modern management techniques to control caseloads. Most routinely, the office simply counts the number of cases per attorney at any time and sets a maximum above which it will not go; or, it may suggest that a certain number of dispositions per attorney is a valid measure of performance or workload, and limit case acceptance accordingly. The program may undertake a time-management study to show how long a "typical" case in the office should take, then seek to establish that an individual attorney is capable of handling only so many "case units," using the typical measure, in a given year with fixed work hours. There may be some disagreement on the value of a "case unit," but offices have developed means by which to give different values to typical cases, such as theft, robbery, or homicides. With such case management techniques, the office can effectively make its case to the funding source for additional attorneys.

A more aggressive technique involves the use of the courts to enforce caseload limits. An office or an individual attorney may simply refuse to accept an appointment, asserting that acceptance of additional work would constitute dereliction of professional duty to those clients whom the attorney presently has. These

attorneys seek a court ruling that such acceptance would be either unconstitutional or violative of professional ethics. The proof offered in such cases comes from the office's caseload statistics themselves, and is often persuasive to judges who do not see the inside workings of an overloaded public defender program. Finally, some private attorneys have successfully argued that provision of defense services without remuneration constitutes a "taking" of private property (the attorney's property interest in his or her law practice) by the government, without just compensation. Such "takings" language is found in the constitutions of many Latin American countries.

### **3. Legislative Hostility to "Lawyers for Criminals," and the Need to "Get Tough on Crime"**

The most serious difficulty now facing defender programs throughout the country is the increasingly hostile attitude of legislatures to "the crime problem," and the perceived need to be tough on crime to prove to voters that politicians have the solution at hand. Despite the fact that study after study demonstrates that the solution to high crime rates never lies with a less lenient criminal process, legislators seem to spend a disproportionate amount of time defining new crimes, raising the sentences for those which already exist, and cutting back on procedural protections of any kind for the accused. In addition, in the United States, the issue of the widespread imposition of the death penalty is a problem which will soon reach crisis proportions. There are now over 3,000 individuals on death row in the state, federal, and military systems of justice, and less than 50 executions per year. The formal direction appears to be in the addition of crimes for which death is a possible sentence, but the penalty is seldom carried out by reluctant judges. There is no moral will to carry out the death penalty, but neither is there sufficient political will to abolish it.

## **VI. CONCLUSION**

The right to counsel in criminal cases is not a privilege, but a right embodied in international and domestic legal obligations throughout the Western Hemisphere. The obligation to make that right effective for all citizens lies not merely with the legal profession, but with all of society. States must take these legal obligations seriously, and create and fund criminal defense services, which provide the indigent accused with effective representation. Representation cannot begin to be effective until governments accept the obligation to provide systemic defense services with organizational and funding levels comparable to those of the prosecution function. Until such time, there is no effective "equality of arms."

The criminal process is undergoing a revolutionary sea change throughout Latin America, a change which is reflective of more general movements toward democracy and consolidation of the rule of law. These changes, however, must be something more than mere paper monuments to due process. There must be a change, demonstrated by action, in the reform of the actual operation of the criminal justice system; an essential component of which is the provision of criminal defense services to the poor. It is often said that the criminal justice system is a three-legged stool, with the courts, the prosecution, and the defense each playing their essential roles as "legs" supporting criminal justice. When the defense leg is shorter or substantially weaker, the three-legged stool cannot stand. Effective defense services make demands on the rest of the system as well. When lawyers for the defense ask judges and prosecutors to legally justify their decisions, the entire system of justice is improved, through greater accountability for all the participants. Effective public defense, then, is both a bulwark of protection against abuse of state power, and an essential participant in an integrated system of criminal justice.

## ENDNOTES

<sup>i</sup> Throughout this paper, the terms “public defense” (*defensa pública u oficial*) and “defense services” are used interchangeably. These terms refer to all government-funded legal services for the indigent in criminal cases. Similarly, the terms “public defender” and “appointed counsel” are used interchangeably to refer to the lawyers who deliver these services. Each of these terms has more precise meanings developed in the text.

<sup>ii</sup> The term “Latin America” here refers to the Spanish-speaking countries of Central and South America. Neither Brazil nor the Caribbean are included unless specific reference is made to either area.

<sup>iii</sup> For treatment of the broader issue of “access to justice” for the poor, with particular focus on the right to legal aid in both civil and criminal cases, see Richard J. Wilson, *Access to Justice: An Issue Paper for USAID and Legal Services Providers*, Aug., 1995.

<sup>iv</sup> Quoted in Anil B. Diván, *Approaches to Legal Aid – A Human Right or a Favour*, in WORKING PAPERS FOR THE 9TH LAWASIA CONFERENCE, NEW DELHI 122, 127 (October, 1985).

<sup>v</sup> See, e.g., *Robinson v. Jamaica*, Human Rights Committee, Doc. A/44/40, p. 286, pr. 6.4 (Committee finds that refusal to permit adjournment for defendant to obtain counsel is a violation of Article 14(1) of the Covenant, especially when prosecution was permitted several adjournments).

<sup>vi</sup> For treatment of the issue of equality of arms see, P. van Dijk and G.J.H. van Hoof, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 251 et seq. (1984).

<sup>vii</sup> A Draft Third Optional Protocol to the ICCPR would state quite simply, in relevant part, that “[n]o derogation from . . . article 14 . . . may be made under the provisions of article 4 of the Covenant.” The draft was proposed to express concern for the suspension of the right to fair trial during times of public emergency.

<sup>viii</sup> M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT’L L. 235 (1993). Professor Bassiouni concludes that, if the number of countries in which the right to fair trial is constitutionally recognized (39) is considered with the number of countries which recognize the right to defense (45), “there exists a strong affirmation of the right to general fairness in criminal proceedings.” *Id.*, at 293.

<sup>ix</sup> *Héctor Gerónimo López Aurelli v. Argentina*, Case Report 9850, Inter-Am. C.H.R. 41, OEA/ser. L/V/II.79, doc. 12 rev. 1 (1990); *Reynaldo Tadeo Aguado Montealegre v. Nicaragua*, Case Report 10.198 Inter-Am. C.H.R. 73, OEA/ser. L/V/II.77 rev. 1, doc. 7 (1989). A case recently referred by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights, in which the author and others appear as special counsel to the Commission, promises to clarify some aspects of the scope of due process and fair trial in criminal proceedings, including the application of Article 8.2(d) and (e). *Iván Suárez Rosero v. Ecuador*, Case 11.273, Report No. 11/95, Sept. 12, 1995.

<sup>x</sup> *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987).

<sup>xi</sup> *White v. Board of County Commissioners*, 537 So.2d 1376 (SC Fla. 1989).

<sup>xii</sup> ILANUD, *LA DEFENSA PÚBLICA EN AMÉRICA LATINA, DESDE LA PERSPECTIVA DEL DERECHO PROCESAL PENAL MODERNO* 58-63 (1991) (studies the right to appointed defense counsel in Bolivia, Colombia, Costa Rica, Ecuador, Guatemala and Panama).

<sup>xiii</sup> AID Center for Development Information and Evaluation, *A STRATEGIC ASSESSMENT OF LEGAL SYSTEMS DEVELOPMENT IN HONDURAS* 15 (July 1993).

## COMMENTARY

Systems of justice show their level of maturity through the ways in which they handle and protect the rights of those who are poor and disadvantaged. In worst case scenarios, the poor do not believe that any representation will be provided to assist them.

The provision of legal assistance and defense is not just an issue of access. When it is lacking, it undermines the credibility and legitimacy of the entire justice system -- a serious obstacle, for the issue of credibility is paramount in studies and opinion surveys about the public's reaction to their system of justice.

Experience shows that pro-bono legal assistance cannot meet the needs of people who cannot afford the services of lawyers, and that the state has an affirmative duty to provide public defense resources comparable, to those contributed to the prosecution and the judiciary. Further, a public defense service should attract and reward excellence, and meet the needs of its impoverished citizens in a comprehensive fashion.

Public defense should be independent from political and other pressures, staffed by compensated professionals, and be able to match the technical expertise of the prosecution and judiciary. Stability and on-going training are necessary elements of sound public defense. Non-profit organizations and universities, and civil society in general, need to participate in its development.

Finally, planning within, and training of public defender organizations are often overlooked when reforms -- such as introduction of orality -- are contemplated.

## **VII. ETHICS**

### **JUDICIAL ETHICS: INDEPENDENCE, IMPARTIALITY, AND INTEGRITY**

*Jeffrey M. Shaman*<sup>138</sup>

#### **I. INTRODUCTION: THE NEED FOR THE RULE OF LAW AND SEPARATION OF POWERS**

The judicial system of the United States is founded upon a number of interrelated principles. The first of these principles is the rule of law, which is needed in order to restrict arbitrary government power. The rule of law is put into effect through a constitutional system, by which power is separated and balanced among three branches of government. Under the separation of powers, the judiciary functions as an independent branch of government, so that it may enforce the rule of law. Judicial independence, though, must be tempered with a certain degree of judicial responsibility. An independent judiciary can properly enforce the rule of law only if it is learned in the law, and is characterized by impartiality and integrity.

The rule of law traces its roots to the England of 1215, when King John signed the Magna Carta, in which he promised that no person "shall be taken or imprisoned or dispossessed or outlawed or exiled or in any way destroyed except by the lawful judgment of his peers and the law of the land." Prior to the Magna Carta, the law was used erratically, at the King's whim and for his personal benefit, rather than for the public good. Thus, the Magna Carta was the first step toward establishing the rule of law, according to which law is applied in a fair and equal manner to all persons, rather than capriciously or arbitrarily. Under the rule of law, it is recognized that no one is above the law. King, counsel, and commoner alike are all subject to the law. The rule of law is the very antithesis of arbitrary and unbridled government power. It brings reason, fairness, and equality to the law. In the United States today, the rule of law finds its quintessential expression in the Constitutional provisions which state that no person shall be deprived of life, liberty, or property without due process of law, nor denied the equal protection of the laws. These provisions, which are the direct descendants of the Magna Carta, establish the rule of law as the constitutional right of all persons.

The framers of the Constitution also recognized the need to create a national government that has sufficient power to effectively govern the nation, yet is restrained by a system of checks and balances specifically designed to limit the abuse of power. Before gaining its independence, the United States was a British colony, and the American colonists had experienced inequities at the hand of the English monarchy. Painfully aware of the tyranny that can result from unbridled government power, the framers of the Constitution sought to create a government characterized by separation of powers among the three branches of government — the executive, the legislature, and the judiciary.

The doctrine of separation of powers lies at the heart of the Constitution of the United States, and also at the heart of the individual constitutions of each of the 50 states of the union. Like the federal Constitution, each of the state constitutions establishes a tripartite government composed of three branches, which are allocated distinct spheres of authority. The doctrine of separation of powers is situated at the very core of both federal and state constitutions, and is based upon the principle that each branch of government has its own sphere of authority, and that no branch should interfere with another's fundamental role under the Constitution. As a realistic matter, absolute separation of powers between the three branches of government is impossible, and some overlap of authority is bound to occur. Nonetheless, the Constitution requires a government of separated powers, and to the extent possible, the Constitution restrains the ability of one branch to overreach its bounds and interfere with another.

---

<sup>138</sup> Senior Fellow, American Judicature Society. This monograph was prepared by the American Judicature Society (AJS) for the Judicial Roundtable II, held May 19-22, 1996 in Williamsburg, VA, at the National Center for State Courts (NCSC), with support from the US Agency for International Development (USAID) and the Inter-American Development Bank (IDB). It may be reproduced and distributed for non profit educational purposes. Points of view expressed herein do not necessarily represent the official position or policies of AJS, NCSC, USAID or IDB.

In addition, by protecting each branch of government from encroachment by the others, the doctrine of separation of powers protects the individual rights possessed by each citizen of the United States. By separating, and hence limiting governmental authority, the doctrine of separation of powers restrains the capacity of any branch of government to impinge upon individual rights. The doctrine of separation of powers thus serves a dual function; it structures and thereby limits government power, and it protects the rights of individuals.

The doctrine of separation of powers recognizes that the judiciary is a separate branch of government that is coequal to the legislative and executive branches of government. It is the doctrine of separation of powers that underlies the need for an independent judiciary that acts as a counterweight to the legislature and executive. Accordingly, there is a delicate balance between the three branches of government. To maintain this balance, the judiciary has been granted the power of judicial review. This means that the courts have the authority to review the acts of the other branches of government to determine if they meet constitutional standards. If, in the opinion of the courts, an act of the legislature or executive is contrary to the Constitution of the United States, the courts have the authority to nullify that act. Thus, the judiciary stands as the final arbiter of the Constitution, and has the responsibility to review legislative and executive action to determine its constitutionality, and hence its validity. Judicial review is the most significant function performed by the judiciary, and operates as an integral cog in the system of checks and balances created by the Constitution.

Nonetheless, there is some historical controversy as to whether the Constitution originally was intended to authorize judicial review. Article III of the Constitution, which is the judicial article, grants "judicial power" to the courts, but otherwise makes no mention of judicial review. There is some question about whether the phrase "judicial power" was intended to include the authority of judicial review. However, in 1803 in the famous case of Marbury v. Madison,<sup>139</sup> the Supreme Court of the United States ruled that the judiciary did possess the authority of judicial review. That ruling has stood the test of time, and to this day judicial review plays an important role in the American system of government.

## **II. THE NEED FOR JUDICIAL INDEPENDENCE**

### **A. History and Purpose**

By establishing a government of separated powers, the framers of the Constitution intended to create an independent judiciary. The legal system of the United States reflects a strong belief in the principle that judges should be independent. The American principle of an independent judiciary originated from the days when the United States was still a British colony. The colonial courts that were established in the United States were under the control of the King of England, who could dictate the decisions made by the courts. From this experience, the American colonists came to recognize the need for an independent judiciary that would resolve disputes impartially. So, judicial independence goes hand in hand with judicial impartiality, and the idea that disputes between people ought to be decided according to the law, rather than according to the dictates of other government officials. An independent judiciary is an indispensable requisite for a free society under the rule of law.

What exactly is meant by the concept of judicial independence? It is a concept that suggests that judges ought to be free from influence by the other branches of government, as well as from political, social, economic, or other influences. For the British, judicial independence meant that judges should be free from influence by the King or Parliament. For us in the United States, judicial independence means that judges should be free from influence by the executive or legislature. And in fact, judicial independence also means that judges should be free from influence by the people. Of course, judges are bound to follow the law, which the people may revise or amend through their representatives in the legislature. Naturally, judges should make their decisions according to the law, but otherwise should not be influenced by what the executive, the legislature, or even the people might think. Under this view, the ideal judge is a person who is both learned in

<sup>139</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

the law and independent, so that he or she will be guided in decision-making solely by legal knowledge and judicial experience.

Article III of the United States Constitution vests the "judicial power of the United States" in an independent department of government -- the judiciary -- which is granted (by Article III) the authority to hear all cases arising under the Constitution and laws of the United States. This grant of authority was intended by the framers as a mandate to an independent judiciary to check and balance abuses of authority by the other branches of government. "The essence of judicial independence, therefore, is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality."<sup>140</sup>

### **B. The Need for Protection of Minority Rights**

It is also significant for judicial independence that under the United States Constitution, federal judges are appointed rather than elected. They are appointed to their offices by the President, with the advice and consent of the Senate, which has the power to veto Presidential appointments to the judiciary. The fact that federal judges are appointed rather than elected might surprise some people, since election obviously is the more democratic method of selection, and the United States supposedly has a democratic government. Certainly it is true that the American Constitution was inspired by democratic ideals, and that it creates a government that is mostly democratic in nature. But the Constitution is also based on one rather undemocratic idea -- the idea that there is a need for protection against a tyranny by the majority. The Constitution recognizes that, while there should be majoritarian control of the government, there should also be some form of restraint upon the majority, because majorities can be selfish and oppressive or tyrannical, and some rights are so important that they should belong to everyone, even if the majority does not think so.

So, while the American system of government is primarily democratic or majoritarian, it is not purely so. The Constitution of the United States creates a government that operates as a limited democracy, or what is at times referred to as a constitutional democracy, because it places constitutional limits upon the authority of the government. Most of these limits can be found in the Bill of Rights of the Constitution, which states, for example, that Congress shall make no law abridging freedom of speech, and that no state shall deprive any person of life, liberty, or property without due process of law or deny to any person the equal protection of the laws. So, even if Congress and the President, which after all are elected by the people, decided unanimously to abridge someone's freedom of speech, they are proscribed from doing so by the Constitution. Even if a state legislature and governor voted unanimously to deny a person or group the equal protection of the laws, the state is prevented from doing so by the Constitution. The Constitution itself limits the authority of the Congress, the President, and the states to deprive individuals of their rights.

Moreover, the judiciary is the branch of government that was specifically designed to protect the rights of individuals, and to make certain that the other branches of government do not exceed their constitutional authority. Because they are appointed rather than elected, and because they do not have to stand for reelection, federal judges are part of the counter-majoritarian branch of government. As a counter-majoritarian branch of government, the federal judiciary functions to oversee the other branches of government, that is, the majoritarian branches of government, to make sure they do not engage in tyranny by the majority. It is apparent, therefore, that judicial independence becomes extremely important to guard against a tyranny by the majority. If judges do not have independence, if they can be voted out of office, or otherwise removed, or if their salaries could be lowered, they would hardly be in a position to oversee the other branches of government or to guard against the excesses of the majority.

### **C. The Creation of Judicial Independence**

Of course, there is a very important question about judicial independence: How is it created and maintained? How does a nation or a state establish a judiciary that is in fact independent?

---

<sup>140</sup> I. Kaufman, *The Essence of Judicial Independence*, 80 Columbia L. Rev. 671, 688 (1980).

If we look to the judicial article of the federal Constitution, which is Article III, we see two significant devices that protect judicial independence. First, Article III states that federal judges shall hold their offices during good behavior, and can only be removed from office by impeachment for the commission of high crimes or misdemeanors. Secondly, under Article III, the salaries of federal judges may not be lowered while they are in office. So, federal judges have virtual life tenure, so long as they do not misbehave, and their salaries are protected during that tenure. This is done in order to insulate them from attack by the executive branch or the legislature.

In addition to the federal judicial system, each of the 50 states in the United States has its own judiciary. The United States is a federated nation that has a federal government with its own sovereign authority, and 50 separate states, each of which has its own sovereign authority, and its own executive, legislature, and judiciary. All 50 of the state systems adhere to the doctrine of separation of powers and to the principle of an independent judiciary. However, judicial independence is achieved differently in some of the states than it is in the federal system.

In contrast to federal judges, state judges are selected by a variety of methods that differ from state to state. Two states follow the federal model and appoint their judges for life. In other states, judges are elected, either in partisan or nonpartisan elections. Yet other states have adopted the merit selection system for choosing judges, according to which a commission or panel of both lawyers and non-lawyers prepares a list of judicial candidates, selected on the basis of merit, from which the governor of the state appoints members of the judiciary. The merit selection plan may be combined with a retention election -- that is, an election after a judge has served for a certain term of years, in which the judge runs unopposed, so the electorate can decide if the judge should be retained in office.

Judicial selection in the United States continues to evolve. Before this country gained its independence from England, judges were selected by the king. This caused a great deal of resentment among the populace. After the United States gained its independence, the states continued to select judges by appointment, either by the legislature or the governor. After 1825, however, there was increasing dissatisfaction with this method of appointment for selecting judges. More and more people came to believe that the appointment process was controlled by wealthy individuals or special interest groups, whose influence enabled them to dictate judicial appointments. With the rise of Jacksonian Democracy, there was a movement toward making government more responsive to the common people. As part of this movement, many states changed their method of selecting judges to popular election. By 1865, twenty-four of the then thirty-four states selected their judges through popular elections. The obvious advantage of selecting judges by election is that it is democratic; it enhances the participation of the people in their own government.

In practice, though, the elective system of choosing judges is not without its own flaws. After many states adopted the elective system for choosing judges, it became apparent that the electorate paid little attention to judicial candidates. This left political machines free to select judges with little effective oversight by the populace. As a result, special interest groups were once again able to dictate the selection of judges. Eventually, the perception arose that the persons who gained judicial office were incompetent or corrupt. A few states moved to reform this situation by selecting their judges through nonpartisan elections. Even more states adopted the merit selection system, in an attempt to remove politics entirely from judicial selection, and to base judicial selection strictly on merit. By today, thirty-three states choose some or all of their judges by the merit selection system.

#### **D. Judicial Immunity**

Whatever method is used to select judges, judicial independence is also enhanced by granting judges immunity from civil liability. In both the federal and state judicial systems, judges enjoy absolute immunity from civil liability for the acts performed as part of their official duties. This is considered necessary so that judges will not be deterred from vigorously performing the functions of office. As the Supreme Court of the United States has said, judicial immunity is needed to protect the independence of judges, because they are often called upon to decide controversial, difficult, and emotion-laden cases, and should not have to fear that

disgruntled litigants will hound them with litigation seeking to obtain financial compensation for alleged damages.<sup>141</sup> The doctrine of judicial immunity is deeply entrenched in American jurisprudence. It has been used to guard judges from common law causes of action, including false imprisonment, malicious prosecution, and defamation, as well as from statutory causes of action for the deprivation of civil liberties and constitutional rights.

Judges in the United States enjoy absolute immunity for their official acts, which means that they may not be held accountable for wrongful behavior in a civil action, even if they act with malice or intentional disregard of the law. Similarly, legislators in this country also enjoy absolute immunity in the exercise of their official functions. On the other hand, members of the executive branch of government only possess a qualified immunity, which exempts them from civil liability for their wrongful acts unless it can be shown that they knew or should have known that their behavior was improper. While it is generally agreed that judges should possess a certain degree of immunity in order to maintain judicial independence, there is some debate as to whether judges should enjoy absolute immunity. It has been argued that a qualified immunity, similar to that granted to members of the executive branch, would provide sufficient protection for judicial independence, while holding judges accountable for intentional abuses of authority.

Nevertheless, the United States Supreme Court has continued to adhere to the principle of absolute judicial immunity. In 1991, the high court reaffirmed its commitment to absolute judicial immunity in a case that vividly illustrates the operation of absolute immunity.<sup>142</sup> The case was a civil action filed by a public defender seeking damages from a state judge. The public defender alleged that after he failed to appear for the initial call of the judge's morning calendar, the judge became angry, and ordered two police officers to forcibly seize the public defender and bring him to the courtroom. Moreover, the public defender alleged that the judge deliberately approved the use of excessive force by the police officers, knowing that he had no authority to do so. Although the Supreme Court accepted these allegations as true, it nonetheless ruled that the judge was cloaked with absolute immunity for his actions, and that absolute immunity was not overcome by allegations of bad faith or malice.

It should be pointed out that while judicial immunity is absolute, it only applies to action that is "judicial" in nature. Unfortunately, it is extremely difficult to define exactly what constitutes a judicial act. There are some extreme actions, though, that can be said to be beyond the scope of the judicial function, and therefore not protected by judicial immunity. For example, in one instance a judge actually left the bench to physically assault a person he thought was disrupting the courtroom. Clearly, this was not part of the judicial function. In another instance, a judge "arrested" someone and conducted a "trial" at a city dump. These actions are also clearly beyond the judicial function, and therefore not cloaked by judicial immunity.

For actions that are part of the judicial function, however, absolute judicial immunity means that judges may not be sued in a civil action for their wrongful acts, even when they act for purely corrupt or malicious reasons. This is not say, however, that judges cannot be held responsible for corrupt behavior. Judicial immunity only extends to civil liability, and judges are not immune from criminal sanctions when they engage in corruption. Nor do judges enjoy immunity from disciplinary action for misbehavior. All of the 50 states, as well as the federal system, have established mechanisms to discipline judges for violating the Code of Judicial Conduct. Judicial corruption, though, since it is a criminal activity, is usually dealt with through the criminal system.

Judicial immunity does not extend to criminal activity. For example, judicial immunity does not shield judges from criminal liability for fraud or corruption, or for soliciting or taking bribes. While judicial immunity is important to protect the independence of judges, its scope should not reach so far as to exempt judges from the criminal law. Thus, judicial immunity stops short of shielding criminal behavior. Moreover, in some states it is provided by law that conviction of a judge of a serious crime operates automatically to remove the judge from office. These laws differ somewhat from state to state. In some states, the laws

---

<sup>141</sup> *Pierson v. Ray*, 386 U.S. 547, 554 (1967); see also *Forrester v. White*, 484 U.S. 219 (1988).

<sup>142</sup> *Mireles v. Waco*, 502 U.S. 9 (1991).

mandate removal from office upon conviction of a felony; others upon conviction of a crime of moral turpitude; and yet others upon conviction of an "infamous" crime. The common thread of these laws is to require the automatic removal of a judge from office if he or she is found guilty of a crime of a serious nature. Under these laws, judges have been removed from office for convictions of fraud, racketeering, bribery, extortion, obstructing justice, assault, and other serious offenses.

### **III. JUDICIAL RESPONSIBILITY, INTEGRITY, AND DISCIPLINE**

#### **A. Impeachment**

Judges are required to do more than merely comply with the criminal laws, and as noted above, every state and the federal system have established methods for enforcing standards of judicial behavior. Historically in the United States, judges who engaged in misbehavior could be removed from office through impeachment. Impeachment is a legislative procedure used to remove government officials from office for engaging in misconduct. Impeachment is initiated by a formal accusation referred to as "articles of impeachment," which are drawn by the lower house of the legislature. Thereafter, the charges are tried by the upper house of the legislature, much like a criminal case would be tried by a court. In the federal system in the United States, conviction requires a two-thirds vote, whereas in the state systems, the necessary majority to convict varies from state to state. The federal Constitution specifies the grounds for impeachment as "Treason, Bribery, or other high Crimes and Misdemeanors."<sup>143</sup> The typical state constitution also refers to criminal activity as grounds for impeachment, although some state constitutions additionally recognize serious malfeasance in office, and gross incompetence, as other grounds for impeachment.

There are several drawbacks to impeachment as a method for dealing with improper judicial behavior. It is a cumbersome, inefficient proceeding. Moreover, it provides only one sanction -- removal from office -- and hence is only appropriate for the most serious misbehavior. As a historical matter, impeachment proceedings often have been entangled in partisan politics, or have been used for political retaliation. Given these drawbacks, it is not surprising that impeachment has been used relatively rarely in the United States. That is not to say, though, that it is never used. Over the years, twelve federal judges, as well as a number of state judges, have been impeached.

#### **B. The Code of Judicial Conduct**

In 1924 the American Bar Association set forth the original Canons of Judicial Ethics as a standard of professional and ethical behavior for judges. While the general terms of the Canons were broad enough to proscribe corruption and other criminal activity by judges, the main concern of the Canons was directed to judicial behavior that was unethical, unprofessional, or otherwise inappropriate. It was thought that the criminal process and impeachment would remain the primary means for dealing with criminal behavior by judges, while the Canons of Judicial Ethics were directed principally at ethical matters. The original Canons were intended as an ideal guide of behavior, rather than an enforceable set of rules.

In 1972, the American Bar Association revised the original Canons, and gave them a new name, the Model Code of Judicial Conduct, which was re-written yet again in 1990. Unlike the 1924 Canons, the Code was intended to be an enforceable set of rules. And, in fact, it has been adopted as such by 48 of the 50 states, as well as by the federal court system. Although in adopting the Code the states and federal system have felt free to revise it here or there, it nonetheless forms the basis for a fairly uniform body of law that regulates judicial conduct throughout the nation.

The Code of Judicial Conduct governs off-the-bench activities of judges as well as their on-the-bench activities. It places restrictions upon extrajudicial conduct, in addition to restrictions upon activities that are part of the official judicial function. Indeed, the Code expressly states that "a judge shall avoid impropriety

---

<sup>143</sup> U.S. Const. art. II, section 4.

and the appearance of impropriety in all of the judges' activities," and "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>144</sup> Public confidence in the judiciary is essential to the maintenance of an independent judiciary that enforces the rule of law. The Code is composed of general standards and specific rules. As a general matter, it requires judges to uphold the integrity and independence of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of office with diligence and impartiality. These general standards are given more definitive meaning by some of the more specific provisions in the Code, and by court decisions interpreting them in various factual contexts.

It is important to note that when a judge commits a legal error – that is, makes an incorrect ruling of law – it is usually a matter to be corrected on appeal, and does not rise to a violation of the Code of Judicial Conduct. The preservation of judicial independence requires that a judge not be subject to disciplinary action under the Code merely because the judge may have made an incorrect ruling. An independent judge is one who is able to rule according to his or her conscience without fear of jeopardy or sanction. So long as judicial rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against legal error is appellate review. Indeed, Canon One of the Code of Judicial Conduct states that an independent judiciary is indispensable to justice in our society, and the courts have often stated that the judicial disciplinary process should not be used as a substitute for appeal.

While the courts have often professed that mere legal error does not amount to a violation of the Code of Judicial Conduct, that is not to say that legal error can never amount to a Code violation. The Code of Judicial Conduct also states that a judge should be faithful to the law, and maintain professional competence in it. Accordingly, flagrant legal error, legal error motivated by bad faith, or a continuous pattern of legal error will be considered to violate the Code of Judicial Conduct. Otherwise, though, legal error will be dealt with through the appellate process, so as to maintain judicial independence.

### C. The Creation of Judicial Conduct Agencies

In each of the 50 states, a permanent government agency has been established to enforce the dictates of the Code of Judicial Conduct, while in the federal system, judicial councils have been formed to enforce the Code. The first state judicial conduct organization was created in California in 1960, and since then each and every state has seen fit to establish a similar agency.

Although their structure varies from state to state, all judicial conduct organizations can be divided into two basic models: the one-tier agency and the two-tier agency. In a one-tier system, a panel, which is typically composed of judges, lawyers, and non-lawyer representatives of the public, investigates complaints, files and prosecutes formal charges, holds hearings, makes findings of fact, and either imposes sanctions or recommends them to the state supreme court. The one-tier commission works within the state court system, to the extent the supreme court is normally responsible for the final disposition of cases, and usually has *de novo* review powers. In a two-tier system, a panel, also usually composed of judges, attorneys, and public members, investigates complaints, and files and prosecutes formal charges (tier one), while a select panel of judges or a special court adjudicates the formal charges, and determines their final disposition (tier two). Two-tier systems operate independently of the state courts, in that they usually provide for finality at the second-tier, thus precluding supreme court review.

In all states, judicial conduct commissions may impose or recommend a range of sanctions. Usually these sanctions include: (1) private admonition, reprimand, or censure; (2) public reprimand or censure; (3) temporary suspension from office; (4) mandatory retirement; and (5) permanent removal from office. Forty-one states have adopted the one-tier model, while the remaining nine states have opted for the two-tier system. There are advantages and disadvantages to both systems. The two-tier system follows a due process of law model that separates the prosecutorial and adjudicative function, in order to avoid biased decision-making. By combining the investigative and adjudicative functions in a unitary agency, the one-tier system

---

<sup>144</sup> Model Code of Judicial Conduct (1990) Canon 2.

avoids duplicative work and provides more promptness, while guarding against bias by leaving the final disposition of cases to the state supreme court.

One-tier systems have been criticized on the ground that by combining the investigative and adjudicative function in a single body, they go so far as to violate due process of law. This criticism is based on the well-established principle that an impartial adjudicator is an essential element of due process of law. Notwithstanding that principle, there is a considerable amount of opinion which holds that the mere combination of investigatory and adjudicative authority in a single administrative agency, absent more, does not run afoul of due process standards. In cases challenging the one-tier model, the courts have taken a pragmatic view, which presumes that the one-tier system complies with due process of law unless the party challenging it can prove that actual bias has occurred.

Some observers have suggested that the two-tier system provides more rigorous discipline by virtue of its independence from supreme court review. It should be kept in mind, however, that in a two-tier system, like a one-tier system, the final disposition of cases is made by judges, or a combination of judges and attorneys, although only in the former system do the judges sit on a panel or court that is independent of the other courts within the state. The size of judicial conduct commissions varies from state to state, ranging from a low of five persons to a high of thirteen. A majority of commissions have either seven or nine members. In a substantial majority of states, the commissions are composed of a combination of judges, lawyers, and non-lawyer public members. Judges are in the majority on twelve commissions, and public members are in the majority on six. Three states do not have any non-lawyer public members, and five states do not require judges to be on their commissions. Two states specify that their commissions include members of the legislature.

Ordinarily, the judges who serve on commissions are appointed by the state supreme court or are selected through judges' organizations. The attorneys on commissions are typically appointed by the governor. In twelve states, the legislature participates in either the selection or approval of some commission members. In the nine states that have adopted two-tier systems, the adjudicative body consists entirely of judges, or a combination of judges and attorneys. All commissions employ staff members to help conduct their operations. The staffs usually include a director, attorneys, investigators, and other personnel, although a few commissions retain attorneys or investigators on a part-time basis, as the need for them arises.

When the first state commissions were formed, some people opposed them on the ground that they constituted a threat to judicial independence. There were those who feared that the commissions would exercise their supervisory authority over judges in retaliation for unpopular decisions. Fortunately, this fear has not come to fruition. In enforcing the Code of Judicial Conduct, state judicial commissions respect judicial independence, and rarely institute proceedings against a judge on the basis of a decision rendered by him or her. The disciplinary process is not directed toward judicial decision-making, and therefore maintains judicial independence, except on those rare occasions when commission disciplinary authority is misused. The vast majority of disciplinary cases, however, demonstrate that the judicial commission system and judicial independence can coexist.

In the federal judicial system, a somewhat different method is used to enforce the Code of Judicial Conduct. In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct Disability Act, which authorizes judicial councils in each of the thirteen federal (geographic) circuits to review complaints against federal judges, and to order sanctions for violations of the Code of Judicial Conduct. Unlike state judicial conduct agencies, the federal judicial councils are composed entirely of judges, and operate under the direction of the chief judge of each circuit. Council decisions are reviewable by the Judicial Conference of the United States.

Whereas in the state commission systems the range of sanctions available includes removal of a judge from office, in the federal councils system the power to remove a judge from office for engaging in misconduct was not granted by Congress to the federal councils, for fear that it may be unconstitutional, on the ground that federal judges may only be removed from office through impeachment by Congress. Still, the Judicial

Councils Act of 1980 does authorize the federal councils to impose other sanctions, short of removal from office, upon errant judges. These sanctions include private and public censure, requesting a judge to retire, temporarily suspending a judge's caseload, and recommending that impeachment proceedings be initiated against a judge.

All of the state judicial commissions, as well as the federal judicial councils, have rules to keep their records and proceedings confidential, at least for some period of time. It is believed that confidentiality in the judicial disciplinary process is necessary to avoid premature disclosure of information, and thereby protect the reputation of innocent judges who have been mistakenly accused of misconduct. Moreover, confidentiality encourages participation in the judicial disciplinary process, by protecting complainants and witnesses from retaliation.

On the other hand, confidentiality is contrary to the principle of openness in government, and freedom of speech, which is guaranteed by the First Amendment of the United States Constitution. Judges and judicial conduct agencies are both part of the government, and therefore subject to oversight by the people they serve. The First Amendment was intended to insure free and open discussion of government affairs, and foster extensive public scrutiny of the government. Judicial conduct is certainly a matter of public concern, as is the operation of a judicial conduct commission. Thus, the dictates of the First Amendment, and the need for openness in government, call for limiting confidentiality in the judicial disciplinary process.

Many state commissions follow a rule of confidentiality, but only until they have determined that probable cause exists to institute formal charges of misconduct against a judge. This approach has the advantage of preventing the airing of unfounded charges against a judge that could do unwarranted damage to the judge's reputation, while allowing public access to information about a judge's behavior, once it has been determined that there is substantial reason to suspect misconduct. So, this approach balances, on one hand, the interest of judges to avoid undeserved damage to their reputation and, on the other hand, the public interest in obtaining information about public officials and the judicial disciplinary process.

#### **D. Advisory Committees**

In addition to federal councils and state commissions which exercise disciplinary authority, judicial advisory committees are present in many jurisdictions to provide advice to judges concerning their ethical and professional responsibilities. These committees exercise advisory functions rather than disciplinary ones, and they have the advantage of deterring judicial misconduct, rather than responding to it after it occurs. The Judicial Conference of the United States has established an advisory committee to provide advice to federal judges, and more and more states are creating advisory committees for their judges. In addition to the federal advisory committee, thirty-four states have established similar bodies to give advice to judges.

In a few states, the judicial conduct agencies have authority to issue advisory opinions to judges. This has the obvious advantage of providing advice regarding the Code of Judicial Conduct from the very agency that has the most expertise about the Code. On the other hand, it has been suggested that the advisory function and the disciplinary function are best effectuated by keeping them separate. Accordingly, in most states the advisory committees are separate agencies from the judicial conduct commissions. In some states, judicial advisory opinions are issued by bar association committees, or by a committee of the state judicial association. In other states, special committees have been formed to issue advisory opinions to judges. These committees are usually composed of a combination of judges, lawyers, and lay persons, which is a combination that has the advantage of representing a variety of viewpoints, as well as being capable of acquiring adequate expertise concerning the Code of Judicial Conduct.

Originally, there was opposition in some states to the creation of committees to provide advice about judicial ethics to judges. It was argued that advisory opinions would be issued from a one-sided context, wherein only the judge provided his or her view of the relevant factual information to the committee, and furthermore, did so at a point in time prior to the actual development of all the relevant facts. Hence, it was argued that the advisory committees might end up giving advice on the basis of incomplete or inaccurate facts.

Notwithstanding these misgivings, it appears that judicial ethics advisory committees can structure their proceedings so that the facts are adequately elucidated. The fears that some people had about the ability of judicial advisory committees to engage in fact-finding were probably exaggerated. Moreover, judicial advisory committees have the great advantage of preventing judicial misconduct by providing sorely needed advice to judges. Thus, more and more states have created judicial advisory committees, and more and more judges turn to them for advice about their behavior.

#### **E. Judicial Training and Education**

Judicial independence presupposes a judiciary that is well trained and educated in the law. If judges are to be granted independence, as they are in the United States, it is extremely important that they exercise their authority with expertise in the law. Accordingly, the ideal judge is independent, impartial, and learned in the law.

In the United States, the training and education of judges does not follow the same path as it does in some civil law countries, where persons are specifically trained to become judges. Here, persons are educated in law school to become lawyers, rather than judges. After practicing law for some time, a lawyer may be chosen or elected to become a judge. Up to that point in time, the person has been schooled in the law, but has received no formal education specifically directed toward being a judge. Beginning in 1956, however, a movement began in the United States which would eventually see the creation of a number of education and training programs designed specifically for judges. By now, there are programs in both the federal and state judicial systems to provide training for new judges, as well as continuing legal education for judges who are already on the bench.

The movement toward judicial education in the United States was initiated in 1956 when the Institute of Judicial Administration was established at New York University, and began sponsoring seminars for appellate judges. Each seminar consists of a two-week session, held during the summer months when it is easier for judges to attend, to discuss the function of judging and the nature of the judicial process. Each seminar is typically attended by 20 to 25 judges.

This program proved to be the catalyst for a number of other educational programs for appellate judges. In the 1960s the Appellate Judges Conference of the American Bar Association established the Appellate Judges Seminar Series, to offer continuing judicial education to appellate judges throughout the United States. This program addresses a variety of issues of interest to appellate judges, and is designed to encourage repeat attendance. The same conference also sponsors an LL.M. program specifically designed for appellate judges at the University of Virginia Law School. And in the 1970s, the American Academy at Boulder, Colorado began to offer its Legal Writing Program for Appellate Court Judges.

In the federal judicial system, a development with great significance for judicial education occurred in 1967, when the United States Congress enacted legislation to establish the Federal Judicial Center. According to this legislation, the purpose of the Center is to "further the development and adoption of improved judicial administration in the (federal courts)," which includes a directive to "stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the government."<sup>145</sup> The Center provides training seminars for new judges and continuing education courses for judges already on the bench. The seminars are voluntary, but have a high rate of attendance, particularly among new judges.

For new federal trial judges and magistrates, the Federal Judicial Center offers two, week-long seminars.<sup>146</sup> First, it offers a regional orientation seminar that focuses on procedural and management aspects of the judicial function. Secondly, it offers an orientation seminar in Washington, D.C., at the Center itself, that reviews basic legal subjects and explores high volume federal litigation topics such as civil rights and procedural due process. The Center also provides slightly less extensive orientation programs for new

<sup>145</sup> 28 U.S.C. section 1620 (1982).

<sup>146</sup> Federal Judicial Center Annual Report 1995.

appellate federal judges, which are supplemented by circulating publications and videotapes on topics of special interest to appellate judges.<sup>147</sup> The Center further conducts programs for more experienced judges, both at the Center itself, and throughout the country in the various judicial circuits into which the federal court system is divided.<sup>148</sup> In addition to conducting seminars, the Center performs a variety of other functions, including publishing educational manuals and monographs.

For state judges in the United States, there is a private institution, The National Judicial College, that conducts judicial education workshops and seminars. Formerly known as the National College of State Trial Judges, this institution was created in 1963. It is located in Reno, Nevada, and is affiliated with the American Bar Association. The National Judicial College offers workshops and seminars for the orientation and continuing legal education of both trial and appellate judges, but its primary focus is on providing training for trial judges. The College conducts one- to four-week courses at its location on the campus of the University of Nevada, as well as at several other locations in the United States. Each year about 1,800 judges attend courses offered by the college.

Another private organization, the American Judicature Society, conducts national and regional conferences and seminars for judges on judicial conduct and ethics, as well as on matters regarding sound judicial administration. The Society was founded in 1913, and is dedicated to improving the administration of justice. In 1977, the Society established the Center for Judicial Conduct Organizations, which became a research and educational center in the field of judicial ethics. In recent years, the Center has stressed educational programs for judges concerning the Code of Judicial Conduct and other professional or ethical rules that pertain to the judiciary.

Additionally, many states have established offices or centers to provide training and education for their own judges.<sup>149</sup> The first of these to be created was the California Center for Judicial Education and Research, which is located in Berkeley, California.<sup>150</sup> Almost all states now have judicial education offices or centers, which are usually under the aegis of the state supreme court. These organizations often sponsor orientation programs for new judges that typically consist of two- or three-day training sessions conducted by experienced judges and, at times, professors or lawyers. They also usually sponsor two- or three-day annual judicial conferences, which are typically conducted by experienced judges, professors, and lawyers.

More and more states are making continuing legal education mandatory for judges. Accordingly, they will either require attendance at their own orientation programs or annual conferences, or they will require that judges attend a minimum number of hours at some other educational program. An increasing number of states also are making funds available for individual judges to be able to attend conferences and educational sessions wherever they may be held.

Almost all of the educational programs for judges, in both the federal and state systems, provide training and education about both substantive legal subjects, and about procedural or administrative matters relative to the judicial function. That is, they will teach judges about substantive topics, such as torts or constitutional law, as well as teaching about procedural or administrative matters, such as management of caseloads and the rules of evidence or procedure. Some of the programs also offer sessions concerning the Code of Judicial Conduct and the ethical standards that pertain to judges in the United States. A few of the programs also cover philosophic subjects about the judicial function. There are even some specialized programs available where judges study works of literature and relate them to the judicial function.

It is necessary for both new and experienced judges to study substantive legal topics, such as torts or constitutional law, for two reasons. First, it is important to keep abreast of recent developments in the law, and secondly, it is needed to master areas of the law in which they have little or no experience. The judge who

---

<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> F. Klein, FEDERAL AND STATE COURT SYSTEMS—A GUIDE 45-46 (1977).

<sup>150</sup> Id.

has spent most of his or her previous career as a lawyer may have little, or virtually no knowledge of many legal matters which will have to be faced as a judge. A former corporate attorney, for example, may know very little about constitutional law, while a former prosecutor or public defender may know very little about patent and copyright law. Thus, there is a need – and a continuing one at that – on the part of judges to learn about substantive legal topics. Obviously, judges also need training and education about procedural and administrative matters. While judges can be expected to have studied the rules of evidence, civil procedure, and criminal procedure as students in law school, they may have had little practical experience with those matters in their years as attorneys. And the vast majority of persons appointed or elected to be judges have not previously studied judicial administration or judicial ethics. So, there is a strong need to teach these subjects as part of judicial education programs.

#### **F. Judicial Impartiality**

In granting judges independence, it is extremely important that their judicial authority be exercised in an impartial manner. Judicial independence brings with it the responsibility to administer the law impartially. Judicial impartiality is a fundamental component of justice. Judges are expected to be impartial arbiters so that legal disputes are decided according to the law, free from the influence of bias or prejudice, or political pressure. The principle of judicial impartiality is dictated by statutory and common law, is required by the Code of Judicial Conduct, and is essential to due process of law.

The Code of Judicial Conduct requires a judge to be disqualified from presiding over any proceeding in which the judge's impartiality might reasonably be questioned. This means that judges are disqualified from presiding over cases not only when they are in fact partial to one side or the other, but also when there is an appearance of partiality to the reasonable observer. Hence, judges are expected to avoid not only actual partiality, but the appearance of it as well, because the appearance of a judge who is not impartial diminishes public confidence in the judiciary, and degrades the justice system.

Moreover, the Code of Judicial Conduct prohibits judges from engaging in *ex parte* -- that is, one-sided -- conversations, because to do so might taint the ability of a judge to remain impartial. A one-sided conversation can give an unfair advantage to one of the parties in litigation, and has much potential to impair judicial impartiality. Hence, *ex parte* conversations by judges are strictly prohibited by the Code.

The principle of impartiality calls for the law to be applied by judges without personal bias or prejudice toward individuals. Judges should extend the law uniformly and consistently to all persons. In other words, judicial impartiality should be akin to equal protection of the law. Judges should apply the law equally or impartially to all persons. This principle is violated when a judge has a personal bias or prejudice concerning one of the parties in a controversy. A feeling of ill will or, conversely, favoritism toward one of the parties is improper, and indicates that a judge does not possess the requisite degree of impartiality to decide a case fairly.

Certain kinds of bias are incompatible with the judicial function and are unacceptable in judges. Clearly, racial bias should play no part in the judicial temperament. In the vast majority of situations that come before judges, race is an irrelevant consideration that has nothing to do with the matter at hand. Racial bias is often based upon misguided stereotypical thinking about groups of people. Racial bias is demeaning and offensive to the individuals to whom it is directed. It denies equal protection of the law, and simply has no place in the judicial process.

Similarly, gender bias, and bias based on ethnic or religious background, is inappropriate for a judge and should be excluded from the judicial process. In fact, bias against any class of persons may be incompatible with the judicial function, because class bias incorrectly ascribes the attributes of a group of people to individual members of the group. Where a judge has a predilection against a class of persons, it may operate to improperly predetermine the outcome of individual cases, and deny a litigant the right to have his or her case decided on the basis of the evidence presented at trial. Thus, the 1990 Code of Judicial Conduct

expressly prohibits judges in the performance of their duties from manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.<sup>151</sup>

Judicial impartiality may also be lacking if a judge has a personal relationship with an attorney or party in a lawsuit over which the judge is presiding. Under the Code of Judicial Conduct, judges are disqualified from presiding over cases if an attorney or party in the case is a close relative of the judge. Similarly, judges are disqualified from presiding over cases where a close personal friend is an attorney or party to the case. In these circumstances the judge may unfairly favor the relative or friend, and even if the judge is able to put aside his or her feelings of favoritism, the appearance of it may still be present. In either case -- actual favoritism or the appearance of it -- disqualification of the judge is required.

A judge, however, is only disqualified from presiding over a case on account of bias or prejudice when it is personal. That is, bias or prejudice does not refer to the attitude a judge may hold about the subject matter of a lawsuit. That a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the lawsuit. Despite earlier fictions to the contrary, it is now understood that judges are not devoid of opinions when they hear and decide cases. Judges do have beliefs and values, which cannot be magically shed upon taking the bench. The fact that a judge may have publicly expressed views about a particular matter prior to its arising in court should not automatically call for the judge's removal from a case. So long as the judge can keep an open mind and does not predetermine the result in a case, any opinions the judge may have about the legal or social issues in the case should not be considered disqualifying.

On the other hand, personal bias or prejudice on the part of a judge is improper and should not be tolerated. Antagonism or favoritism directed personally at a party by a judge indicates that the judge does not have the requisite degree of impartiality to decide a case fairly. Animosity or irrational bias are clear signs of improper partiality that disqualify a judge from presiding over a case.

Similarly, a judge is disqualified from presiding over cases which might have an impact upon the judge's financial or property interests. It is well settled that a judge may not preside over any case in which he or she has a financial or property interest that could be affected by the outcome of the case. For example, a judge is disqualified from presiding over a case if one of the parties in the case is a company in which the judge owns stock. Even if the amount of stock owned by the judge is small, disqualification should be required, because the judge might be predisposed to rule in a way that would favor the judge's own financial interest.

In addition, a judge is disqualified from presiding over any case where the judge has prior personal knowledge of evidentiary facts concerning the case. In the American legal system, facts are to be determined on the basis of evidence presented in court within the adversary process, so that each side has the opportunity to present its version of the facts (subject, of course, to the bounds of honesty). Prior personal knowledge of facts may cause a judge to predetermine a case, or evaluate facts on a one-sided basis, which precludes the plaintiff or defendant from having an equal opportunity to present their view of the facts. Even in cases where the jury and not the judge sits as the finder of fact, the judge should not possess prior knowledge concerning the facts of a case, because that knowledge could unfairly influence the judge's rulings and other actions in the case. Where a judge sits as fact-finder, there is all the more reason to prohibit his or her prior knowledge of factual matters about the case.

### **G. Judicial Integrity**

In granting judges independence, it is also extremely important that their judicial authority be exercised with the utmost degree of propriety. The Code of Judicial Conduct states that judges shall avoid not only impropriety, but also the appearance of impropriety in all of their activities. This proscription applies to off-the-bench conduct as well as on-the-bench conduct. Because a judge's extrajudicial behavior may diminish

---

<sup>151</sup> Model Code of Judicial Conduct, Canon 3B(5) (1990).

public confidence in the judiciary, judges should avoid impropriety and the appearance of impropriety at all times, whether in their official functions as judges, or in their extrajudicial behavior as private citizens. Therefore, the Code of Judicial Conduct directs that a judge shall respect and comply with the law, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

One aspect of this mandate is that judges should not lend the prestige of the judicial office to advance the private interests of others. The judicial office was created for the purpose of administering justice; it was not intended to be used to support the private ventures of others. Accordingly, it is a violation of the Code of Judicial Conduct for a judge to attempt to use the prestige of office to do favors for friends or relatives. For example, it is improper for a judge to intervene before a government agency that grants licenses to ask for special consideration from the agency for a friend or relative. Similarly, it is improper for a judge to intercede in criminal proceedings before another judge on behalf of a friend or relative. This occurs most commonly in cases involving traffic tickets -- one judge will ask another to dismiss a traffic ticket that is pending against a relative or friend. Occasionally, this will happen in more serious criminal prosecutions. But whether in a serious case or not, it is improper for a judge to use the prestige of office in this manner, because judicial authority was not intended to be used to advance the purely private interests of another individual.

It is also improper for a judge to use the prestige of office to advance his or her own private interests. Accordingly, in one case it was found to be a violation of the Code of Judicial Conduct for a judge to assign cases to attorneys with whom he was formerly associated and still maintained financial ties.<sup>152</sup> It is also a violation of the Code for a judge to use the judicial office to seek personal revenge or retribution. For instance, in another case it was found to be misuse of the judicial office for a judge to organize his court so as to delay the cases of local attorneys who had filed a grievance against the judge with the state judicial conduct commission.<sup>153</sup> In a particularly egregious case, a New York judge was removed from office for (among other things) ordering that a coffee vendor be brought before him in handcuffs, and then screaming at the vendor for selling "putrid" coffee.<sup>154</sup> Obviously, this sort of behavior is a gross abuse of judicial authority that violates the Code of Judicial Conduct.

Furthermore, judges are not entitled to any special favors by virtue of the office they hold. In fact, the Code of Judicial Conduct prohibits judges, as well as members of their family who reside in the judge's household, from accepting gifts, bequests, favors, or loans unless they fall into certain exceptions. The most significant of these exceptions allows judges to accept gifts that are part of ordinary social hospitality. When a judge accepts a gift or a favor that goes beyond ordinary social hospitality, however, it creates an extremely negative impression in the public eye. It appears that the judge may be "bought" or unduly influenced. And, of course, the judge is accepting something to which he or she has no true entitlement.

There is an especial danger when judges accept gifts from attorneys or parties who appear before the judge in litigation. Hence, it has been found to be improper for judges to accept paid vacations, car rentals, and other sorts of favors or gifts from attorneys. Judges may even be held responsible when employees under their supervision accept improper gifts or favors. Under the Code of Judicial Conduct, a judge has the responsibility to properly supervise the court personnel under his or her direction. Failure to do so may result in a judge being held accountable for the improper behavior of employees, even if the judge was unaware of what the employee was doing. For example, the Texas Commission on Judicial Conduct once publicly admonished a justice of the Texas Supreme Court, because two of his law clerks accepted a free weekend trip to Las Vegas from a member of a law firm that had several cases pending before the Court.<sup>155</sup> Although the justice had no knowledge of the trip, the commission still found that he violated the Code of Judicial Conduct by neglecting to properly supervise the members of his staff.<sup>156</sup>

<sup>152</sup> *In re Lawrence*, 335 N.W.2d 456 (Mich. 1983).

<sup>153</sup> *In re Terry*, 323 N.E. 192 (Ind. 1975).

<sup>154</sup> *In re Perry*, 53 A.D.2d 882 (N.Y. 1976).

<sup>155</sup> *In re Kilgarin*, Unreported Order (Texas Commission on Judicial Conduct, June 8, 1987).

<sup>156</sup> *Id.*

It is also obviously improper for judges to misappropriate public property or public funds. Court property or funds should not be used by judges for personal purposes. Thus, it is a violation of the Code of Judicial Conduct for a judge to charge the expenses of a personal trip to the state. Though perhaps less serious, it is also improper for a judge to assign court personnel to perform personal tasks for the judge, because it amounts to a misappropriation of court personnel that compromises the integrity of the judiciary. There have also been several instances when judges have required prisoners to perform personal tasks for them, such as having prisoners paint the judge's home or work on his farm. This is also an impropriety that violates the Code of Judicial Conduct. There was even one case where the chief justice of a state supreme court required his secretary, as a condition of employment, to baby-sit for his child. This, too, was found to violate the Code of Judicial Conduct.

In addition, the Code prohibits judges from belonging to any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership in such an organization can create the appearance of impropriety, and thereby erode public confidence in the integrity and impartiality of the judiciary. Along similar lines, several courts have ruled that it is improper for a judge to associate with criminals, because to do so brings the judicial office into serious disrepute. Thus, on several occasions it has been found to be a violation of the Code of Judicial Conduct for judges to socialize with criminals. Under the Code, judges are required to act at all times in a manner that promotes public confidence in the integrity of the judiciary. Therefore, the Code expressly states that judges shall avoid impropriety and the appearance of impropriety in all of their activities.

#### **IV. CONCLUSION**

Judicial independence is critical to the maintenance of the rule of law. An independent judiciary provides a balance and check upon the authority of the other branches of government, and thereby prevents arbitrary government action. Whether elected or appointed, judges need to possess a certain degree of independence in order to foster the rule of law. Judicial independence may be achieved by granting judges immunity from civil liability and protecting their terms in office, by providing that they may not be removed from office or otherwise penalized on account of the decisions that they make.

There is, however, a corollary to judicial independence, namely judicial responsibility. If judges are to be granted independence, it is critical that they exercise their authority with competence, impartiality, and integrity. Judicial independence can operate properly only when judges are learned in the law and comport themselves with integrity and impartiality. The law must be administered professionally and impartially, with equality for all persons. Judges must avoid even the appearance of impropriety, as well as actual impropriety. Judges are important public officials who exercise a great deal of authority over individuals. As such, they are guardians of the public's trust. They must be granted independence to fulfill their responsibility of enforcing the law, but that independence must be tempered with the highest degree of impartiality and integrity. Public support of the judiciary is essential, and that support is only possible when members of the judiciary maintain an exacting standard of impartiality and integrity.

While judicial independence should be respected and protected, that is not to say that the judiciary should be entirely free from accountability. In the United States, judicial independence is maintained by granting judges tenure in office and immunity from civil liability. Judicial accountability, however, is effectuated by state judicial conduct commissions and federal judicial councils that enforce the standards mandated in the Code of Judicial Conduct. At the same time, egregious judicial behavior, such as corruption, may be dealt with through the criminal process or through impeachment by the legislature. In this way, judicial impartiality and integrity are upheld without compromising judicial independence. The goal is to foster an independent judiciary that will protect the rule of law, but a judiciary that is learned in the law, impartial, and honorable.

## **ADDRESS**

*Frances Khan Zemans*<sup>157</sup>

### **The Rule of Law and Judicial Independence**

Almost eight hundred years ago, in 1215, an English king signed the Magna Carta, committing the sovereign to be limited by the law. This was the first and most important step in establishing the Rule of Law, which dictates that no one is above the law, and that all are to be equal under the law. At a more basic level, the Rule of Law makes it possible for the public to know in advance what behavior is acceptable, and what is punishable. In other words, the people are no longer to be subject to the whims or arbitrary decisions of the ruler.

The Rule of Law is an essential ingredient in a democratic society. For those from developing nations, it is also worth noting that the predictability provided by the Rule of Law is most attractive to capital investment.

In operation, the Rule of Law is dependent on the essential ingredient of judicial independence, to insure that in individual cases it is the law (along with the facts) that will be determinative of the outcome. It is one thing for political leaders to commit themselves to the Rule of Law in principle, but quite another to insure that they are willing to be constrained by the law. An independent judiciary is designed to insure that the Rule of Law operates not only in theory, but in practice as well.

In reality both the Rule of Law and judicial independence are destined to be works in progress. Using the United States as my example, I want to address the following questions:

- How can we develop institutions and mechanisms that will enhance judicial independence so that it will contribute to the Rule of Law? and,
- How can that be accomplished without the judges themselves becoming arbitrary rulers?

The United States provides a particularly complex example, because in reality we have fifty-one quite distinct legal systems: the federal judiciary and the judiciaries of each of the fifty states. On the other hand, using the U.S. and its multiple jurisdictions illustrates that there are varying approaches to the same ends.

The United States Constitution, ratified just over two hundred years ago (in 1787), seeks to insure judicial independence by providing lifetime appointments for federal judges and prohibiting a diminution in their salaries during their terms of office. This job and salary guarantee is designed to restrict the influence of the political branches of government on judicial decisions; it is a way of reinforcing the point that judges are to reach their decisions impartially, based on the law.

A good example of judicial independence in this country occurred during what has come to be known as "Watergate." This case, which eventually led to the only resignation of a U.S. president, involved criminal prosecution, alleging obstruction of justice. Tape recordings of conversations in the president's office were deemed by the prosecutors to be evidence essential to their case. It may not surprise you to learn that President Nixon resisted making the tapes available to the court, where they would become a matter of public record. The president's challenge to the trial court's right to access to the tapes eventually reached the Supreme Court of the United States. Despite the fact that President Nixon had appointed four of the nine members of the Court, they ruled unanimously (with one recusal) that he was required to make the tapes available as evidence in the criminal trial. It is a credit to the nation's commitment to the Rule of Law that once the Supreme Court had spoken, the matter was settled without challenge.

---

<sup>157</sup> Frances Zemans, Executive Vice-President and Director of the American Judicature Society, made this presentation at the Tuesday luncheon of the JRTI. It may be reproduced and distributed for non profit educational purposes. Points of view expressed herein do not necessarily represent the official position or policies of AJS, NCSC, USAID or IDB.

Consistent with my theme that the Rule of Law and judicial independence are works in progress, let me assure you that neither deference to the Supreme Court, nor commitment to the Law, is always clear, a point that I will return to later.

### **Enhancing Judicial Independence**

If government leaders – executive, legislative, and judicial – argue for the benefits of judicial independence and the Rule of Law then they must truly seek to insure it. For in a democratic society, the Rule of Law ultimately depends on the people’s grant of legitimacy, and this can be diminished when laws, though written by the representatives of the majority, have an anti-majoritarian result in application. Thus, judges who follow the law as it is written may find themselves under attack for not following the momentary will of the people (which at a particular time may be quite different from that which motivated the relevant legislation). In fact, tension between the judicial branch and the executive and legislative branches is inevitable, for the political branches are inclined to side with the momentary will of the people, even if it is contrary to the law. In fact, early in our history, the first attempt to impeach a federal judge (he was not actually convicted) is now thought to have been a politically motivated effort that reflected dissatisfaction with judicial decisions.

A more recent example, and one of my favorites, comes from the state of Arkansas, home to our current president. The case involved the death of a child at the hands of his father. The father was convicted of first degree murder and sentenced to forty years in prison. On appeal, the Arkansas Supreme Court reversed the decision of the trial court, to the outrage of the public, the politicians, and the press. As stated in the opinion, first degree murder as defined by the legislatively drawn statute required premeditation, that is, the act was planned ahead of time. Since there was no evidence that the father had planned to kill the child, the court reasoned that the statute did not allow them to sustain the decision of the lower court. To do so would have been a violation of the Rule of Law. The court sustained a conviction of murder in the second degree (without premeditation), and reduced the sentence to the 20 years provided by statute for that offense. (The statute was subsequently amended to provide that a future case with the same facts would now require a different decision by the court).

While that is perhaps an extreme example, judges are regularly faced with making decisions for which the law dictates one result, and public emotions demand another. This is part of the discomfort of being an independent judge.

Actual corruption of judicial independence runs along a continuum: from the direct purchase of desired decisions (bribery); to favoritism of those responsible for the judge obtaining and retaining judicial office (making the mechanism for selecting judges very important); to extremist ideology (that prevents impartial decisions based on the law); to bias against particular groups (that diminishes equality under the law); to conflicts of interest, both personal and financial. This compendium of various inappropriate influences on judicial decision-making cannot be eliminated by simple or easy solutions.

In the United States, we attempt to deal with these problems through three different approaches (keeping in mind that each of these vary among our fifty-one legal systems):

- criminal prosecution;
- codes of ethics and disciplinary enforcement mechanisms; and,
- judicial education.

Direct bribery of judges to achieve a desired result in a particular case appears to be a relatively rare phenomenon, but it continues to exist (even enforcement of the criminal law is a work in progress). Bribery is particularly difficult to enforce because prosecution depends upon a complainant, typically a victim. Since neither the briber nor the one being bribed is likely to file a complaint, other investigatory efforts are required. While accusations of bribery may first come to a judicial discipline system (and such behavior surely violates

every code of judicial ethics), in the United States these cases are prosecuted in the criminal justice system (although if found not guilty, the case can be pursued under the less stringent evidentiary standards of the discipline system).

In the 1980s, there were two system-wide bribery scandals in two American cities: Chicago and Philadelphia. In Chicago's operation Greylord, as the investigation was called, more than 40 people, including 15 judges (and numerous lawyers and court employees), were sentenced to jail. Philadelphia had another bribery scandal, though not as extensive. The bad news, of course, is that two hundred years after our nation's founding with a stated commitment to the Rule of Law, we are faced with the realities of corrupt judges. The good news, on the other hand, is that the public was outraged, and the criminal justice system pursued powerful public officials to the full extent of the law. As dictated by the Rule of Law, even public officials are to be held to established standards of conduct.

In reality, most corruption of the judicial system is not so blatant; it is more subtle, and we therefore approach it differently.

### **Judicial Ethics and Discipline**

Until 1924, a full 137 years after the adoption of the federal constitution, there was no systematic attention to judicial ethics in the United States. The first efforts, strangely enough, relate to baseball, our national pastime.

The year of the infamous Black Sox scandal was 1919. Several members of this baseball team were prosecuted and convicted of taking bribes from gamblers to alter the outcome of that year's World Series. In the wake of the scandal, United States District Judge Kenneth Shaw Mountain Landis, who enjoyed lifetime appointment to the federal bench, was selected to fill the newly created position of Commissioner of Baseball. While his appointment was hailed as a way to insure that such scandals would not occur in the future, Judge Landis refused to relinquish his seat on the bench. It was this situation that provided the impetus for the American Bar Association to promulgate the first Canons of the Judicial Ethics.

The Canons were stated as model behavioral goals for judges, that were to be subsequently adopted by the States. These aspirational statements depended upon voluntary compliance by judges, many of whom were committed to doing their very best. They provided standards to which judges could point and say in response to an inappropriate request: "I would like to help you, but the rules prohibit me from doing what you ask." The standards incorporated in the Canons were designed to protect and enhance judicial independence and impartiality, and were deemed necessary if the public were to believe that they would receive fair and impartial justice. The issues covered included prohibitions on *ex parte* communications, requirements for judges to recuse themselves in cases involving personal or financial conflicts of interest, and the like.

It was not until 1960, however, that the first judicial discipline body was established to actually enforce standards of judicial conduct. Beginning in California, every state eventually created a judicial conduct organization to enforce standards of judicial behavior. In 1980, even the federal judiciary adopted such a mechanism, although with significant differences. In every state, the judicial system body includes non-judges, and in almost all states they include non-lawyers. In significant contrast to the states, federal judicial discipline involves only judges in the decision-making process.

In every state, the system of judicial discipline provides for alternatives to impeachment for removing a judge from office, and all provide for additional sanctions less onerous than removal. Both established ethical rules for judges to follow, and an effective discipline system to enforce them, serve to enhance judicial independence. First, judges are provided with a defined basis for appropriate behavior; second, the public receives the message that if judges violate the rules, there are consequences; and third, judges become educated as to what is acceptable behavior in the context of actual cases. It should be noted that none of this relates to legal error by judges. Legal error is a matter for appeal, not for disciplinary review.

But ethical codes of conduct go well beyond behavior that is obviously problematic for judges. Such codes reflect significant concern with prohibiting even the appearance of impropriety. This is particularly important, because, even the judge with a strong commitment to the highest ethical standards may not be sensitive to the extent to which some behaviors, while not themselves inappropriate in principle, become inappropriate because they appear to be so to the public. While this may seem an excessive burden on judges, attention to appearances is critical to public support for the legitimacy of the judiciary, on which judicial independence is so dependent.

We continue to struggle with judicial ethics and the appearance of impropriety. One particular area of difficulty for judges occurs in those states that elect their judges where campaign contributions by lawyers who appear before the judges, and promises to voters to decide cases in particular ways, raise serious questions about the impartiality of the judiciary.

We at the American Judicature Society, a national non-profit court reform and education organization, continue to work to educate judges (and also court employees) about the subtleties of ethical conduct. Both the standards of conduct and the disciplinary systems around the country continue to evolve. For more information, I recommend to you the work of Jeffrey Shaman, a senior fellow at AJS, whose detailed discussion of these issues has been provided to you in both Spanish and English.

In the United States and elsewhere, the Rule of Law and Judicial Independence are works in progress. But be assured, that a commitment to them is critical if progress is to be made. Our civil rights movement in the 1960s was successfully fought by appeals to the law, and the stated (if not enforced) commitment to equality under the law. But state judges, many of them elected by majority vote, were not responsive to these appeals.

Instead, it was federal judges, with lifetime appointment, who lead the way in decisions that are now hailed as one of the great achievements of the federal judiciary. But they too were subjected to extremely harsh criticism, particularly in states, such as the one in which we are currently gathered, where the Southern Manifesto opposing a series of Supreme Court decisions was endorsed by a wide range of prominent elected officials, and where roadside billboards called for the impeachment of Chief Justice Earl Warren.

And just recently, a decision by a federal district judge to exclude evidence in a drug case generated verbal attacks by politicians of both parties. Even the president of the United States suggested that the judge might consider resigning, and the presidential candidate of the other majority political party suggested that impeachment might be appropriate.

Thus, in the abstract, we want an independent judiciary and the Rule of Law that it sustains, but when it produces an undesirable result, it is the judge that is frequently the focus of attack. This reflects an ongoing, but healthy tension between an independent judiciary and the political branches of government.

Despite these continuing occurrences, we have made considerable progress since our nation's founding. Earlier I made reference to the case involving President Nixon's audiotapes. It is certainly questionable whether Thomas Jefferson, who spent a good many years here in Williamsburg, as both student and legislator, would have been so deferential to the Supreme Court of the United States. But times have changed since the days of Jefferson, and it is a measure of our more than 200 years of working at democracy that deference to the Rule of Law has been sustained.

We wish you well on your journey to enhance the Rule of Law in your countries. The journey is not an easy one, but the benefits are well worth the effort.

## COMMENTARY

The judiciary should “represent the best” of society, and the function of administering justice should be under public scrutiny.

While there was unanimity on these issues, there were deep divisions on the feasibility and advisability of developing ethical codes of conduct and mechanisms for training and enforcement.

For some, ethical conduct is a vocation -- “you either get or don’t, but cannot be taught,” and “conduct unbecoming to a judge” is impossible to define in detail. They claim that, when such definitions are attempted, instances of unethical conduct -- not covered by the ethical code -- will surface, and further confuse the issues.

For others, such mechanisms help make ethical conduct explicit, sensitize court officials (judges and administration personnel) to the issue, and broaden horizons. In countries where these provisions exist, mechanisms vary, such as bar associations and Supreme Courts. Penalties and enforcement processes also vary. Many viewed ethical standards for the judiciary and court personnel as consistent with, and related to, ethical considerations that apply to the entire public sector. They also argued that these codes are useful instruments to invoke when combating pressure, and, when they do not exist, they should be created.

Finally, concerns were expressed about the role of the media. Throughout the hemisphere, the judiciary is excoriated when it renders a decision consistent with the law, but unpopular. Reactions from the media “contaminate” the system, by suggesting that the judge acted inappropriately. The existence of ethical codes of conduct is useful, then, to help clarify such issues and controversies.

## **ADDRESSES**

## OPENING ADDRESS

*The Honorable Mark L. Schneider*<sup>158</sup>

Ladies and Gentlemen:

USAID, with the Inter-American Development Bank, and the National Center for State Courts, is pleased to welcome you to this second conference on "Judicial Reform and Rule of Law in Latin America and the Caribbean."

The two years since the first conference here in Williamsburg have seen a broadening understanding throughout our hemisphere of the fundamental role of legal reform and the rule of law in stabilizing democracy.

USAID has been promoting this movement for many years, and we are proud to have had the opportunity to work with many of you as individuals, as government officials, and as leaders of non-governmental entities.

John Adams, who would become the second president of the United States, in the days before our American Revolution, put the importance of the rule of law in clear, simple terms, when he said that there must be a "government of laws, not of men." It was the good fortune of the United States to be born with this principle enshrined -- to have fought a war of independence to put this principle into practice.

Your presence here, and the legal reforms which you have supported in the region, are evidence that our entire hemisphere is moving to embrace this great principle.

There is no longer any serious disagreement about the centrality of the rule of law or the obligations of states to protect the legal rights for their citizens, or the legitimate concern of the international community for the protection of human rights. This consensus is reflected in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.

More recently, 34 elected heads of state declared in the Plan of Action, adopted at the Summit of the Americas in Miami, "There must also be universal access to justice and effective means to enforce basic rights. A democracy is judged by the rights enjoyed by its least influential members."

Concern for the rule of law has increased tremendously in recent years. Not only are the traditional non-governmental groups which monitor human rights involved, but so too are governments and multilateral organizations -- as demonstrated by our *co-host* here, the IDB.

The 1980s and 90s have brought not only a return to democratic elections, but also the recognition that an essential foundation of democracy is the rule of law. Efforts to improve the rule of law are underway throughout the hemisphere -- codes are being reformed, methods for selecting judges changed, access to justice increased, and more transparent court procedures.

Colombia and Guatemala have introduced sweeping changes in their criminal procedure codes, and in their criminal justice system. Bolivia, Honduras, Peru, and Chile are in the process of modernizing their criminal procedure codes. Bolivia and Honduras have recently introduced the office of the Public Ministry into their criminal justice system for the first time in their histories. Chile is currently considering doing the same.

---

<sup>158</sup> The speaker is the Assistant Administrator, Bureau for Latin America and the Caribbean Region, US Agency for International Development.

Honduras has developed a civilian investigative unit, for the first time in its history separating civilian police investigations from the military. Bolivia has developed an Office of the Public Defender, which is supported as part of the Ministry of Justice. Argentina, Uruguay, Guatemala, and Colombia have all introduced oral process into their court proceedings. Costa Rica is introducing innovative efforts in the area of alternative dispute resolution. Argentina and Uruguay have introduced alternative dispute resolution mechanisms with broad reach and applicability.

These are the kinds of justice sector reforms USAID has been assisting. We began by helping law schools in developing countries improve the training of lawyers. Later USAID programs focused on making legal services accessible to the poor through legal aid projects. More recent programs, and those most relevant to this conference, focus on strengthening the system of justice – efficiency of the court system; training for judges, prosecutors and police; developing public defender systems; and efforts to improve court administration.

In the last 10 years, the Latin American and Caribbean Bureau of USAID has committed more than \$200 million to justice sector projects. Every country in the region, with the exceptions of Surinam and Cuba, has participated in projects which have ranged from \$55,000 for a judicial exchange program in Mexico, to a \$36 million, six-year project with Colombia, to support a multidimensional restructuring of the Colombian justice system.

To summarize a few of USAID's projects in the hemisphere:

- Bolivia – USAID has been working with the Government of Bolivia since 1992 to develop 1) judicial efficiency and accountability through a modernized judicial structure and efficient case processing; 2) effective criminal prosecution and investigation capability of prosecutors, police, and judges through training programs; 3) a functional public defender's office which has handled 22,730 cases since 1992.
- Guatemala – USAID has developed a major project, working with the Public Ministry, Supreme Court, and the universities, to support the implementation of the new Guatemalan criminal procedure code.
- El Salvador – USAID assistance supports Salvadoran efforts to accelerate and deepen El Salvador's judicial reform process, which includes reforms to the criminal procedure code, criminal code, criminal sentencing, and administrative procedures; training for judges, public defenders, and prosecutors; a public education program; curriculum reform in law schools; training of a civilian police force; development and distribution of legal textbooks; improved court administration; and reducing criminal and civil case backlogs.

- Haiti – USAID's assistance has focused on the development of a functional justice system. This has included 1) the development and training of a new 5,000 man civilian police force; 2) establishment of a judicial training center and training program for the 500+ Haitian judicial personnel including judges, prosecutors and justices of the peace; 3) improvement in the administration of justice, including case management, case tracking, and reporting.

USAID has learned a great deal through its years of work in the area of Rule of Law. Allow me to summarize some of these lessons which are set out in the 1984 USAID report on Rule of Law projects, entitled, "Weighing in on the Scales of Justice":

- A strong civil society is an effective base for launching efforts to mobilize constituencies to support Rule of Law development.
- NGO-based coalitions may prove difficult to build, but can form a strong force for legal reform.
- Structural reform is the boldest and the most difficult Rule of Law strategy to undertake.

- Introducing new structures may provide more returns than reform of older, entrenched institutions.
- Alternative Dispute Resolution is a low cost measure that can provide expeditious and accessible services in settling grievances.
- Legal advocacy represents the most promising access strategy.
- Legal system strengthening may be a difficult place to begin a Rule of Law program, but it is highly effective.
- Successful components of legal system strengthening strategies vary widely among countries.

While we have learned a great deal, and while we have made some important progress, there is still much to do. I suggest four challenges to you, you who are involved daily in making the justice systems work in our countries.

First, to make the rule of law equitable for all people, rich and poor, regardless of social position or stature.

Legal institutions and legal process, which respond to the public's demand for just and equitable decisions, strengthen democratic society. It must be clear that there is no double standard for the privileged on the one hand, and the poor on the other. The laws must be as fair for the pauper as it is for the prince.

Judicial officers who see their role as upholding the law and enforcing it in an equitable fashion, without bending to political pressure, strengthen democracy. Legislatures which pass needed code and statutory reform aimed at enhancing a more equitable and effective justice system strengthen democratic society. Non-governmental organizations which provide legal assistance, and pressure governments for needed legal change, strengthen democratic society. Civilian police forces effectively enforcing the law, yet respectful of human rights, strengthen democratic society.

The people throughout the Americas, and certainly including my own country, must see courts and judicial institutions become more equitable; they must see police and prosecutors demonstrate not only more efficiency, but more responsibility; they must see the law and legal rights effectively and equitably enforced; they must see courts demonstrate fairness based on each individual's rights, not on any individual's station.

There must be "governments of laws, not of men." To accomplish this, institutions must be established to provide legal defense and legal aid; programs must exist to assist victims of crime and injustice; public education must educate the public not only about their rights, but of the paths for redress of grievances; and alternative mechanisms for addressing legal wrongs and complaints must be developed.

The second challenge is to ensure that no citizen, whether in civilian clothes, in police uniform, or military dress, is above the law. Impunity must end. The rule of law must apply to all.

There is a legitimate and growing demand for accountability of government officials, including military and police. Democratic countries with legitimate legal systems cannot tolerate impunity for criminal activity by any official, or else the public's confidence in, and respect for, the legal system will disappear.

The third challenge is to see that the rule of law is transparent, open to public scrutiny, and accountable to the public we all serve.

There is a growing intolerance for corruption by government officials, and greater pressure for legal action against those involved in corruption. The actions taken by the Governments of Venezuela and Brazil against their former presidents are examples of increased application of the rule of law and of intolerance for corruption. The Summit in Miami saw the first ever hemispheric statement of concern and commitment from the heads of state to rid the region of corruption.

Throughout the region there is a growing demand for more transparency in the governing process, and more accountability of public officials. A clear example of transparency in the law is the increased number of countries requiring oral process in court proceedings, and opening these proceedings to the public.

The demand for transparency and accountability is part and parcel of the democratic process -- a demand for responsiveness and accountability of government. A major element in this search is a vital, free, and independent press, protected in its free speech by the law.

But in the end, you who form the system of justice, you who represent the rule of law in your countries, you ultimately must be the guarantors of accountability.

Finally, our challenge is to ensure that the rule of law, and the entire criminal justice system, protects the life and property of the average citizen, fairly and effectively.

Violence -- whatever its case -- is rising to the top of national priorities in country after country, including here in the United States. People must have the right to walk the streets of their cities without fear. And an effective and fair system of justice -- from the policeman on the beat to the Supreme Court Justice on the bench -- is absolutely essential to control that violence.

The rule of law must be enforced, or else it becomes merely a laudatory expression of rights on a piece of paper. Court proceedings must be more efficient and provide speedy judicial process to the public. Judicial officers must be effective and diligent in their work in upholding the law. Police officers must be effective in enforcing the law, but effective to all people and classes. Their duty is to serve and protect the public, effectively but equitably.

During the next few days at this conference, you will be sharing lessons learned from efforts to reform legal systems. There is much to learn from each other, and a great deal to share. Your work in addressing legal reform is vital to all countries in the Americas, for we must have viable systems of justice. I am honored to be part of this important conference, which addresses a topic of great importance to the consolidation of democracy in our hemisphere.

Justice Felix Frankfurter wrote, "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process."

During the conference, I have no doubt that your exchanges will help insure that the legal process will become stronger, and thus also contribute to strengthening the democratic process throughout the Americas.

I wish you the best in your work here and in your own countries.

## CLOSING ADDRESS

Mr. Charles Costello<sup>159</sup>

Linda Caviness introduced Chuck Costello, Director of the Global Bureau of USAID.

Thank you very much. First of all, I would like to thank the National Center for State Courts for all of their hard work in putting on this conference and the great job they have done for all of us. I would also like to thank the Inter-American Development Bank. We did a rule of law conference a few years ago, and in deciding to do another judicial roundtable we were delighted to do it together with the IDB.

What is it that USAID set out to accomplish more than a decade ago when we started to work in this field? Actually, USAID had done some work in what we called "law and development" starting in the 1960s, especially in Latin American, but also to some extent in Asia, based on the notion that the law and legal systems were elements of the economic development process. We had some successes and some failures, but our activity in that field trailed off, and we did not do much after the 1960s.

But we re-engaged and began to work heavily in this area, of what we would now call "rule of law" programs, at the beginning of the 1980s. Most of this work began in the Latin American region, although by the end of the 1980s we also became heavily involved in Eastern Europe and the countries of the former Soviet Union. We have been engaged, but to a lesser extent, in both Africa and Asia.

But I think we came at it from a different point of view. At least in the initial work we did, it wasn't looked at so much as being part of the process of economic development, but was seen more from the perspective of human rights and democracy. It was very closely linked to the process of what we call the "opening to democracy," or in Spanish *la apertura democrática*, and the understanding that the search for democracy, constitutional government, and protection of human rights was dependent on a strong rule of law and judicial reform. Legal regimes had not succeeded in protecting the rights of citizens or preventing abuses by governments against their citizens, so we began to work more broadly in the area of democratic development.

It's for that reason that the center I direct at AID is called the Center for Democracy and Governance, because we are working not only in rule of law, but also in elections and political process; strengthening of civil societies; and programs of governance, including decentralization, transparency and accountability. It was a conviction that in trying to promote democratic development as part of the overall development process, you couldn't limit democracy just to elections, even free and fair elections.

If you think back 20 years within the region you would see that not only did you have many unelected governments holding power, that is to say *gobiernos de facto* or military governments, you had a practice of fraudulent elections in many countries. USAID worked a lot with countries in the region in strengthening the electoral process, working with election commissions, civic education, and similar programs, but it became clear that it wasn't enough simply to see military governments replaced by elected civilian governments. That didn't necessarily guarantee democracy; democracy requires much more. If you sought to strengthen a process in which people have a chance to work for change peacefully within their systems, as an alternative to violent revolution, the only sure way to do that, and to offer to the people a process that protects their rights, was to strengthen the rule of law.

The rule of law gives people confidence that their rights will be protected, and that disputes about property rights or personal rights can be resolved in a form in which people have confidence. This means confidence that it will be honest, free from corruption, predictable, and within a reasonable period of time. So

---

<sup>159</sup> Mr. Costello is the Director of the USAID Center for Democracy and Governance.

it was the twin bases of economic development and political development needs that led us back in an important way to work in this field.

I think that in typical North American fashion we said, "some things are broken, they're not working right, so let's get in there and help people fix them." There were problems with the judges, so we said "train the judges;" there were problems with court case management, so we said "buy computers." We jumped in with programs in a number of countries, but we failed to realize in many cases that the whole system was broken. You couldn't very effectively deal with the problem simply by going after one activity here and another activity there. I think we discovered -- and I don't mean just us, but our host countries' counterparts as well -- that in order to deal with a problem in the entire system of justice, we needed better analysis of what was wrong, why things didn't work, and how the pieces fit together. We needed to develop judicial reform strategies.

Nonetheless, in the early stages we continued to look at it as a technical problem that would have technical solutions. If something was not working you bring in the experts to look at it, write up recommendations, implement the recommendations, and everything will be OK. We looked at it too much as a problem of management reform for the judicial sector, that if you'd just apply modern management science to something that wasn't working, you could make it work.

We discovered in time, working with our partners, that what was really necessary was a combination of good technical skills, with the building of political will on the part of governments, and within civil societies, to press for change, to insist, in a democratic fashion, that the system change and begin to serve the people in the way it was designed.

By way of substantive improvements, we saw the introduction of oral procedure, a new procedural system in criminal justice. It makes the process of justice one of face to face contact between the experts in the system, the judges and the lawyers, and the people who are parties to disputes. We tried to make that public so that the people can see what is said in a trial, they can listen, they can judge in the same way that a judge or a jury does whether people are telling the truth or lying, whether the judge in a case is giving a fair hearing to both parties. Also, we saw the introduction of the adversary system, *el sistema acusatorio*, in which the prosecutors play a stronger role in pressing criminal cases in place of the old inquisitorial system. We also worked on alternative dispute resolution, not only as a method to reduce congestion in the court system or to reduce costs, but also as an effort to recognize a democratic principle of greater popular participation. It allows ordinary citizens to feel that they themselves can participate in the justice system in the resolution of disputes. That is why I think so many of the surveys have shown there is greater acceptance on the part of the parties of agreements reached under alternative dispute resolution procedures. People don't feel that the outcome has been dictated to them by a judge, but rather that they themselves have taken responsibility for resolution of the dispute.

The most important struggle for reform that we have been engaged in with our partners in the region is the effort to make judicial institutions independent of the political domination, not only by the executive branch of government, but also by political parties and powerful economic groups. In many of the countries of Latin American, certainly that is still an issue today. As they say, "for a poor man there is no justice." Impunity, *la impunidad*, or the failure of justice systems to enforce justice against everyone, especially against the military, is still the main complaint of citizens. We have worked a lot with our partners on attempts to change the method of selection of judges so they could be freed from political influence. We've worked on systems of discipline so that when judges or lawyers act unethically or illegally, there are ways in which they can be disciplined. If we indeed are successful in making the justice system function better, the scales will be tilted heavily in favor of the state, particularly against citizens who have little money to hire lawyers. In the interest of greater protection of human rights within systems that traditionally have not done a very good job at protecting human rights, we've seen a lot of attention to initiatives to strengthen public defenders' offices, the *defensoria pública*.

One of the things we have learned in the process, and in which the countries we work with have increasingly come to believe, is the concept of building public support for justice reform. That is not something to be done just by the ministry of justice or by the supreme court. It needs and depends on public participation. One of the best ways to build a base of support for reform of justice systems are programs of popular legal education and, more broadly, programs of civic education. This is part of the strengthening of democratic culture.

What has resulted from all this effort? I think we have much higher public expectations of national justice systems, and much more insistent demands from the public. I think we are all finding it hard to respond adequately to those demands, and this is certainly a problem in the United States as well. If you look back ten years, we have made a lot of progress; nonetheless, you find that people's expectations have continued to rise during that period. What was good enough to satisfy them ten years ago no longer does. What that means is what we have to build an even stronger base of support for reform, in order to tackle the toughest issues, and to meet much higher public expectations about their national justice systems. In fact, people indeed are beginning to believe in their rights. This is marvelous. Once citizens are convinced of their rights within a democracy, governments must respect those rights, because people will demand them.

In large measure I am referring here to what we discovered to be the most critical issue that determines the success or failure of judicial reform efforts: significant reform in the judicial sector will not happen without strong political will. Legal systems need to be conservative, in the best sense of that word, because they need to be normative institutional arrangements by which we maintain and transmit the public values of our societies. But they must be systems that are adaptive, that can respond to the need for change. What we found is that whether you are practicing lawyers or judges, or members of judicial commissions, you won't be able to achieve real reform in the judicial sector unless there is a strong political will in your country to make it happen. Political will has to be reflected not only at senior levels of government in the executive branch, but also by leadership in the legislature, and by yourselves in the judicial sector; it must also be a part of the platforms of political parties -- it must be part of what politicians and parties promise to the people when they are asking for their votes, and they must then keep those promises once in office.

The process of building support for change necessarily links us as experts with civil society, with human rights groups, and with business organizations, which have a strong interest in seeing a legal system operating in a modern and efficient way, as a support base for a modern economy. You will not find a developed country with a strong economy and a modern private sector without a judicial sector which is not also modern. You need a functioning, modern justice system to support a modern economy. The two must go together.

The judiciary, and many of you are judges, play a key role. As part of the fight for independence, as judges you must divorce yourselves from politics, or at least from party politics, even if your own nomination as judges is part of the political process driven by political parties, as it is for federal judges here in the United States. You must accept the responsibility that once you are on the bench, you will no longer let any of those party connections affect your impartiality or independence. Of necessity, you are leaders in the process of legal reform, but you alone cannot do it. Human rights groups, business groups, university faculties, and other groups that you might normally not even think about as part of the judicial reform process, such as labor unions or teachers groups, are all important.

I think the Roundtable has shown agreement on the importance of the challenge to build democratic societies based on the rule of law. We at USAID remain strongly committed to working in the area of administration of justice. We plan to continue our financial, technical, and political support for national and regional reform efforts. We hope that this group can continue to be active advocates for reform in your own countries, and that through such conferences as this one you can give continued momentum to efforts at the national level, supported by actions at the regional level.

I trust the things we have learned here will help support a deeper, more fundamental principle, which is that rule of law programs, and programs to improve administration of justice, are an essential element of

democratic development in the Americas and elsewhere. Democratic development and good governance go together; you will not find the true rule of law in non-democratic societies. If you seek to strengthen the rule of law in your countries, you must also be strong supporters of democracy and democratic development. The two go hand in hand. True sustainable development must be built on a foundation of democratic institutions governed by the rule of law.

Thank you.

## **CLOSING ADDRESS**

*The Honorable Roger Warren*<sup>160</sup>

Good Evening. I have been in Washington D.C. for meetings with officials of the U.S. Department of Justice over the last two days, and therefore, I have not been able to join you for the entire Roundtable, but I know that you have had a very busy three days, and that you have worked long hours to discuss topics that are of utmost importance to us all as we try to improve our justice systems.

As Ms. Caviness mentioned on Sunday evening, I served as a judge in the State of California for 20 years, before recently taking office as President of the NCSC.

As a former state court judge here in the U.S., I am well acquainted with the struggles that confront each of you. In California:

- We struggled to maintain our judicial independence from encroachment by other branches of government in order to assure that our judicial decisions were not influenced, and did not appear to be influenced, by outside or political pressures, but were based wholly on the rule of law and the balancing of the rights and interests of the parties before the court.
- We struggled to obtain the resources necessary to perform our judicial functions.
- We struggled to remind ourselves that the courts are here to serve the people, the public -- not the other way around.
- We struggled to improve our performance in order to meet the public's rightful expectations.
- We struggled to run the court in an efficient, business-like manner.
- We struggled to eliminate bias or prejudice based upon gender, age, race, or ethnicity.
- And, we struggled to provide access to the poor, the illiterate, those who don't speak our dominant language, English, and those who are sick or disabled.

Even before I became a judge, I worked as a legal aid lawyer for the poor, for those who could not afford an attorney, in order to open up access to the justice system so that it might provide justice for all.

I also know the work that must take place to come to any consensus on the role and activities of a judicial council, because I served as a member of the California Judicial Council and as Chair of the Judicial Council's Planning Committee, with responsibility for developing and implementing a long-range plan for California's judicial system. I also served as Chair of the statewide committee of chief or presiding judges of California's 200 trial courts -- a Judicial Council committee which had the responsibility of advising the Judicial Council on policy matters affecting the trial courts.

I also know the work that must take place in order to manage cases and reduce delay and unnecessary costs in your courts, because I was one of those responsible for reducing delay on my court by instituting a delay reduction program, in which we, the judges, took responsibility for the scheduling of court events, and set and adhered to time guidelines within which cases had to be concluded.

I also know the hard work that is necessary in order to build support among groups that can help (or hinder) your efforts toward change. In California, coalition-building was an important part of the change process. I was active in forming and leading an organization in Sacramento -- we called it the Sacramento

---

<sup>160</sup> Judge Roger Warren is the President of the National Center for State Courts.

Criminal Justice Cabinet -- which was made up of the head of every government agency which was a part of the criminal justice system (law enforcement, etc.). We ultimately had our own staff and budget, and became the planning agency for our criminal justice system.

We also built coalitions with lawyers, and led a coalition we called the Children's Coalition, which included all the public and private organizations which look after the interests of children.

And, I also know the work and the many hours of additional time that will be necessary as you develop your own ADR programs. I formed a Committee of lawyers and judges to create an ADR program in our court -- a program which promoted mediation and negotiation, and which required the parties and lawyers involved in a lawsuit to consider ways to resolve the dispute other than through formal court processes.

So, you see, there are almost 2000 judges in California, and over 30,000 state court judges in the United States, who are striving toward a more accessible, fair, and efficient system of justice in *this* country, just as you are striving to improve the administration of justice in *your* countries.

We have a lot in common, brothers and sisters around the world, as we lead our respective efforts toward a truly just society.

During this journey, it is important that we share our experiences, share our successes and our failures, share our thoughts on why we have been successful, and what we have learned from our failures. This Judicial Reform Roundtable experience is but one way to share those lessons.

Let me take a minute to express how the National Center views its mission, and our participation in the work we do with our colleagues from abroad.

The mission of the Center is to promote justice, to promote judicial reform, and to improve the administration of justice through service to courts. The NCSC is proud of its 25 years of service to the courts of the U.S. We are proud of our research which results in new information and knowledge about court problems; we are proud of our education and training for judges and court officials that results in a better informed profession; we are proud of our technical assistance to individual courts that results in greater efficiency for those courts; and we are proud of our information services that result in the sharing of lessons learned throughout the worldwide judicial community. Through this Judicial Roundtable, the NCSC has provided a forum for you to share ideas and information.

It is also the mission of NCSC to promote justice and judicial reform, and to improve the administration of justice, by actively encouraging and supporting the development of judicial and administrative leadership within court systems. Through this Roundtable we wanted to support the leaders of justice system reform around the world -- those who are in a position to make a difference in their countries; those who will necessarily need to take risks; those who must educate others about the need for change; those who must and will give greatly of themselves in order for the goals of justice system reform to succeed. You are the leaders of reform, and we wanted to provide you, the leaders, with a forum to discuss and debate issues of reform among yourselves.

We at NCSC are proud of what you have accomplished, both here at the Roundtable and at home. We salute you, and look forward to future collaboration with our Latin American and Caribbean neighbors, and to the expansion of our knowledge-sharing and leadership development activities worldwide. We have been very pleased to have delegates from Albania, Egypt, Nepal, Senegal, Tanzania, and Zambia join us at this Judicial Reform Roundtable. And we hope that the next Roundtable will provide even wider opportunities for judicial leaders from around the world to share the lessons they have learned, as we all continue to reach for a true sense of justice in our countries.

As a side note, let me mention that the National Center, in partnership with another NGO, will be working in Egypt over the next five years, to assist the judiciary there to further develop a judicial training center, and to improve the efficiency of their courts.

The Center is also interested in providing assistance to the major donors in this field: the U.S. Agency for International Development, the Inter-American Development Bank, and the World Bank. As partners, the National Center and these donors can jointly develop a greater understanding of the global rule of law issues, and contribute to each others' technical knowledge of justice system improvement.

The philosophy behind this Roundtable experience -- promoting justice system reform through the sharing of information among peers, and networking of judicial leaders -- is the philosophy of the National Center for State Courts' International Program. We hope it has been a useful experience for you, and that you take home new ideas and renewed commitment. In particular, we hope that you take home the sense that you have made new friends, and a sense of fellowship -- of brotherhood and sisterhood, that will form the nucleus of a global network of support for you and others in the worldwide struggle for justice.

Thank you for being here.

## **APPENDICES**

## LIST OF PARTICIPANTS

### ARGENTINA

GLADYS S. ÁLVAREZ (D)  
President  
Federal Civilian Court of Appeals

### BAHAMAS

EMMANUEL OSADEBAY (D)  
Justice of the Supreme Court

NATHANIEL DEAN (D)  
Registrar of the Supreme Court

### BOLIVIA

FÁTIMA LUNA PIZARRO (D)  
Director Ministry's Judicial Organization

CARL A. CIRA (O)  
USAID/La Paz

### BRAZIL

SÁLVIO DE F. TEIXEIRA (D)  
Judge of the Superior Court of Justice

PAULO TONET DE CAMARGO (D)  
Ministry of Justice Representative

CARLOS E. CAPUTO BASTOS (O)  
Bar Association Representative

### CHILE

LUIS CORREA (D)  
Justice of the Supreme Court and  
President of the Judicial School

JUAN ENRIQUE VARGAS (O)  
Executive Director of CDJ/CPU

### COSTA RICA

CARLOS ARGUEDAS (D)  
Justice, Constitutional Chamber  
Supreme Court of Justice

SARA CASTILLO VARGAS (D)  
Executive Director, CONAMAJ

HERNANDO PARÍS (O)  
Secretary General of the Supreme Court

### DOMINICAN REPUBLIC

MILTON RAY GUEVARA (D)  
Executive Director  
Fundación Institucionalidad y Justicia  
(FINJUS)

MANUEL PÉREZ SÁNCHEZ (D)  
Judge of the Court of Appeals

DOUGLAS BALL (O)  
AID/Dominican Republic

### ECUADOR

JOSÉ MARÍA PÉREZ NELSON (D)  
Executive Director - PROJUSTICIA

### EL SALVADOR

JOSÉ DOMINGO MÉNDEZ (D)  
President, Supreme Court of Justice

RUBÉN MEJÍA PEÑA (D)  
Minister of Justice

RENÉ HÉRNANDEZ VALIENTE (D)  
Vice President, Supreme Court of Justice

MAURICIO HERRERA (O)  
AID/El Salvador

**EASTERN CARIBBEAN**

MURRIO DUCILLE (D)  
Chief Magistrate Antigua & Barbuda

DENNIS BYRON (D)  
Justice of the Supreme Court Saint Lucia

**GUATEMALA**

MARIO AGUIRRE GODOY (D)  
President of the Supreme Court

JULIO E. MORALES PÉREZ (D)  
President of Criminal Chamber  
Magistrate of the Supreme Court

BRIAN TREACY (O)  
AID/Guatemala

**HAITI**

ASTRID FOUCHÉ GARDÈRE (D)  
Secretary of State in Charge of Judicial Reform

JEAN-PHILIPPE VIXAMAR (O)  
AID/Haiti

**HONDURAS**

JOSÉ EDUARDO GAUGGEL (D)  
Minister of the Supreme Court

EDMUNDO ORELLANA M. (D)  
Attorney General

**JAMAICA**

EDWARD ZACCA (D)  
Chief Justice of the Supreme Court

BOYD H. CAREY (D)  
Justice Court of Appeal

**MEXICO**

JEAN CLAUDE ANDRE TRON PETIT (D)  
Judge, Federal District

**NICARAGUA**

ARTURO CUADRA ORTEGARAY (D)  
Justice, Supreme Court of Justice

**PANAMA**

AURA GUERRA DE VILLALAZ (D)  
Supreme Court Justice, Criminal Chamber  
Judicial Branch

JOSÉ MARÍA CASTILLO (D)  
Secretary General, Office of the Attorney General  
Public Ministry

**PARAGUAY**

RAÚL SAPENA BRUGADA (D)  
President Supreme Court

ANIBAL CABRERA VERÓN (D)  
Attorney General

**PERU**

FRANCISCO EGUIGUREN PRAELI (D)  
Director Judicial Academy

CARLOS MONTOYA ANGUWERRY (D)  
Director Judicial Council

**URUGUAY**

IRMA JULIA ALONSO PENCO (D)  
Judge, Court of Appeals of Montevideo

**VENEZUELA**

ROSALINDA PAIVA (D)  
Criminal Court Judge

GISELA PARRA MEJÍA(D)  
Magistrate, Judicial Council

## DELEGATES FROM OTHER REGIONS

### ALBANIA

KRISTOFER PECCI (D)  
Justice, Supreme Court

### EGYPT

AHMED MAHMOUD KAMEL (D)  
Vice President, Court of Cassation and  
Deputy Director of the National Center for Judicial  
Studies

KAMAL GEORGY DANIEL (D)  
Chief Justice, Cairo Court of Appeals

### NEPAL

INDIRA RANA (D)  
Secretary of the Judicial Council, Ministry of Law,  
Justice and Parliamentary Affairs

### SENEGAL

MATAR DIOP (D)  
Judge of the Court of Appeals

EL HADJI MALICK SOW (D)  
Judge of the Court of Appeals

### TANZANIA

JOHN ALOIS MROSO (D)  
Judge of High Court

BARNABAS ALBERT SAMATTA (D)  
Principal Judge of the High Court

### ZAMBIA

BOBBY MACK BWALYA (D)  
Justice of the High Court

## OBSERVERS

FAY ARMSTRONG  
US Department of State

WALEED MALIK  
Public Sector Specialist - World Bank

WILLIAM M. BERENSON  
Director, Department of Legal Services of the  
Secretary General Organization of American  
States

ROBERTO MCLEAN  
Special Advisor - World Bank

MARIA DAKOLIAS  
Legal Counsel - World Bank

JORGE OBANDO  
Senior Advisor for Justice  
UNDP/RBLAC

SUSAN GADDY  
Administrative Office of the US Courts

IZUMI OHNO  
Public Sector Specialist - World Bank

LOUIS FERRAND  
Department of Legal Services  
Organization of American States

JORGE RIOS  
Senior Trial Attorney  
OPDAT - U.S. Justice Department

ANIELLA GONZALEZ  
Program Manager - US Department of State  
Bureau of Democracy, Human Rights and Labor

MALCOLM ROWAT  
Project Advisor - World Bank

JORGE GARCÍA GONZÁLEZ  
Special Advisor of the Secretary General  
Organization of American States

COLETTE PICARD  
Attorney - Canada

ROBERTO LAVER  
Counsel - World Bank

JEANNETTE TRAMHEL  
Legal Secretariat  
Organization of American States

LOUISE LAVIGNE  
C.I.D.A. - Canada

RUSSELL WHEELER  
Deputy Director  
Federal Judicial Center

## ROUNDTABLE CO-SPONSORS

**PABLO ALONSO**

Attorney, State & Civil Society Unit of the  
Strategic Planning and Operational Policy  
Department - IDB

**CHRISTINA BIEBESHEIMER**

Attorney, State & Civil Society Unit of the  
Strategic Planning and Operational Policy  
Department - IDB

**FERNANDO CARRILLO FLORES**

Senior Advisor, State & Civil Society Unit of the  
Strategic Planning and Operational Policy  
Department - IDB

**CARLOS CORDOVÉZ**

Attorney, State & Civil Society Unit of the  
Strategic Planning and Operational Policy  
Department - IDB

**CHARLES E. COSTELLO**

Director  
Center for Democracy and Governance  
USAID

**ROBERTO FIGUEREDO**

USAID/Global Bureau

**BELINDA FONSECA**

Official, Country Division 3 of Regional  
Operations Department 2 - IDB

**LINN HAMMERGREN**

USAID/Global Bureau

**EDMUNDO JARQUÍN**

Chief, State & Civil Society Unit of the Strategic  
Planning and Operational Policy Department  
IDB

**FRANCISCO MEJÍA**

Economist, State & Civil Society Unit of the  
Strategic Planning and Operational Policy  
Department - IDB

**HÉCTOR MORENA**

Official, Country Division 4 of Regional  
Operations Department 2 - IDB

**NORMA PARKER**

Deputy Assistant Administrator  
Bureau for Latin America & the Caribbean Region  
USAID

**MARGARET SARLES**

Bureau for Latin America & the Caribbean Region  
Democracy and Human Rights Office

**MARK L. SCHNEIDER**

Assistant Administrator  
Bureau for Latin America & the Caribbean Region  
USAID

**JORGE TELLER**

Attorney, State & Civil Society Unit of the  
Strategic Planning and Operational Policy  
Department - IDB

**STEFANO TINARI**

Economist, State & Civil Society Unit of the  
Strategic Planning and Operational Policy  
Department - IDB

**PAUL VAKY**

Project Officer  
USAID/LAC/DI

## **STEERING COMMITTEE**

### **NATIONAL CENTER FOR STATE COURTS**

Linda Caviness, Executive Director  
International Programs Division

Madeleine Crohn, Project Director  
International Programs Division

William Davis, Senior Advisor

### **AGENCY FOR INTERNATIONAL DEVELOPMENT**

Roberto Figueredo, Coordinator for Asia and the Near East  
Global Bureau

Debra McFarland, Senior Rule of Law Advisor  
Global Bureau

Michael Miklausic, Democracy Officer  
Center for Democracy and Governance

Pamela Pelletreau, Consultant  
Center for Democracy and Governance

Paul Vaky, Project Officer  
Latin American & Caribbean Bureau

Fay Armstrong, Administration of Justice Officer  
Office of Policy, Planning Coordination & Press, State Department

### **INTER-AMERICAN DEVELOPMENT BANK**

Christina Biebesheimer, Attorney, State and Civil Society Unit  
Strategic Planning and Operations Department

Helmuth Carl, State and Civil Society Unit  
Strategic Planning and Operations Department

Fernando Carrillo Flores, Senior Advisor, State and Civil Society Unit  
Strategic Planning and Operations Department

Francisco Mejía, Economist, State and Civil Society Unit  
Strategic Planning and Operations Department

## **SPEAKERS**

**Mr. Charles Costello, Director  
Democracy and Governance Center - USAID**

**Mr. Edmundo Jarquín, Chief  
State and Civil Society Unit - IDB**

**Hon. Mark L. Schneider, Assistant Administrator  
Bureau for Latin America and the Caribbean Region - USAID**

**Hon. Roger Warren, President  
National Center for State Courts**

**Dr. Frances Zemans, Vice-President and Director  
American Judicature Society**

## **ROUNDTABLE NCSC STAFF LIST**

**Linda Caviness, Executive Director, Intl. Programs  
Madeleine Crohn, Project Director  
Natalie Davis, Administrative Assistant  
William Davis, Senior Advisor  
Karen Heroy, Director, Intl. Visitor Training  
Sepideh Keyvanshad, Program Coordinator  
Margarita Mattivi, Program Assistant**

## **FACILITATORS/REPORTERS**

**Judge Gladys Álvarez  
Fay Armstrong  
Christina Biebesheimer  
Linn Hammergren  
Michael Miklaucic  
Hernando París  
Jorge Teller  
Stefano Tinari  
Brian Treacy  
Paul Vaky  
Juan Enrique Vargas  
Russell Wheeler**

## **INTERPRETERS**

**Martha Goldstein  
Michael Kent  
Patricia Michelsen  
Margaret Zandrowich**

# JUDICIAL REFORM ROUNDTABLE II

Williamsburg Woodlands - Cascades Meeting Center

Williamsburg, Virginia

May 19-22, 1996

Sponsored by the U.S. Agency for International Development (USAID)

and the Inter-American Development Bank (IDB)

in collaboration with the National Center for State Courts (NCSC)

## **SUNDAY, MAY 19, 1996**

- 1400 - 1700**                      **Registration**  
Cascades Foyer (Conference Center adjacent to Woodlands Hotel)
- 1500 - 1630**                      **Faculty Orientation (for reporters and facilitators ONLY)**  
Corner Room (in Conference Center, Restaurant Level)
- 1800 - 1930**                      **Reception and Welcome**  
National Center for State Courts  
*Busses will pick up at Cascades Upper Lobby at 1745, and  
return from NCSC beginning at 1930*
- The Honorable Roger K. Warren, President, NCSC
  - Charles E. Costello, Director, Center for Democracy and  
Governance, Global Bureau, USAID

## **MONDAY, MAY 20, 1996**

- 0900 - 0945**                      **PLENARY - Judicial Reforms and Rule of Law in Latin  
America and the Caribbean - An Overview**  
Cascades Room, Conference Level
- Linda R. Caviness, Executive Director, Intl. Programs, NCSC
  - The Honorable Mark L. Schneider, Assistant Administrator, Bureau  
for Latin America and the Caribbean, USAID
  - William E. Davis, Senior Advisor, Intl. Programs, NCSC
- 0945 - 1030**                      **PART I - INSTITUTIONAL AND LEGAL REFORMS**  
**PLENARY - Judicial Councils**  
Cascades Room, Conference Level
- 1030 - 1100**                      **Break**
- 1100 - 1230**                      **GROUP DISCUSSION - Judicial Councils**
- |            |               |                  |
|------------|---------------|------------------|
| Group I -  | Council 1     | Conference Level |
| Group II - | Council 2     | Conference Level |
| Group III- | Seminar 1     | Conference Level |
| Group IV   | Seminar 2     | Conference Level |
| Group V    | Corner Room   | Restaurant Level |
| Group VI   | Cascades Room | Conference Level |

**MONDAY 5/20/96 - CONTINUED**

- 1230 - 1400**                      **Buffet Lunch - Dutch Treat**  
Group seating in North Room (adjacent to Dining Room - Restaurant Level)
- 1400 - 1430**                      **PLENARY**  
. **Review of Judicial Council Recommendations**  
. **Caseflow Management**  
Cascades Room - Conference Level
- 1430 - 1600**                      **GROUP DISCUSSION - Caseflow Management**  
Group I - VI (see page 1 for room assignments)
- 1600 - 1630**                      Break
- 1630 - 1800**                      **PLENARY - Conclusions and Recommendations**  
Cascades Room - Conference Level
- 1930 - 2200**                      **Informal Dinner - Virginia Cook-Out**  
Pavilion at Kingsmill Resort  
*Busses will pick up at Cascades Upper Lobby at 1915, and return from Pavilion beginning at 2200. Casual Attire.*

**TUESDAY, MAY 21, 1996**

- 0900 - 0930**                      **PLENARY - Oral Process**  
Cascades Room
- 0930 - 1045**                      **GROUP DISCUSSION - Oral Process**  
Group I - VI (see page 1 for room assignments)
- 1045 - 1115**                      Break
- 1115 - 1145**                      **PLENARY**  
. **Review of Oral Process Recommendations**  
. **Delay Reduction**  
Cascades Room - Conference Level
- 1145 - 1245**                      **GROUP DISCUSSION - Delay Reduction**  
Group I - VI (see page 1 for room assignments)
- 1245 - 1400**                      **Buffet Lunch - Dutch Treat**  
Group seating in North Room (adjacent to Dining Room, Restaurant Level)  
**Speaker: Frances Zemans, Executive Director, American Judicature Society: "Ethics and the Judiciary"**

**TUESDAY 5/21/96 - CONTINUED**

**1400 - 1430**                    **PART II - DEVELOPING CONSTITUENCIES AND  
CREATING ACCESS**  
**PLENARY**  
  . **Review of Delay Reduction Recommendations**  
  . **Coalition Building**  
Cascades Room - Conference Level

**1430 - 1600**                    **GROUP DISCUSSION - Coalition Building**  
Group I - VI (see page 1 for room assignments)

**1600 - 1630**                    Break

**1630 - 1800**                    **PLENARY - Conclusions and Recommendations**  
Cascades Room - Conference Level

**Evening**                        **Dinner on own**

**WEDNESDAY, MAY 22**

**0900 - 0930**                    **PLENARY - Alternative Dispute Resolution (ADR)**  
Cascades Room - Conference Level

**0930 - 1045**                    **GROUP DISCUSSION - Alternative Dispute Resolution**  
Group I - VI (see page 1 for room assignments)

**1045 - 1115**                    Break

**1115 - 1145**                    **PLENARY**  
  . **Review of ADR Recommendations**  
  . **Legal Services**  
Cascades Room - Conference Level

**1145 - 1245**                    **GROUP DISCUSSION**  
Group I - VI (see page 1 for room assignments)

**1245 - 1400**                    **Buffet Lunch - Dutch Treat**  
Group seating in North Room (adjacent to Dining Room - Restaurant  
Level)

**1400 - 1600**                    **PLENARY - Conclusions and Recommendations**  
Cascades Room - Conference Level

**1600 - 1630**                    Break

**1630 - 1800**

**PLENARY - Judicial Reforms and Rule of Law in Latin America  
and the Caribbean - Next Steps**  
Cascades Room - Conference Level

- Linda R. Caviness, Executive Director, Intl. Programs, NCSC
- Charles E. Costello, Director, Center for Democracy and  
Governance, Global Bureau, USAID
- William E. Davis, Senior Advisor, Intl. Programs, NCSC

**1930 - 2300**

**Dinner**

Williamsburg Lodge

*Busses will pick up at Cascades Upper Lobby at 1915, and return to  
Cascades beginning at 2300 - Business Attire*

- The Honorable Roger K. Warren, President, NCSC
- Charles E. Costello, Director, Center for Democracy and  
Governance, Global Bureau, USAID
- Dr. Edmundo Jarquin, Chief, State and Civil Society Unit,  
Inter-American Development Bank

