

EXPANDING THE RULE OF LAW: JUDICIAL REFORM IN CENTRAL EUROPE & LATIN AMERICA

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I almost feel that I ought to throw away my playbook this morning. Let me say first of all, it is a little bit daunting to appear on the same panel as Linn Hamnergren because nobody knows more about Latin America and judicial reform than Linn. But I am the hands-on guy and I think that I ought to tell you a little bit about how my colleagues and I function in the U.S. federal judiciary.

There is a committee of the judicial conference of the United States called the International Judicial Relations Committee, appointed by the Chief Justice. I was a member for six years, which was as long as one can serve on the committee. I was Chair of the Working Group for Latin America and the Caribbean for three of those years. The committee consists of about a dozen judges, including the Assistant Secretary of State for Democracy and Human Rights and, usually, a dean from a law faculty. This group meets regularly to talk about what is going on in international judicial reform matters and, frankly, the telephone never stops ringing. I probably get invited three or four times a month to lecture somewhere in the world. I have been to Mexico, Brazil, Ecuador, and Columbia. I am about to go to Argentina, and you know, I have a day job. I have a jury out right now that I must keep in touch with, and I have another judge sitting my jury to keep ahead. As you can see, we are really busy, and it is not just my background in Brazil and some facility in the Portuguese language that is useful. There is a Serbian judge in Chicago who travels to Central Europe; there are judges who speak Russian who are involved with Russia. There are Arabic-speaking judges. We are out there working the field, so to speak.

Frankly, it was quite a hard sell in the beginning to convince the people at the United States Agency for International Development (USAID) that maybe American judges had something to contribute to the concept of

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judicial reform. We are still trying to convince the World Bank that it is so. But other organizations are involved. The United Nations has an International Development Program; the Germans are involved; the Japanese are involved; it's a very active field.

I suppose I am a little distressed to see the disconnect between the academic study of comparative law and what is actually happening on the ground. Interestingly, the 1904 Conference was mostly judges and lawyers, not academics. There really seems to be something of a disconnect between us, because there is a huge industry out there where judges are involved in active comparative law today. Perhaps more judges need to be involved in your conferences in the future; I meet with enough judges on my own that I think we judges need to invite more academics.

I consider myself relatively Hobbesian because I do not believe generally in the perfectibility of legal systems. I do not believe that most legal systems even come close; not in Latin America, frankly, or anywhere, including the United States, which, whether we like it or not, is often taken as the gold standard for review. We have very political judicial nominations in the United States. Budgets for the judiciary are not ample in this country. Congress is not approaching the necessary budget for the federal judiciary. Judicial salaries, comparatively, are not bad; however, compared with lawyers in big firms, U.S. judicial salaries are paltry. A first- or second-year law graduate in a big firm makes more than a U.S. district judge who has been a lawyer for some thirty-five or forty years.

Let us talk for a moment about judicial independence. When you think about things like sentencing guidelines, which restrict the authority of judges to impose sentences; when you look at federal proposals to strip the federal judiciary of the authority to consider certain issues, you have a judiciary that is constantly under attack. A problem in Latin America is the problem of enforcing judgments. This is a problem everywhere. The point of all of this is that, while the judiciary in the United States may be better off than most judiciaries, we are not perfect. Only in gymnastics, I think, can you get a ten. We cannot get a ten here; but we keep trying—no question about that.

When talking about judicial reform in Latin America, you must consider just how far can you go with judicial reform. I will take the optimistic view. Overall, I am impressed with what I have seen in Latin America over the last twenty years. For all their shortcomings, it is a matter of perspective; there is every reason to believe that Latin America will continue to improve in the future.

With the exception of Costa Rica, virtually all Latin American countries have emerged from authoritarian regimes or civil strife in the last twenty years.¹ The prior histories of these countries were marked by governmental instability, authoritarian chief executives, weak judiciaries, antiquated laws, decisions that favored the wealthy and powerful, and pervasive corruption at all levels. So the idea that Latin America may not be going fast enough in judicial reform is hard for me to accept, given that base.

At the end of twenty years, you have something of a smorgasbord of projects. You do not find every one of these menu items in every Latin American country, but when you put them all together, you find that you do have a fairly comprehensive menu. Contrary to the view of some, I believe these items have a great deal more portability and more transplantability than one might suppose. I give credit here to USAID because, frankly, they began early in the game on this.

I happen to be a product of the long development movement of the 1960s. When I was a Peace Corps volunteer in Sao Paulo, Professor David Trubek (Wisconsin) came down and talked to me, and so did Professors Harlan Blake (Columbia) and Henry Steiner (Harvard), and they all wanted to know how they could revise the capital market laws. I am much more positive about what happened there because I followed the careers of people who were involved in the Getulio Vargas Foundation and some of the other activities there that the Ford Foundation sponsored, and I came away thinking that there were some positive results. It is all a matter of how fast you can go.

Today, the most important single observation that can be made about judicial reform in Latin America—and I suspect you could make it in other parts of the world too—is that it is on the agenda virtually everywhere. Every country is talking about judicial reform today. The judiciary talks about it; the executive talks about it; the legislature talks about it; the civil society talks about it; and the public talks about it. Everybody wants quicker, cheaper access to justice. Everybody wants independent, competent, honest judges and judicial personnel. People want respect for their fundamental rights. They want a fair justice system. They want decisions promptly enforced. This debate is going on virtually

1. Bolivia emerged from such a regime in 1982; Argentina in 1983; Brazil in 1984, when the dictadura went out; Nicaragua in 1984; Panama in 1989; Honduras in 1990; Chile in 1991, when the Pinochet years were over; Salvador in 1992, after years of civil strife; Guatemala in 1996 after 36 years of civil strife; and Peru, which we thought had some potential when Fujimori came in, but we were wrong about him and have to start all over with at base date of 2000.

everywhere. And as I say, there are various approaches to these issues all over Latin America. First of all, there is a framework for dialogue among the stakeholders. The judges, the executives, the legislatures, and the civil society talk to one another to a great extent. This may have started in the form of conferences and seminars, thanks to USAID and others, but it has become institutionalized in some places.

There have been major constitutional revisions in many of these countries. For example, Brazil completely revised its constitution in 1988, and you can replicate that in a number of countries in Central and South America. There have been structural reforms where new constitutional courts have been established where they did not exist before, such as in Bolivia. Small claims courts in Brazil are really the jewel in the crown of Brazilian justice these days. There are small claims courts being transplanted now in many places in Latin America. Specialized courts are emerging in various countries that deal with issues of family, juveniles, and commercial matters. And you have debates in some countries about dedicating a certain percentage of the budget to the judiciary. It becomes a matter of law that the judiciary gets a dedicated percentage of the national budget for its operations.

This is going on almost everywhere and, of course, there is substantive law reform. This includes capital markets reform, securities law reforms, commercial law reforms, in addition to the constitutional law reforms. There have been major procedural reforms and criminal justice reforms. Some countries with large Amerindian populations are making efforts to harmonize indigenous law with national law. That is particularly prevalent in Central American countries.

Criminal procedure law reform has been embraced in Latin America. Many countries have adopted accusatorial criminal justice systems, where the prosecutor now investigates the case rather than an investigative judge. Public defenders provide the adversarial aspect of the case. Matters then go forward; trials take place much more quickly. In the trials themselves, you have these concepts of concentration and orality. In some situations, the judge never has any contact with the witness—it is all done on paper. This idea of concentration, where a trial starts and ends in a short space of time instead of getting elaborated over a long period of time is also being introduced. Orality is another new concept: where a witness is called, examined, and cross-examined, and the lawyers now ask the questions as much as the judge. These are concepts being introduced in many parts of Latin America.

I happened to talk with Steve Hendrix of USAID just this week, who told me that it used to take three years to get to trial in Bolivia in criminal cases. Now it takes three months. That is a radical change. People were held in custody for longer than they would have to serve if they were found guilty of the crime. This is the kind of reform taking place in Latin America.

The proceedings are now open so that people can observe what goes on in the criminal proceedings. Transparency opens the doors considerably to much more democratic functioning. There are reforms of the judicial office itself. Many countries have judicial councils now. These are judges responsible for the selection, promotion, and discipline of judges; they follow the European model. This model has been adopted all over Latin America with mixed results. There is a long way to go yet, but the point is they have removed some of the authority of the Supreme Court to go ahead with the judicial selection, judicial promotion and discipline, and so on.

There are now judicial career laws, which guarantee that the people who will serve as judges have an opportunity to be selected based on examination and merit for their promotion. I was recently involved in Ecuador, helping develop an evaluation system for judges. Now, it got a little bit unreal because the people from Price Waterhouse wanted to quantify every qualitative factor. The consultants did not want to do anything but quantify. But still, the effort was there. The judicial council, or the *Consejo Nacional de la Judicatura* in Ecuador, was very interested in the concept of how to weigh factors that evaluate a judge. That is going on in Ecuador and similar kinds of projects in other parts of Latin America.

There are issues of codes of ethics. Costa Rica has a very significant new code of ethics for the judiciary where judges are discussing what they should and should not do. A common feature, which would probably horrify most American lawyers and judges, is that parties can have *ex parte* contact with the judges, on the theory that they are not going to say anything improper. Well, that is being debated now in some countries. But that kind of dialogue is continuing through the reform process.

Judges have been impeached in the past. Argentina is a good example where there have been several impeachments lately because of issues of alleged corruption. At least there are mechanisms now for the removal of judges that one might perceive as not being totally pure. There are more and better trained prosecutors. There are better statistics.

The point is, there are all these things happening that did not happen fifteen or twenty years ago. You have even got the beginning of plea

bargaining in places like Brazil. In misdemeanor cases, the prosecutors are bargaining with defendants for possible community diversion programs rather than going forward with the criminal process.

We have seen the development of judicial schools. Chile has one of the more impressive judicial schools. As I am speaking right now, there is a major conference on judicial schools going on in Brazil. They just finished one in Ottawa that the World Bank sponsored, where people came from fifty or sixty countries to talk about judicial schools. Latin America has been very prominent in establishing judicial schools for training their judges—not only new judges, but continuing judicial education in the future. You see more public defenders being hired and trained. And, I might say, it is not just the effort of the United States. Germany was very much involved in criminal justice reform in Chile.

There are issues of victims' rights being recognized in various countries of Latin America. Some countries have developed specialized units to protect victims' rights. There are shelters being set up for victims in certain countries. There are restitution programs being built into sentences—Chile and Paraguay are actually the leaders.

With regard to the modernization of courts, not only are there new buildings, but there is computerization that we did not see before. There are statistical compilations that we did not have before. A lot of effort has been put into case management to make the whole case management system flow more quickly. The entire concept of a professional court administration—that is, not the judge as presiding administrator, but an administrator who makes paper and cases flow more quickly—is a new concept being introduced, with varying success in various countries.

There has also been the introduction of Alternative Dispute Resolution (ADR). That has been one of the major efforts of both the World Bank, the Inter-American Development Bank, and USAID. Alternative Dispute Resolution is showing some good results. Argentina is a good example. ADR is also taking hold in other places as well. Brazil is another good example. Brazil is beginning to use ADR in commercial cases far more than previously.

Equally important, there are legal aid centers where people specialize in delivering legal services. You have justice houses, or *casas de justicia*, in Colombia that are very active. They are one-stop shops, where you get not only a prosecutor and a defender, but also a social worker and maybe a policeman. They work effectively in rural settings and people can come. This is really an access to justice issue for people at the bottom rung of society. I think they target having forty of these in Colombia by the end of 2005, and a fair number of these are in place already.

One of the most innovative developments is the mobile justice unit. In Brazil they call this *justica volante*. They actually have buses outfitted as courts that go into the interior, and there is a judge and a clerk to hear your case. It is like the old circuit rider but the entire court is transported. In fact, boats go up the Amazon to do the same thing. Well, this concept is being implemented in Brazil and Guatemala, and they are talking about it in Venezuela as well. In comparative law, it isn't just the United States delivering ideas, it is everybody talking to everybody else.

A lot has been done with gender sensitivity, particularly in Ecuador with the *commissarias*, and most Latin American countries now have ombudsmen, or *defensores del pueblo*, who are available when one has complaints about government.

And of course, civil society has encouraged this reform as well. Among non-governmental organizations, the pro-justice groups are very active. You have in Ecuador a *projustica*; in Guatemala, the *Pro Justice and Peace Committee of Guatemala*; in the Dominican Republic the *FINJUS*; Argentina has the *ARGENJUS*. These groups have all been very effective. In the Dominican Republic, one of the civil society groups influenced the modification of the selection of the Supreme Court justices. They hired experts; they applied a lot of public pressure in getting people more interested in getting a more able Supreme Court in place.

Legal education has improved considerably. There have been many additions to the curriculum in law schools that deal with human rights and access to justice issues. Public awareness through the media has also been quite considerable in many countries.

No Latin American country has all of this, but they are there to be studied, to be improved upon, to be adapted. And these are not random items. There is no shortage of advisors to help with implementation and prioritization of these concepts. There are donor agencies that I have mentioned, and now there are regional organizations like the Center for Justice Studies in Santiago, Chile (CEJA) which has a website, hosts conferences, publishes papers, and employs technical advisers. You have regional organizations like the Peruvian Andean Commission for jurists. You have regional organizations of Supreme Court justices and *ministerios publicos*; the list goes on and on.

People are talking to one another all the time; these groups do research, they compile reports, they hold conferences and share expertise. And of course, lawyers, judges, and reformers from Latin America continue to travel abroad to the United States and Europe as observers. They take back ideas and often stay as students. I think that, much like the students of

Roman law in twelfth-century Bologna, they are bringing new concepts of law to their countries.

So, I would say that we are getting involved in a long-standing tradition with these activities today. We owe a great debt to the scholars of comparative law and pure science who give us folks on the ground encouragement. With that, I thank you for your time and attention.