

Consolidation of Judicial Reform in Latin America: Fantasy or Reality?

Presentation by Diana Villiers Negroponte,
the Brookings Institution, April 24, 2008

Context for study: globalization of criminal activity –
penetration of the hemisphere by drug cartels, criminal networks and the *mara* .

Consequence:

■ Homicide rates (per 100,000):

In El Salvador - 37 in '03, 45 in '04, 56 in '05, 72 in '07

Guatemala - 32 in '03, 47 in '06, 59 in '07

U.S. on average 5.6

70% of deaths occurred with a deadly weapon, 800,000 firearms possessed illegally and 0.5 million legally held.

Source: *UN Office of Drug and Crime Statistics*

■ Level of Fear: Chile – 2000 15% expressed high levels of fear rising to 19.5% in '07

■ Victim to robbery or intent to rob

Source: *Adimark: GfK* private polling

Negative impact on quality of life, investment, protection of property and legitimacy of the state

Alternative means to contain criminal activity

- Traditional response post crime:
- *mano dura* - use of military forces, pre-trial lengthy imprisonment
- Alternatives:
- Engage prior to crime with societal prevention programs
- Intervene with rehabilitation programs + societal prevention
- Commit to institutional reforms of the judiciary
- police reform, and
- Prison reform

- Recommend integrate societal prevention, intervention and
- institutional reforms.

Traditional inquisitorial system characterized by:

- Written arguments at all stages of the process
 - Concentration of investigative and decision making procedures in the examining magistrate
 - Secretiveness
 - Absence of any means, throughout the criminal process, to assure that the person charged is not guilty
 - Automatic conversion into proof of all information gathered in the course of the indictment
 - Minimal capacity to challenge probity of evidence, and
 - Practice of provisional imprisonment during the investigative stages as a means to ensure that the criminal process achieves results.
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- Underlying purpose is the identification of a culprit to satisfy the needs of the victim and the state. It is less important that the person charged be the guilty party.
 - Source: *Instancia Coordinadora para la modernizacion del Sector Justicia*, IADB, Sept '06

Fundamental challenges

- historical role of the judiciary
 - systemic or structural forms of corruption
 - judicial inefficiency
 - political corruption, and
 - criminal association with the cartels.
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1. Cumulatively, the traditional process has undermined the legitimacy of judicial system
 2. Judicial reforms not accompanied by cultural change among jurists and the public, and
 3. National budgets remain inadequate.

Resulting public opinion of the Judiciary

- lack of independence, impartiality, transparency, public accountability.
- minimum access to justice, minimum likelihood of fair hearing, minimum protection of witnesses, and
- discrimination against women, youth and indigenous people.

- **Sources:** Latinobarometro, World Bank's Governance Indicator's, Freedom House, Transparency International, Due Process of Law Foundation, World Economic Forum's Competitiveness Report, Index for Management & Development, Political & Economic Risk consultancy

See DATAGOB:

<http://www.iadb.org/datagob>

Constitutional Reforms

- Constitutional reforms regarding the penal code introduced in 1990s and influenced by Alberto Binder and Julio Maier.
- Entered into force in Colombia and Argentina (1992) Guatemala (1994) Costa Rica and El Salvador (1998) Venezuela (1999) Chile (2000) and Peru (2004) Mexico (2008).

Constitutional Changes to the Traditional Judiciary in LATAM

- Inquisitorial to accusatorial system – oral argument
- Principle of innocent until proven guilty
- Opportunity to challenge the prosecutor in open court
- Public trials and public access to state charges and grounds for final decision
- Timeliness
- Limitation on pre-trial detention
- Balancing the rights of the victim and the accused
- Impartial judge with capacity to enter into a direct relationship to prosecutor and attorney for the defense, and
- Alternative remedies.

Current Problems faced

- Traditional acquiescence to Presidential and judicial authority
- Culture of judicial exclusiveness and avoidance of public scrutiny
- Reduced protection of victim and the state
- Role of attorney general, prosecutor and police remain vague, sometimes undefined
- Inadequate budget
- Inadequately trained lawyers
- Role of the bar, or judicial council
- Concentration of judiciary in cities

Indicators to determine success in reforming judiciary

- Size of the budget for the judiciary
- Existence and independence of a judicial career
- Qualifications for admission to the judiciary
- Public trials, translation and interpretation
- Case load
- Internal or external audit, process for complaints
- Independence of bureaucracy
- Timeliness – how long
- Geographical coverage within the nation
- Source: *Indicadores judiciales para las Americas, Centro de Estudios de la Justicia de las Americas (CEJA)*

Conclusion

- Prolonged process of adaptation
- Creation of trust in the judiciary is related to trust in the political process
- Civil society commitment to monitor and help overcome considerable obstacles
- To date, less than desirable impact on levels of criminality
- Indispensable engagement with other elements to protect citizen security
- U.S. role: enhance its support for civil society working on rule of law and citizen security.