WORKSHOP ON THE RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA

A Rapporteurs' Report

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Program for the November 9-10, 1996 Workshop on The Rule of Law and the Underprivileged in Latin America

Session I. Problems of Lawless Violence

Chair: Tom Farer, *The University of Denver*

1. Conditions of Detention
Paper: Nigel Rodley, *University of Essex, England*
Discussant: Ligia Bolívar, *PROVEA, Venezuela*

2. Defining the Role of the Police
Paper: Paul Chevigny, *New York University Law School*
Discussant: Jean-Paul Brodeur, *University of Montreal*

3. Rural Conflicts
Paper: Alfredo Wagner Berno de Almeida, *Social Anthropologist, Brazil*
Discussant: Roger Plant, *UN Mission to Guatemala*

Session II. Overcoming Discrimination

Chair: Rebecca Cook, *University of Toronto*

1. Indigenous Peoples
Paper: Jorge Dandler, *International Labor Organization, Lima, Peru*
Discussant: Shelton H. Davis, *World Bank*

2. Women
Paper: Mariclaire Acosta, *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos*
Discussant: Dorothy Q. Thomas, *Women's Rights Project, Human Rights Watch*

3. Racial Discrimination
Paper: Peter Fry, *Universidade Federal do Rio de Janeiro, Brazil*
Discussant: Joan Dassin, *Inter-American Dialogue*

Session III. Institutional Reform, Including Access to Justice

Chair: Juan Méndez, *Inter-American Institute of Human Rights*

1. International Aspects of Current Efforts at Judicial Reform
Paper: Reed Brody, Esq., *USA*
Discussant: Leonardo Franco, *UNHCR; Former Director, UN Mission to Guatemala*

2. Judicial Reform
Paper: Jorge Correa, *Law School, Diego Portales University, Chile*
Discussant: Leopoldo Schiffrin, *Federal Court of Appeals, Argentina*

3. Access to Justice
Paper: Alejandro Garro, *Columbia University Law School*
Discussant: Sérgio Adorno, *University of São Paulo, Brazil*

Introduction

The Kellogg Institute hosted an academic workshop on "The Rule of Law and the Underprivileged in Latin America" from 9–11 November 1996. This was the fourth annual workshop in the series "Project Latin America 2000," supported by The Coca-Cola Company. The workshop gathered scholars, policymakers, business and labor leaders, NGO representatives, and journalists from the Americas, Europe, and Africa, to evaluate the present state of the Latin American legal system. Guillermo O'Donnell (Academic Director of the Kellogg Institute), Juan Méndez (Director of the Inter-American Institute of Human Rights in Costa Rica), and Paulo Sérgio Pinheiro (Director of the Center for the Study of Violence at the University of São Paulo, Brazil) organized these events. This report summarizes the academic workshop, including each of the papers presented, the discussants' remarks, and the issues debated.

I. PROBLEMS OF LAWLESS VIOLENCE

1. Torture and Conditions of Detention in Latin America

Nigel Rodley

In the past, the Latin American region was characterized by illegitimate regimes which maintained their power by resorting to systematic torture and enforced disappearances of their opposition. Nigel Rodley pointed out that while most governments in the Latin American region now enjoyed political legitimacy, conduct amounting to cruel, inhuman, or degrading treatment, and conditions that must sometimes be described as torturous persisted, particularly in the treatment of criminal suspects, before and after conviction, in the hands of the police and prison authorities.

Enforced disappearances—the scourge of the region in the 1970s and 1980s—have now declined, with the exception of Mexico. They are still a problem in Colombia, Guatemala, Mexico, and Peru. In these countries, the military has not yet abandoned the practice of enforced disappearances, and civil authorities acquiesce in its use. The international community has given little attention to the problem.

Levels of torture are difficult to assess. Recent reports of the UN Special Rapporteur on Torture reveal that a substantial number of allegations of torture came from Colombia, Mexico, and Peru, with most of the complaints being in respect of acts allegedly committed by the military or other security agencies upon suspected "subversives." In Chile and Venezuela, common criminal suspects are also at risk. In Mexico, the problem appears to be confined to common

criminal suspects. The demise of illegitimate governments has not put an end to torture. Police, who learned to coerce confessions in the past, have not forgotten their techniques. Poorly trained, underpaid, and under-respected as they are, police resort to torture. Public outcry in the face of escalating crime levels leads officials to turn a blind eye to malpractices.

International standards call for the separation of remand and convicted prisoners—because remand prisoners have not been convicted their detention is preventive, rather than punitive. Overcrowding means that such standards are ignored. In Brazil, 30 percent of prisoners are on remand; in Mexico, 49 percent of prisoners charged with federal crimes and 70 percent of those charged with state crimes were unsentenced (November 1992). The figure for Peru is 77 percent.

Juveniles or minors do tend to be separated from adults. Some systems, however, allow for minors to be treated as adults where particular crimes are involved. Male and female prisoners are generally kept apart—though instances of mingling are reported in Mexico and Peru. International standards also require that prisoners be separated on the basis of their criminal record: murderers should not be imprisoned alongside petty thieves. This seems to be largely ignored.

Many of the problems discussed can be attributed to overcrowding. Brazilian prisons are reported at 250 percent above capacity. In 1993, Mexican prisons were at 126 percent of capacity. In 1991, two Peruvian prisons were respectively 416 percent and 312 percent above capacity. In Venezuela, the overcrowding problem was of a ratio of about two to one. Under such conditions, prisoners can barely find room to sleep, sanitation is severely compromised, and supervision becomes difficult. In Brazil, staff reportedly resort to beating prisoners. Prisoners abuse each other. Homosexual rape occurs with the complicity of officials. While governments do not wish to impose such conditions, they are the inevitable result of the fact that prisons are low on the budgetary priority; prison conditions are scarcely a concern of a society on the "outside" fearing escalating levels of crime. Public anxiety about law and order leads to pressure upon judges to send ever more suspects and convicted persons to jail.

Systems of prison governance are frequently either arbitrary and oppressive, or nonexistent—in that inmates are left to run the internal affairs of prisons themselves. Riots and mutinies in prisons are common. Authorities have often responded with shocking, indiscriminate use of lethal force. In Brazil, there have been three disturbing incidents—in which 18, 31, and 111 prisoners, respectively, died or were killed as a direct result of the action of authorities. Authorities have not been prosecuted for their actions. In Peru, armed forces were called in to quell uprisings in two prisons in 1986. Judges and prosecutors, prison authorities, and the government's own peace commission members were denied access. Over 200 inmates died. A

military court investigation ended in prison sentences for only a handful of officers. In a 1992 uprising, 39 prisoners died and many more were reportedly wounded.

Conclusions

Prisons are unlikely to be granted greater priority in the allocation of resources. Detaining greater numbers of persons in prisons is not necessarily an appropriate response to calls for law and order, and justice; neither is the traditional Western model of prisons and prison governance necessarily appropriate in Latin America.

Following the presentation of the paper, in his capacity as chair, Farer identified three issues raised by Rodley's paper: Firstly, is the nature of criminal procedure in Latin American countries such that undue emphasis is placed on confessions at the expense of rights? Secondly, on the issue of prison governance: What sort of inmate participation in prison management is appropriate, and to what extent should inmate participation be encouraged? Finally, where and how should the bounds of acceptable forms of police practice in interrogation be drawn?

Discussant's Comments (*Ligia Bolívar O.*)

Bolívar focused on the relationship between poverty, discrimination, and human rights violations. She contended that poverty and discrimination were, at once, both a source and a consequence of the deprivation of fundamental rights. In particular, the right to physical integrity and the right to adequate prison conditions were at stake.

New constitutional regimes in the Latin American region have been established in cultures deeply rooted in authoritarian patterns. Rigid structural adjustment programs have been imposed by these new regimes; the implementation of such programs has followed the authoritarian patterns of the past, becoming a source of acts of repression and exclusion. Because of the longstanding traditions of authoritarianism and history of regularized coercion of suspects, victims of torturous forms of coercion do not consider themselves tortured. Similarly, deplorable prison conditions are accepted; for those affected by such conditions, complaints can lead to victimization. (As regards prison conditions, international standards make no provision for policy on inmates' sex lives. This is a glaring omission. The lack of policies deprives prisoners of dignity, as homosexual rape becomes normal practice.) There is a double victimization: first, by the perpetrator of abuses, and second, by a system unwilling to take action on the victims' behalf.

Actors

The replacement of dictatorial regimes with constitutional regimes has influenced the manner in which actors—be they states, NGOs, or the international community—contribute to or

become an obstacle for the enforcement of the rule of law. Where states are concerned, constitutional regimes continue to wield their power in a manner similar to the dictatorships they replaced. Criminal procedure has remained unchanged; states' judicial systems emphasize written confessions, encouraging police to detain in order to coerce confessions, rather than investigate in order to detain. Police need adequate training in investigative skills.

NGOs, which in the past geared themselves to focus upon the evils of dictatorships and advocated democracy, have lost sight of their primary purpose: to defend human rights, regardless of the context and the victim. Where they do so, they run the risk of confronting hostile public opinion because, fearing escalating levels of crime, the public has been willing to compromise fundamental rights. A task for NGOs is therefore to reconcile the rights of common criminal suspects with the rights of victims of crimes.

The international community tends to regard democracies as being incapable of perpetrating human rights abuses, or it ignores such abuses—reasoning that the system has the ability to correct its own excesses, in that a government which violates human rights ought not be re-elected. Yet human rights abuses have continued to be normal practice, and cover-ups the order of the day. This is the "stable democracies myth": the international community allows or overlooks human rights abuses as long as a stable democratic government is in power. That these very abuses undermine the basis of the state is ignored.

Floor Discussion

Christopher Larkins (University of Southern California) questioned whether the prison conditions described arose as a result of a lack of state presence or an excess thereof. Rodley replied that it is difficult to generalize in this respect. However, the system of prison governance is one which fosters arbitrary and oppressive governance, allowing states to simultaneously avoid responsibility and exercise authority. Instead of the state providing adequate resources, prison uprisings are brutally suppressed; the lack of resources precludes governments from taking any alternative course of action. In some countries—for example, Brazil—collusion between the actual authority exercised over prisons and the state (the apparent authority) is considerably formalized.

Farer asked of Rodley where he would allocate further resources, were these to materialize. This, Farer observed, raised the more substantive issues of how rigorous prison conditions ought to be and the function prisons perform. Rodley declined to speculate on precisely where further resources would be allocated without knowing the extent of such resources. As to the substantive issues, the punishment meted out by society is deprivation of liberty, and deprivation of liberty alone.

Bolívar commented that the scarcity of resources should not be isolated from other factors informing the problems that confront prisons: prisons should be contextualized within the criminal justice system as a whole. Alternative punishments for perpetrators of "light" crimes should be considered—problems for prisons can be solved at other levels in the criminal justice system.

Echoing Rodley's earlier point, Mariclaire Acosta pointed out that prisons are frequently a source of revenue for the interests which govern them. This is the case in Mexico, where a maze of interests impedes prison reform. The tendency of the press to pressure the police for quick results in high profile crimes contributes to an environment in which police feel justified in resorting to torture in order to extract confessions.

Guillermo O'Donnell drew attention to the motivations of persons staffing prisons which might inform a "self-selection" process in prospective prison warders. Rodley indicated that research in this area was scant. Bolívar commented that the training of prison warders was frequently inadequate.

Farer postulated two scenarios in response to problems of control in prisons: In the first, authorities could seize control by force—to do so requires increases in the number of guards, and is expensive. In the second scenario, authorities could relegate guards to the role of securing the perimeter of a prison, allowing "self-government" of prisons—in which case, authorities should consider formulating incentives to encourage the organization of prisons along less anarchic and less brutal lines.

By way of conclusion, Rodley drew attention to the fact that prison governance remains a local issue. Players at the international level are constrained to offering support at a local level. Where different levels are thus involved, progress is inevitably slow—communication between different levels is difficult, and new stakeholders and additional parties with their own set of interests and priorities enter at each level.

2. Defining the Role of the Police

Paul Chevigny

The role of the police in many Latin American countries is clearly misdefined. In many of these countries, a semi-military model is accepted in which the job of the police is to "fight" the enemy—"crime." This model has led to a situation in which the police are ill-equipped both for preventative policing and keeping order, and for criminal investigation.

Politicians rely on a rhetoric of fear and personal insecurity, shifting the blame to the poor and underprivileged for some of society's ills. This appeal panders to the fears of the middle and upper classes, while at the same time intimidating those most affected by police crackdowns (i.e.,

the lower classes). Abuses are concealed through a system of impunity. It is necessary to go beyond the assertion of human rights in order to show why, as a practical matter, it is in the interests of both the elite and the poor to subject the police to the rule of law in a democratic society.

In order to understand why it is in the interests of all that the police are subject to the rule of law, it is necessary to look at the following problem areas in police work: torture, extra judicial killings, and a system of impunity.

Torture is extremely widespread in Latin America, even in relatively quiet places. For the most part it is used against common criminals. It is used as a method of punishment, not only to extract information. Sometimes it is used against peasants as a method of social control, as is deadly force.

Deadly force varies enormously from country to country. In some countries it is used as a method of social control with the aim of repressing unrest. In the cities it is primarily used against those accused of ordinary crimes. In Brazil, the number of people killed is enormous; the police claim that these killings result from "shoot-outs." The most disturbing aspect, here, is that vigilantism is generally accepted and even supported by the public. This vigilantism prevails where governments are at their weakest.

These abuses continue because of a prevailing system of impunity. The systems of administrative discipline are unknown to the public. The judiciary has often not been vigorous either in investigating or in punishing police abuses. Even in cases where abuses are referred to the courts, the police regularly interfere in the investigations.

These abuses are not effective, as they do not control or reduce crime. Furthermore, they do not contribute to the safety of police officials.

Conclusion

In conclusion, Chevigny recommended that proper pay and training are needed for the police. The creation of an ombudsman, citizens' commissions, whistle blowers to whom police can turn, and an independent body of investigators are needed. The use of every firearm should be accounted for. Police officials should be removed from duty until investigations against them are complete. There should be no special courts. Care must be taken with the inclusion of involuntary confessions. A tripartite approach to reform should be taken, through the creation and strengthening of complaint procedures, inspection mechanisms, and auditing bodies.

Discussant's Comments (*Jean-Paul Brodeur*)

Brodeur divided his comments in two parts. The first dealt directly with Chevigny's paper, and the second went beyond it.

i. Will Subjecting the People to the Rule of Law Be Perceived to Be In the Interests of All?

Chevigny reviews several mechanisms through which the police are made respectful of the law and accountable. These are not in themselves conducive to fundamental change but are fine-tuning mechanisms.

In the United States and Canada, the exclusion of evidence and legal constraints in the admissibility of confessions are powerful tools for making the police respect the due process of law. However, it is of concern that in Latin America, where due process of law is perceived to be an obstacle to be overcome in the war against crime, measures that would be efficient in reducing torture may incite the police to use lethal force more often in order to balance the uncertainty of obtaining a conviction in court.

It is difficult to say whether the argument that it is in their best interest to have a police force which respects human rights will convince the upper class. Firstly, people tend to differentiate between political and criminal law policing—approving of abuse in one area (criminal law policing) and disapproving in the other. This separation is artificial—excess in the one leads to excess in the other.

Secondly, largely depending upon what the media feeds the public, it might be believed by the upper classes that the greatest threat to them comes not from the underclass but from the police.

As long as progressives frame the debate on policing in terms of individual risks and victimization, they are fighting a losing battle. Police corruption is a collective concern; it strikes at the wealth of the nation. Only once collective rights and the collective impact of deviant policing come to the foreground can a more persuasive argument against it be made.

ii. Rule-Governed Democracies and the Social Contract

A cautionary word should be offered against believing that the rule of law in itself guarantees that there will be no recourse to massive penal repression.

State Monopoly of Physical Violence

The rationale behind the state having the monopoly on violence is that you will have fewer thugs and those that you have will be in uniform. The monopoly on state violence is epitomized in Hobbes' *Leviathan.* History revealed that regression might follow from the absence of a contract—i.e., if force lacked legitimacy.

The difference between torture in the seventeenth century and torture today is that in the past it was highly visible. Torture was often publicly inflicted for the purpose of deterrence. Today it is covert. It is contended that it is this shroud of secrecy which makes torture more palatable. If this is true, what needs to be done is to make torture visible. This can be done through the media: by publicizing the testimony of torture victims and recording the results of torture in photographs.

The Social Contract

There are two kinds of democracy:

Firstly, there is rule-based democracy, consisting of the constitutional and institutional framework of laws, customs, and public agencies. This is a necessary condition for democracy, but it may not be a sufficient one. The weakness of rule-based democracy is that it is based on a highly discriminatory definition of citizenship such as those of ancient Greece and the government of the American Republic before the Civil War, both of which, for instance, permitted slavery. In a similar vein it was maintained that, during *apartheid,* South Africa was a democracy.

Secondly, there is contract-based democracy, resting upon a covenant in which all citizens or those who are legally in the process of becoming citizens are equally protected by the laws and share the same privileges that are granted to someone by virtue of his or her being a citizen.

Conclusion

It is striking that abuses are sanctioned by members of the middle and upper classes (as well as the state), who view the underclass as a threat. Efforts should be made to convince the upper class that the continuance of police abuses threatens it too. This, however, will be fraught with difficulties. Finally, it is clear that the military model is totally unsuited for promoting respect for law within society.

Floor Discussion

Chevigny commented that systems of review are more effective than they appear. Police fear prosecution.

Farer posed the following questions: Can the investigative approach to policing work in a class-polarized society where the police are in a belligerent relationship with an entire community, and there is a lack of resources? Can intellectuals compete with the media in persuading the electorate as to what should be done? Intellectuals seem to try to persuade the elite and not the media: Is this a useful and plausible strategy? He also offered the following comments: In efforts to reduce impunity, there might conceivably be situations in which a "militarized" form of justice—i.e., subjecting the police to special courts—would be more efficient. However, this would be futile where the police and military form a single unit. Not only the middle and upper classes support police brutality, but also the lower classes. Finally, it is clear that torture works where the opposition is organized and clandestine.

Pepe Eliaschev (Corporación Multimedios América), drawing from experience, noted that there is a lack of transparency in Argentina.

Paulo Sérgio Pinheiro commented that the use of deadly force is in the interest of the ruling class and that it is not used against all in Brazil. Also, intellectuals should not compete with the media but work with them. In reply, Chevigny stated that although deadly force is not directed against everyone, the system of impunity is so directed. Brodeur added that the idea of competing with the media and trying to convince the ruling class is elitist, as it assumes that the elite are untouched by the media. What is needed is a more precise strategy and knowledge of the media. For the media, what sells is not human rights but horrendous crime.

Ana Tereza Ramos (University of Notre Dame Department of Government and International Studies) stated that it was the poor who were victimized, as the rich were able to pay bribes. She also noted that the rise of organized crime in Brazil is a direct consequence of corruption. The sectors in the upper classes which need to be targeted are the progressives.

Mariclaire Accosta, citing statistics from Mexico, showed that merely increasing the numbers of police officials does nothing to solve crime. Mexico has the highest number of police officials per person in Latin America, but police efficiency is the lowest in the world. Brodeur echoed this sentiment.

3. Rural Conflicts: Amazonia Rite of Passage from Massacre to Genocide

Alfredo Wagner

With the aid of a series of slides, Wagner initially described the events which took place in the Pará/Amazônia state of Brazil on 17 April 1996 at a place called "Curve do S" on the PA-150 road. Troops of the military police surrounded 1,500 rural workers who had blocked the road. The workers claimed land for work and housing. In trying to remove them, troops opened fire for 50 minutes. They shot 19 workers and injured 45; all of those killed were shot three or four times

in the chest and head. Eleven people were shot in the back of the neck. Wagner moved on to describe, in general, the systemic violence that besets rural areas.

Areas of Rural Conflict

The areas most affected by ongoing violence are mainly inhabited by indigenous peoples. Today, these areas are the subject of competing claims. On the one hand, the mining, farming, fishing, or logging industries are expanding their activities, and on the other, blue collar workers are migrating back to their areas of origin in the face of dismal prospects of employment in urban areas.

In the area composed of Southern Pará, Northern Tocantins, and Western Maranhão there are 535,440 small-scale agrarian producers who do not own the land they cultivate. Included in this number are approximately 300,000 settlements of squatters paying no form of tribute to owners of land on which they squat. The Amazon is no longer a "frontier" region or an escape valve for the absorption of social problems and conflicts. It has become, in itself, a zone of conflict and social tension where land rights are bitterly contested. The conflict has a ripple effect, compelling producers to move to adjacent urban areas. Slums, homelessness, and contested land claims in urban areas have resulted.

Systemic Violence

The area is witness to increasing levels of violence that are manifest in frequent acts of brute force and physical coercion against those who demand land, and a significant growth in the number of deaths in agrarian conflicts. In general, accurate information is difficult to obtain, and no statistics recording massacres are available for a period from 1988 to 1992. Taking this into account, using data of the National Pastoral Land Commission of the Catholic Church (produced in April 1996) together with information gathered by various different rural volunteers associations, support institutes, and independent researchers from March 1985 to June 1996, at least 21 massacres are indicated within the area officially referred to as "Grande Carajas Program." There have been 1,100 assassinations in the area in the last two decades. Invariably, one male who heads a productive grouping is assassinated, disorganizing the support network essential to productive activities.

The areas affected are traditionally regarded as areas in which the government is weak. Planners seem to regard the situation as a necessary phase of a "democratic society undergoing modernization." However, the response of authorities evidences a deficient notion of democracy and an underlying devaluation of the citizenship of rural groups. Local government structures adopt the perspective of the industries, and the federal government largely accepts and relies

upon the information supplied by local government. A military police apparatus sponsored and established by ranchers ensures proper conditions for forced industrialization.

Few deaths result in complaints being made to the police, even fewer are investigated, and not even a dozen perpetrators have been sentenced. Violence has become increasingly systematized—for example, victims are shot at point blank range, or in the back whilst handcuffed. Perpetrators act with impunity. Victims' survivors do not have access to legal process. Given the paucity of reliable data, one is left to infer—by reference to the manner in which murders of local indigenous people increasingly take place rather than recorded numbers of registered deaths—that, under such conditions, the line between massacre and genocide is becoming increasingly blurred.

In his capacity as chair, Farer identified the implications of the paper for land rights and land reform: Is a clarification of existing land rights required, or would a redistribution of land be more appropriate? In his view, the paper also raised the issue of the role of local cultures in self-government and policing, as it did the extent to which rural peoples are organized and unified.

Discussant's Comments (*Roger Plant*)

Failure of Neoliberal Model of Development

Plant linked the conflict Wagner described with the failings of neoliberal development models. This is not only confined to Brazil. The challenge such conflict presents is to revisit and, if necessary, arrest the application of the neoliberal model.

Land reform efforts have failed to provide land for the landless, leading instead to greater landlessness within rural areas. Governments emphasize commercial crops; this results in large-scale farming operations, reinforcing high concentrations in land ownership. Because they have no title to land, rural workers have been forced into unstable, seasonal and migrant labor. The employment crisis of the 1980s placed further pressure upon rural areas, because governments met the crisis by shifting landless workers into rural areas—where they rarely received firm title.

Restoring the Rule of Law

The challenge is to restore the rule of law in this situation. This calls for three steps: Firstly, rural violence perpetrated *with* state complicity needs to be noted and sanctioned. To this end, the reports of NGOs which have identified the patterns of rural violence need to be widely read and circulated in order to place rural violence perpetrated *with* state complicity on the agenda of UN human rights organs as a thematic issue. Secondly, the legal system must be brought to work for the rural underprivileged. Here, access to justice can be increased by establishing ombudsmen's offices; labor law needs to be revised to cater for rural workers' interests; and

programs offering legal assistance to rural populations are to be recommended. Thirdly, the broader problem of economic and social policies which marginalize the poor and perpetuate landlessness—beyond human rights and rule of law issues in the narrow sense—must be addressed. Development thinking on land reform, land titling, land security, and land banks must be reconsidered.

Plant concluded by describing the process in Guatemala, where land issues were the root of conflict. The government and insurgent groups reached a series of agreements between 1994 and May 1996. These agreements initially recognized that *campesinos*' calls for land restitution were legitimate. The final text of the most recent agreement is more moderate; it emphasizes labor rights and market solutions rather than tampering with title. Since this agreement has been signed, land conflicts have intensified in some regions. While police have not resorted to violence, new legislation sanctioning unlawful land occupation with imprisonment has been passed.

Floor Discussion

Paulo Sergio Pinheiro commented that he did not regard the Brazilian Federal Government as unduly obstructive: it was the federal government which had supplied data in respect of the events described and duly investigated them. Tensions do exist between federal and local government, and these could be used creatively in order to reinforce rights. Wagner disagreed. He emphasized that the branches of government largely supported each other. The federal government accepted and relied upon local government policy. There were racist undertones in local government policy, in that victims of violence were most often from particular indigenous groups. Farer stated that the federal government generally accepted the version of events as described from the point of view of the local governing elite.

Ana Tereza Ramos postulated that the massacre described in the paper under discussion is a reflection of the structural violence that afflicts "victims of development." Their plight is a reflection of the manner in which their citizenship is qualified in its construction, in that rural citizens who are members of indigenous groups are regarded as second-class citizens.

Rachel Sieder (Institute of Latin American Studies, England) opined that the term "the rule of law" is not neutral. Rather, models of development inform its definition. The paper under discussion evidenced a tendency within the framework of some models of development to criminalize the poor. This calls for an examination of the relationship of the state to society and the construction of citizenship.

Rodley emphasized that "the rule of law" should not be mystified. For example, everyone can understand that a culture of respect for the law cannot be maintained where the law is violated in its imposition. Law cannot be violated in the name of enforcing it.

II. OVERCOMING DISCRIMINATION

1. Indigenous Peoples and the Rule of Law In Latin America: Do They Have a Chance?

Jorge Dandler

There have been a number of problems which have historically hampered the recognition of indigenous peoples' rights. Firstly, although the constitutions in Latin America formally guarantee the principle of non-discrimination and fundamental rights, indigenous peoples' human rights are frequently violated in practice since the basic constitutional principles recognizing their existence and permanence have, until recently, been deficient or absent. Secondly, in spite of considerable progress, the collective rights of indigenous peoples have been systematically violated. Thirdly, the dominant goal in Latin America was to create a homogenous, integrated society, without indigenous people. Fourthly, development projects generally have not been able to transcend an integrationist/patronizing approach. Finally, the benevolent ideology in much national legislation and many constitutions gave rise to elaborate mechanisms of tutelage that denied indigenous individuals and their communities effective participation as well as the legal security necessary to exercise their rights of citizenship and defend their cultural identity and livelihood.

The following changes/reforms have taken place: Firstly, the ILO adopted Convention 169 in 1989. Secondly, the Working Group on Indigenous Populations (a Sub-Commission on the Prevention of Discrimination of Minorities) has been preparing a draft Universal Declaration on the Rights of Indigenous Peoples. Thirdly, efforts have been made towards the adoption of an instrument on the rights of indigenous peoples in the Inter-American system. Fourthly, provisions regarding the rights of indigenous peoples have been adopted into international agreements. Also, guidelines and directive policies have been adopted.

The common concern of these agreements and guidelines is to provide indigenous peoples with equal opportunities to influence and benefit from development. It should also serve as a reminder to governments of their own commitments to indigenous peoples.

Recent Constitutional and Legislative Changes

The evolving normative developments show the following trends:

The use of the term "indigenous peoples"; the recognition that societies are multicultural or pluricultural (the Argentinean and Paraguayan constitutions go even further, recognizing that today's indigenous peoples are descendants of populations that existed prior to the founding of

the state or nation; the Brazilian constitution recognizes the rights of Indians as prior to law); all constitutions refer to collective land rights; most refer to the right of indigenous peoples to education in their own languages (the promotion of bilingual and bicultural languages); a few recognize indigenous languages as official languages where predominant; most recognize customary law and the role of traditional authorities; some go as far as recognizing the latter as first instances of the system of administration of justice; the Colombian constitution provides for direct representation of two senators; most recognize various forms of local administration or autonomy; the Nicaraguan constitution goes as far as a recognition of regional autonomy.

These changes are often the result of hard fought battles. There is a shift away from a top-down and benevolent approach to a conception recognizing the rights inherent to indigenous peoples or derived from their existence. Integration is no longer a basic underpinning. Cultural diversity has become a reality. Although progress has been made in constitutional law, there is little reflection of this change in derived legislation or regulatory laws.

Guatemala

An agreement on the Identity and Rights of Indigenous Peoples resulted from negotiations between the Unidad Revolucionaria Nacional Guatemalteca (URNG) and the government. This agreement is a remarkable document which covers a wide range of issues and commitments. The United Nations played an important role in the process.

Mexico

The Chiapas rebellion is a movement of indigenous people who want a hearing with all of Mexican society and a negotiated settlement with federal and state governments. The agreement reached is a result of negotiations between the government and indigenous peoples (unlike Guatemala, where indigenous people did not directly participate in negotiations). If effectively implemented, it will point to a new relationship between the indigenous peoples and the state.

Bolivia

The examples of Guatemala and Mexico raise the question as to whether it takes violence to make a cause heard. Bolivia provides an alternative. There, in 1991, thousands of indigenous people marched to press the government for the recognition of the Chiamanes forest area as *temtono indegena.* The march gained national and international attention, creating a broader awareness of the plight of the indigenous peoples. As a result, a number of changes took place in the constitution. Indigenous groups in Bolivia have fought hard to have their rights included in new land, forestry, and mineral exploration laws.

Conclusion

Latin America has a unique opportunity to peacefully construct multi-ethnic societies and avoid the inter-ethnic conflict that some of the other nations in the world have been too blind to prevent.

Discussant's Comments (*Shelton H. Davis*)

The Reform Process

The road to reform has not been without obstacles—at both national and international levels. Most of the constitutional reforms regarding indigenous people in Latin America have taken place on the level of substantive or normative law, not in the areas of legal process or administration.

The differences between written law and the social realities in many Latin American countries are noteworthy. Anthropologists have begun to realize that the legal system is pluralistic in nature and that, in many villages and at the local level, traditional law persists. Traditional law, however, remains subject to national law and is greatly misunderstood by judges and attorneys. Despite these conditions, customary or traditional legal regimes appear to be quite strong in many Latin American countries. These systems function differently from but nevertheless in tandem with national legal systems.

The method employed by traditional legal systems is that of reconciliation. An attempt is made to reestablish social peace. These traditional systems differ fundamentally from the Eurocentric judicial systems based on written documents, legal professionals, adversarial procedures, and decisions in which there are clear winners and losers.

A trend in Latin America is to incorporate some of the principles of the traditional systems into national reform programs, especially at the local level or in courts of first instance; for example, in Peru there has been widespread promotion of the use of Justices of the Peace (non-lawyers). However, the picture is quite different in the higher courts.

If even limited funds directed at judicial reform were to go to the rural level, a fundamental impact could be made.

International Bodies

Given the current situation, in which grievances are not adequately addressed at the local level, we could expect more attempts to be made by indigenous organizations to bring their grievances to international bodies such as the UN Commission on Human Rights and the Inter-American Commission on Human Rights.

Conclusion

In summary, many positive steps have been taken. However, a great deal needs to be done before one can say that the "rule of law" reigns between nation states and indigenous peoples in Latin America. More attention needs to be focused on procedural aspects of the law if indigenous peoples and the rule of law are truly to have a chance in Latin America.

Floor Discussion

Dandler emphasized the importance of indigenous communities exercising traditional values and ways of dealing with conflicts. We must recognize that indigenous peoples have been able to solve conflicts without resorting to the courts. In most constitutions that recognize customary law, there is a proviso—"when compatible with national legislation or fundamental rights established internationally." The judiciary lacks the experience to deal with matters "when they are compatible." Furthermore, university law faculties look down upon customary law.

Roger Plant noted a dichotomy in the presentations. On the one hand, there is a tendency to emphasize indigenous control, and on the other, a tendency to emphasize the issue of access to justice. He identified a tension between indigenous rights and self-determination. He also distinguished between two categories of indigenous people: those who have long been integrated, and those who have had little contact with national life. The latter still require protection, while the former face problems related to multi-ethnicity within the state. The question is whether or not these situations require different normative approaches. He also wished to know whether the discussion is about indigenous values or indigenous rights. Dandler remarked that indigenous people have a universal message regarding their claims: Firstly, the right to be regarded as enduring and permanent. Secondly, they claim the right to participate and be consulted. Thirdly, lands are a precondition for existence.

Rachel Sieder added that it would be easier to grant rights to those who were separated from national life. She wanted to know what the role of the international community should be when there is conflict between national laws and indigenous rights to customary law. Dandler noted the important role which the international community can play. Measures are more easily adopted at the international level than at the national level. Also, the international community has a great role to play in the monitoring of indigenous rights.

Emilio García Méndez (UNICEF) noted that bilingualism and translations could appear as compensatory measures. He wanted to hear more about the politics surrounding the problem. Dandler, in reply, said that there is a definite political platform—indigenous peoples want to build a new relationship with society and the state. The state denies their existence and looks upon them as an obstacle to development. Indigenous people are conveying a clear political message.

Davis stated that for indigenous peoples there is no conflict between identity and citizenship. Protective legislation is needed with regard to language. The use of indigenous languages in the courts is a sham. The issue of self-determination concerns the issue of governance. This discussion should be embedded in decentralization. One of the areas of concern for indigenous groups is their sacred sites. The protection of these sites poses a challenge. Because of the lack of access to justice on the national level, indigenous people will look to international mechanisms, which include the Inter-American system and, increasingly, the UN courts.

Ligia Bolívar, while seeing the value of the institution of Justice of the Peace, wondered if there is not an overestimation thereof. She wondered if it does not encourage second-class justice for second-class citizens.

Desmond Harris was struck by the absence of discussion of the concept of violence in the generation of new legal norms in indigenous communities. Paradoxically, the source of this new conception of law seems to be the breakdown of the rule of law and legality in the countryside and marginalized communities. This shift seems to result in a direct challenge to our notion of the state.

Paul Chevigny stated that all indigenous groups view themselves as indigenous, but not all are really traditional—some of these groups have become highly hispanisized. There is a danger that traditional law could be used as a means by which indigenous people can be regularized.

Davis, drawing from the Guatemalan experience, called for the reestablishment at the local level of a sense of shared tradition and shared moral and political order. Without this it is difficult to maintain any form of social cohesion at the local level.

In conclusion, Dandler reiterated the plea of the indigenous people. They want to participate and be heard. They do not want to be encapsulated and compartmentalized. They are saying to the judicial system that what is needed is a systematic integration of indigenous rights—a social-contract democracy.

2. Overcoming the Discrimination of Women in Mexico: A Task for Sisyphus

Mariclaire Acosta

Background and Context

Acosta initially drew attention to the overwhelming importance of the family in Mexican life. This, she contextualized within a society where considerable income inequality has been perpetuated and even exacerbated by the demands of a rigorous structural adjustment program imposed in the face of a debilitating foreign debt problem. Social welfare policies which provided

subsidized food, health, and education for the majority of the population have been dismantled. Political parties, legislative bodies, and the courts are insufficiently developed to provide a framework for adequately solving social problems.

While the economy has been liberalized, the ruling elite has refused to relinquish political power and move towards a more democratic and competitive political system. Institutions of the state have been eroded, and many regions are at crisis point. Women, in particular, have borne the cost of the abrupt changes that have occurred in Mexican society.

The Female Population and the Feminization of Poverty

Acosta pointed to 1996 surveys which indicate that Mexican women continue to be family oriented. Educational opportunities between men and women have tended to become equalized. However, trends following the implementation of the structural adjustment program show that women have borne a disproportionate share of the impact of its implementation: employment levels have dropped, and the earning power of women as compared to men has dropped considerably. Advances made by women in the years between 1970 and 1980 have been lost.

While working women constitute a significant portion of the membership of trade unions, they have not been successful in attaining leadership positions. This is also true in political parties. NGOs advocating women's rights do lobby political parties.

Legal Rights versus Real Rights

Men and women enjoy formal equality before the law. Discrimination, however, remains a fact of daily life. While laws in the Federal District have been made more stringent, offenses continue to be under-reported. Even so, there have been disturbing increases in levels of sexual violence against women—particularly in areas of political unrest. Abortion is illegal, but rape victims who resort to abortion are not punished. However, no mechanism exists for rape victims to obtain safe abortions. The Supreme Court held in 1994 that a husband cannot be found to have raped his wife.

Domestic violence problems are dealt with by a specialized police department and prosecuted by a special division of the prosecutor's office. It continues to be a major problem however. Changes in the criminal code mean that visible injuries which do not endanger a woman's health and take less than two weeks to heal will only be prosecuted after complaint. Formerly, injuries would have been prosecuted by the state. Crime against women is seen as a private matter rather than a public one. In the face of these changes in the criminal code, a new law against domestic violence in Mexico City, the result of lobbying by women's groups, aims to bring matters of domestic violence back into the public arena.

Future Prospects

The government has adopted a "Program for Women." It envisages affirmative action in the political arena and an economic policy capable of eliminating the marginality and exclusion of women. Women's groups are participating in the implementation of the program. However, the struggle of women is far from over. It will take more than rhetoric and good intentions to ensure the full participation of women in Mexican society.

Discussant's Comments (*Dorothy Q. Thomas*)

Dorothy Thomas initially expressed her surprise that women were not more angry as a result of the manner in which they were discriminated against. Discrimination against women should be the concern of any person who cares about the rule of law. Indeed, for women, the rule of law is the exception, not the rule.

The Paradox of Continuing Violence and Discrimination against Women

The pervasive discrimination against women evident in Mexico presents a paradox: discrimination and violence against women are officially illegal, yet the system allows these to continue. This paradox replicates itself in other societies. Too often, it is accommodated without question. The sexual violence perpetrated against women in the genocide in Rwanda, for example, has not been the subject of an investigation or indictment by the international tribunal convened to deal with events in that country.

The consequences of the failure to address this paradox in society are dire: It is not only the rights of women that are at stake, but also those of their families. Indeed, violence against women represents not just a violation of women's rights, but of health and economic rights too. Where the rule of law is concerned, it is not violence that discriminates, but "justice." Discrimination against women is difficult to overcome because the focus of discrimination against women is frequently fundamental to the way in which society organizes itself.

The Roots of Violence against Women

It is the source of violence against women which must be addressed. This lies in the lust for power, in whatever sphere, expressed in the accumulation of wealth. The tendency of power to discriminate is evident in all spheres of society. An examination of the rule of law has to grapple with discrimination and the complicity of the law with those who rule the law.

Thomas offered the following points in conclusion: First, overcoming discrimination means overcoming the notion that it is acceptable. Second, an approach that combats the

mutually reinforcing relationship of one form of discrimination with another is necessary. Thirdly, the link between discrimination and the lust for power and wealth is vital.

Floor Discussion

The question of whether or not discrimination against women was more intense in some cultures than others was raised by Tom Farer. He went on to ask if attitudes of respect for traditional cultures and communities could be maintained while overcoming discrimination against women. Acosta explained that, in her paper, she had focused upon identifying the prevalence of rape and the failure of the state to punish it. She said that social and economic forces which are "beyond culture" and require action must nonetheless be addressed. In her experience, indigenous women in Mexico supported the call for the rights of their indigenous people, but not at the expense of their equal status. Thomas agreed that women around the world want both their rights and their culture to be respected.

Jean-Paul Brodeur drew attention to the "evil causes fallacy": confronted with evil consequences, people become angry and assume that the causes of evil must, in themselves, be evil and intolerable. This was relevant in consideration of the evil consequence of discrimination against women, in the light of issues of local culture and calls for self-government of rural peoples. Issues of local culture and calls for self-government of rural peoples are not, of themselves, an evil. He also wished to distinguish between the different causes of similar manifestations of violence—for example, rape may be sexually motivated or motivated by genocide. The latter was the case in the rapes of Muslim women in Yugoslavia. Where the causes of violence were so different, he questioned whether the approaches to it ought not also be different.

Thomas conceded that different sorts of violence may well be distinguished by their motivation. However, at the root of violence against women lies the abuse of power. Violence against women should not be accepted. People *should allow* themselves to be angered and use their anger to advantage.

Xochitl Lara Becerra (University of Notre Dame Department of Government and International Studies) stated that in Mexico the problem of discrimination against women should be seen in the context of a repressive regime. Until this was remedied, only limited progress in combating discrimination against women would be possible. Acosta responded that the Mexican government had recently adopted a policy the aim of which was to reduce discrimination faced by women. This, Acosta explained, led her to be less critical than she would otherwise have been of the government, and engage with it.

Rebecca Cook wished to know whether the Inter-American Convention on Violence against Women had had any ramifications for women in Mexico. Acosta replied that it has been the subject of lobbying by groups in Mexico and is likely to be ratified by Mexico.

3. Color and the Rule of Law

Peter Fry

Color and the Rule of Law In Brazil

Ninety-four percent of all Brazilians have no faith in the rule of law. There is a recognition that the wealthy receive better treatment than the poor. In this regard, it is significant to note that Brazil is the world leader in inequality. In surveys, 68 percent of Brazilians assume that blacks receive worse treatment than whites. Academic research confirms what Brazilians believe.

In his research, Sergio Adorno notes that blacks are more persecuted and receive more vigorous penal treatment. Color is a powerful instrument of discrimination in the distribution of justice. Adorno's findings regarding the present also hold true for the past.

Costa Ribiero, in his research, found that the determinative factor in conviction was the color of the defendant. Ribeiro noted that at the turn of the century "scientific racism" played an important role in Brazil. It was at this time that Raymond Nina Rodrigo argued that criminal responsibility decreased from the white race to the black. These ideas, while never part of the legal system, informed the moral judgment of those drawn into the criminal justice system.

The Brazilian constitutions remained neutral on the issue of race. The first race-related legislation, which punished racial discrimination, was passed in 1951. The 1958 Constitution incorporated racist practices as a crime. Later, Federal Deputy Cao presented new legislation which would deny bail to those accused of "crimes resulting from racial or color prejudice" and stipulated prison sentences from one to five years for those found guilty. This law further provides that crimes resulting from racial or color prejudice may never lapse. All evidence points to the fact that the new law has been no more effective than the old, either in stemming racism or in punishing racist practice.

During the early part of the century, Brazil was seen as the cradle of racial democracy. After World War II, UNESCO promoted a series of studies on race relations in Brazil—this opened a Pandora's box and has systematically proven the degree of discrimination in Brazil. Studies show that discrimination has the effect of forcing non-whites into positions of least privilege. Ricardo Paes de Barros argues that racial discrimination is responsible in itself for the inequality of wealth and income in Brazil.

The Paradox

Recent surveys show that everyone in Brazil is aware of discrimination; they also reveal a contradiction, in that Brazilians continue to believe in racial democracy. Thus, the paradox lies in the fact that Brazilians deny racism, yet practice it. The demonstration and recognition of racism did more than deny the myth of racial democracy; it suggested that the myth had the powerful function of masking discrimination and impeding the formation of a large-scale black protest movement. In this way, racism has become more insidious because it is officially denied.

What is being done to reduce prejudice and discrimination against the poor and, in particular, people of darker color? In the past, black groups emphasized the establishment of a black identity. Recently, a shift has taken place, with growing emphasis being placed on addressing concrete issues of inequality in the workplace, the educational system, in relation to health, and in religious organizations. Parts of the movement have become more inclusive, recognizing that not all Brazilians favor the bipolar model.

Various anti-discrimination measures have been taken. The National Human Rights Program's goal proposes a strengthening of the bipolar model and policies in favor of black Brazilians. These actions differ from the de-racializing ones mentioned earlier. Instead of a denial of "race," there is a celebration, recognition, and formalization of race as a criterion for defining and targeting policy. In this spirit, the Brazilian government promoted a conference on "Affirmative Action and Multiculturalism" in 1996. Affirmative action consolidates the belief in racial difference by celebrating race as a legitimate criterion for public action.

Conclusion

Brazil is at a crossroads—either it can continue to pursue "de-racializing" policies or it can turn towards affirmative action. Recent surveys show that all Brazilians share the same basic values, regardless of race. Variations in education and income levels constitute the great divide.

Discussant's Comments (*Joan Dassin*)

Fry, in asking how color interacts with the rule of law and the underprivileged, holds up several paradoxes.

Firstly, racism is pervasive. However, it is hard to recognize. Where it is recognized, there is no recourse, no sustained attention. Even in cases where it is redressed, the delay causes great personal sacrifices. Racism is everywhere but nowhere in Brazil; it is as difficult to prove or identify as it is to redress.

Secondly, the potential for corruption by power and wealth is exacerbated by the Brazilian situation, where there is a great disparity in wealth. Economic and social inequality are of extreme importance (e.g., class as opposed to race). This is particularly true of the law. At the same time, race can be separated as an independent and the apparently dominant factor in the biased treatment accorded to blacks and mulattos by the law. Fry does not decide whether class or race takes precedence. Rather, it is implicit that the relationship between class and race is the bedrock of Brazilian social relations.

Thirdly, there is a culture which admires those that take advantage of the law. However, formally, there is equality before the law. Manipulation of the law by those who have the privilege and status to do so (i.e., whites) is seen as a positive value, while on the other hand, there is a provision of formal equality. The picture is further complicated by the thought that the penal system ought to provide unequal treatment for unequal individuals.

Fourthly, despite increasingly punitive legislation to prosecute racial crimes and the acknowledgment by most Brazilians that racism exists, there is a general reluctance to seek remedies. Fry notes that recent research denouncing the myth of racial democracy and the active role taken by the relatively small black community has helped create a reversal in Brazil's self-image.

The central paradox is that although most Brazilians agree that racism exists, most claim not to suffer from it. This suggests that the real debate should center around the myth of racial democracy. The question is whether the myth does not mask discrimination or neutralize racial identification among non-whites. Fry takes the view that racial democracy is an aspiration of such strength that it impedes the recognition and subsequent punishment of those who would deny it. For him, this explains why legal instruments are of such limited use in remedying racism in Brazil.

Fry summarizes the changes in Brazil's black movement over the past three years. There has been a growing emphasis on concrete issues of inequality in those areas of social life where they have been best documented—in the workplace, educational system, and health and religious organizations. This has given blacks real targets in the struggle against economic and social consequences of discrimination.

Fry ends his paper with a warning regarding affirmative action. He dislikes the idea of formalizing race as a criterion for defining and targeting policy. He is shocked that the government would contemplate passing legislation recognizing the existence and importance of distinct racial communities in Brazil. Drawing from US experience, he states that while affirmative action may result in real gains, it also polarizes those falling on different sides of the divide.

Fry reaffirms that the belief in racial democracy is a valid aspiration. According to him, the government should limit its actions to exposing and punishing the evils of racism and racist thought. However, the underlying problem should be targeted—super inequality. Poverty is the

fundamental issue. What separates Brazilians is their educational qualifications and income. Accentuating their racial divides could be highly destructive. He lays down the gauntlet for broader debate on the issue.

Floor Discussion

Margaret Crahan (City University of New York) commented that one should look at the myth of racial harmony not only as an integral part of social structuring, but also political and economic structuring in the nineteenth century. Fry noted that, throughout the literature, the bipolar system was seen to be more efficient and modern.

Tom Farer posed the question as to what the least insidious form of inequality is, racial discrimination being the most insidious. Regarding affirmative action, he asked whether you reduce the insidious character by allowing those already the most advantaged in a system of disadvantaged to benefit in order that they may assist those unable to exploit the situation. This might have the effect of breaking down the class movement. It is clear that affirmative action is only beneficial to a small percentage of people. Fry commented that in the United States blacks remain loyal to the black community, regardless of whether they are rich or poor. This is not so in Brazil. Thus, in societies where there is segregation, it makes sense to talk about affirmative action. However, perhaps in the case of Brazil there is another way out. Dorothy Q. Thomas suggested introducing anti-poverty programs targeting the poor. This would inevitably target a large number of blacks.

III. INTERNATIONAL ASPECTS OF CURRENT EFFORTS AT JUDICIAL REFORM

1. International Aspects of Current Efforts at Judicial Reform: Undermining Justice in Haiti

Reed Brody

Brody contextualized the current efforts at judicial reform in Haiti: historically, repressive rulers and their henchmen have not been brought to justice. President Aristide—now that his government has been restored—has declared his intention to seek justice for victims of the excesses of the reign of terror that began after the 1991 coup. The restoration of an independent judiciary is vital to this task. To date, however, few offenders have been brought to book; Haitians have little confidence in the system.

Indeed, legal practitioners are drawn from the small upper stratum of Haitian society and are frequently unable to represent the interests of poorer clients; disarmament of former soldiers and paramilitary agents has been slow, inhibiting people from coming forward to denounce their

repressors; government efforts at investigation and prosecution are inconsistent. A "truth commission" diverted attention and resources away from prosecutions. Its report has never been released.

The international community, particularly the United States, is also responsible for this state of affairs. It has refused to help the government in its effort to bring offenders to book, yet has offered generous support for other aspects of "judicial reform." US agencies have had no contact with Haitian human rights groups in their activities.

Role of International Actors in the Fight against Impunity

The United States attempted to pressure President Aristide to grant an amnesty to the coup leadership. It even went so far as to make a unilateral offer of amnesty. US troops allowed top criminals to leave, and where Haitian authorities made arrests, US officials intervened to secure their release. US forces seized 160,000 pages documenting killing and torture and shipped them to the Pentagon. The United States has said that it will restore them only after it has deleted or removed names or other information identifying individual US citizens. The United States has refused to return Emmanuel Constant, a leading offender, despite a court finding that he was deportable.

Other international actors have not offered the Haitian government assistance in securing prosecutions. The UN/OAS Civilian Mission in Haiti has found it to be outside of its mandate to help the government of Haiti to prosecute human rights crimes.

Former Minister of Justice Guy Malary was murdered in 1993. The chief of police, a prime suspect, was allowed to slip away by US forces. An accomplice, Marcel Morissant, was arrested in Haiti but sprung from jail. Two hitmen were tried, but the evidence against them was insufficient since the United States blocked access to army and police records.

Conclusions

The interest of donor countries in "judicial reform" has not coincided with the Haitian interest in securing prosecutions. Haitians have not been consulted. International and US assistance has been directed so as to meet the priorities of donor countries, rather than those of Haiti.

Discussant's Comments (*Leonardo Franco*)

Franco offered the diagnosis that many programs of judicial reform have been ill matched to the particular problems presenting in the societies in which they have been adopted. This is the case in Haiti: "quick fix" solutions which fail to connect judicial reform efforts with human rights

violations and which do not include consultation with sectors of civil society are bound to fail. Judicial reform is not neutral. Rather, it is susceptible to the interests of political actors.

International Efforts in Judicial Reform

International actors have recognized the importance of judicial reform programs in the post-conflict peace building, recovery, and reconstruction phase. Fortunately, such actors are also both realizing the importance of maintaining a sensitivity toward the local contexts in which reform efforts are undertaken and addressing judicial reform as part of a comprehensive sector strategy. For example, efforts to educate a judiciary that lacks independence will be insufficient if the root political causes of a lack of judicial independence are not addressed.

Efforts of the UN Mission for the Verification of Human Rights in Guatemala are instructive. The mission has provided technical and financial support to institutions relevant to the protection of human rights, with a view to ending a long tradition of impunity. A "comprehensive sector" approach was adopted: The mission consulted with civil society in order to diagnose the problems faced, facilitated the enactment of a new criminal procedure code, and addressed issues of access to justice, and human rights education, promotion, and dissemination. Sufficient political will, maintained by ongoing publicity regarding the process, has meant that the mission's approach has yielded tangible benefits to human rights protection in Guatemala.

Conclusions

Judicial reform cannot be divorced from reforms in other sectors: A comprehensive sector approach is vital. Ongoing consultations with communities affected are necessary to effectively diagnose the problems targeted and maintain a foundation of political support.

Floor Discussion

Méndez warned against viewing the rule of law as a non-neutral or relative concept. International actors and donor countries could find themselves without any standards to use as benchmarks against which to measure the performance of recipient states. This would have implications for the practice of setting preconditions for aid.

Brody asserted that some principles are universal by their very nature—for example, the Universal Declaration of Human Rights and doctrines of international law. Where, however, the local focus of aid is under consideration, greater weight should be given to local preferences. The decision about whether to grant aid can, however, remain subject to overriding standards or conditions—for example, that there be present the political will to accept and implement measures in a recipient state. Formal independence of the judiciary may also be such a condition. He drew upon the example of UN peacekeeping operations which have linked technical

assistance to their monitoring role in order to "leverage" assistance and ensure that conditions were met.

Felipe Michelini (Representante Nacional, Uruguay) wished to know whether there was a link between the truth commission and judicial reform in Haiti. Brody replied that the Haitian truth commission has hardly been a success: its report was yet to emerge, and many prosecutions had lapsed.

Christopher Larkins wanted to know how the judiciary could be strengthened in states where a strong military or a dominant presidency had been the order of the day. Jorge Correa viewed the paper as emphasizing the importance of judicial reform as a goal pivotal to further reforms. Addressing these points, Brody stressed that the principal concern of people in Haiti was whether their tormentors would be brought to justice. He was, however, hesitant to advocate that donors should intervene in recipient states so as to alter the political balance among judiciary, presidency, and military—though he again raised the matter of whether or not formal independence of the judiciary might be stipulated as a precondition of aid.

The unique nature of Haiti was stressed by Henry Raymont (Syndicated Columnist, Washington DC). He referred both to the manner in which Haiti was regarded by the United States, and to the role of the Black Caucus in the US Congress. Brody concurred that Haiti was indeed exceptional, in the sense that the events in that country were largely a result of US intervention—but for US intervention, President Aristide would not have been restored to power.

2. Judicial Reforms in Latin America: Good News for the Underprivileged?

Jorge Correa

Judicial Reform

Correa stated that the amount, nature, and degree of the different initiatives aimed at reform might cause the observer to become overwhelmed. More reform efforts and more attention are aimed at the judiciary. Also, more activity and money is being invested in judicial reform than ever before. Some examples of reform are the following: Many countries have changed or are in the process of changing the way in which the judiciary is governed. Similarly, a number of countries have changed the way in which judges are appointed. Also, many countries are trying to move their criminal procedures away from the inquisitorial model. In nearly all Latin American countries, there are attempts to improve judicial education. There are reforms bearing on public prosecutors and public defenders. Attempts have been made to create mechanisms of alternative dispute resolution and an ombudsman. It has become fashionable to talk about judicial reform in Latin America. It is necessary to recognize the presence of the underprivileged in the reform process.

The causes of judicial reform are threefold: firstly, the tendency to diminish the role of the state, and the opening of markets in Latin America; secondly, political democratization; thirdly, an inclination toward and pressure for crime control.

Do These Reforms Mean Good News for the Underprivileged?

The underprivileged have themselves not done anything as an organized group to promote reform. However, ADR presents an opportunity for the underprivileged, as does the reform of the criminal codes. There is a shift of power between forums of decision-making and dispute resolution which is relevant to the underprivileged.

What is Changing?

The government is scaling back its role in society. It is also becoming less important as a forum for participation and a vehicle of social mobilization. Most of the decision-making process and power is being transferred to the market. This, however, is not the ideal place for the underprivileged to fight for their causes. Finally, there is a shift towards a more powerful judiciary. There is a shift toward more open discussion—through public interest litigation the courts are now being used more by the underprivileged.

Discussant's Comments (*Leopoldo Schiffrin*)

That judicial reforms will improve the possibilities of poor people to obtain access to the legal machinery cannot be taken for granted. The connection between judicial reforms and improved access for the underprivileged must be scrutinized. The following issues are of importance in this regard: The most important sphere in which improvements is required is that of defendants' rights. Similarly, victims' procedural rights need to be addressed. Regarding excess in police action, police officers have the power to imprison offenders charged with misdemeanors and put them to trail before an administrative police agency, the decisions of which are seldom challenged in court.

Court personnel may not be able to execute the new procedural rules. Argentinean experience has shown that most judges and other administrators of justice have not been able to do so capably. As long as politicians still manipulate the judicial system, there is no hope of fighting corruption and enhancing the prestige of the judiciary—necessary steps for the development of constitutional democracy.

The fight by the poor for fair treatment is the very fight for the rule of law. The rule of law will exist when all enjoy equal opportunity to seek judicial protection of their rights.

Floor discussion

Christopher Larkins, drawing attention to examples of extreme politicization of the judicial process and, in some countries, direct action taken to subvert the judiciary, noted the absence of public outcry. He wondered if combating crime might not be a starting point.

Marcelo Leiras (University of Notre Dame Department of Government and International Studies) drew attention to the implications of the wider policy framework within which judicial reforms occur. He suggested that the trend towards minimizing the role of the state, while strengthening the judiciary, might result in less protection for the underprivileged. Correa, emphasizing the need for an independent judiciary, stated that changes are occurring and that, therefore, there was a chance for the underprivileged.

Drawing on his experience in Argentina, Horatio Verbitsky (Página 12) stressed the vulnerability of judicial independence to attacks by the state.

Karen Poniachek (Council of the Americas) was interested to know what role the private sector was playing in judicial reform. Correa replied that although the private sector was not providing money, they were pushing for judicial reform.

Schiffrin stated that better access to justice can now be observed and is being implemented. The greatest problem of the system is that of an insufficient number of judges. International aid can do much with regard to legal assistance.

Mary Ann Mahony (University of Notre Dame Department of Government and International Studies) stated that social historians are showing that the poor are using the courts—when they believe it is in their interest to do so. She asked whether and how judicial reform would increase access for the underprivileged.

Jose Miguel Vivanco (Human Rights Watch/Americas) asked about the extent to which the problem of the increase in common crime and the inability of the police to deal with it have become an obstacle to judicial reform. He also wished to know if any efforts were being made to incorporate international human rights standards into the reform process.

Emilio García-Méndez stated that he was uncomfortable with the term "underprivileged," as it posits privilege. Not enough attention is being paid to a demand for justice. The main problem of poverty in Latin America is that of poverty of citizenship.

Correa reiterated the need for an independent judiciary. There is a tension between guarantees, and law and order. There is a need to utilize the expertise of international lawyers in domestic courts. Judges need to be attuned to human rights.

Schiffrin, using examples from Argentina, showed that for many years the law and order movement has attempted to repeal guarantees—these attempts have failed. In Argentina, the restrictions imposed on defendants is the work of the courts—the Superior Court (established

three years ago) has misinterpreted the guarantees. Finally, he noted that the law and order movement continues to narrow the scope of the new courts.

3. Access to Justice for the Poor In Latin America

Alejandro Garro

At the outset, it is important to define what is meant by certain terms. "Underprivileged" means the most vulnerable sections of the community. "Access" implies that there are obstacles in the way of the achievement of justice.

Access to justice is a critical element of the legitimacy of law. If people are to be governed by the rule of law, it must be accessible: otherwise, it loses legitimacy. What, then, is the rule of law? It occurs when criminal responsibility, rights, and obligations are determined on the basis of rules adopted by some form of popular consensus. The rule of law also calls for fair application of norms by an independent judiciary.

The Rule of Law

The implementation of the rule of law faces specific problems in the context of Latin America, where there is tension among the legacy of authoritarian regimes and liberal ideas about equal protection, freedom of thought, and universal application of the law. The rule of law is molded by historical and cultural factors pertaining to the production of these rules. It is also important to note that such factors have shaped the ways in which these rules are applied. Therefore, any critical analysis of the implementation of the rule of law and access to justice calls for an analysis of the fundamental elements of the rule of law. A distinction needs to be drawn between two different aspects of this matter: Firstly, the recognition that rules need to be improved to eliminate existing biases against the disadvantaged sectors in society. Secondly, the dysfunctional operation of the rule of law in Latin America implies that existing legislation is not implemented in the way it should be, due to a variety of obstacles.

The question of how the poor can enforce their rights has received sparse attention in Latin America, with the possible exceptions of Chile and Brazil. Nevertheless, there is consensus that equal protection under the law is a fundamental right. Theoretically, there is the assumption that everyone has equal opportunities to vindicate their rights and that legal assistance is a fundamental right and an important component of a fair trial.

To what extent is access to justice essential for an accountable democracy? To what extent can the free market operate without access to justice? Predictable application of the law by independent tribunals is required if accountable democracy and the free market are to function effectively.

What Will It Take to Improve and Universalize Access to Justice in Latin America?

The existing programs for the poor in Latin America are poorly run and underfinanced. As a result, they are overburdened and understaffed. It is not surprising, then, that the benefits of existing legal services do not reach the majority of the poor.

The connection between judicial reform and access to justice is at the forefront of modern debates over access to justice. In the first place, it is important to recognize that charitable legal aid programs cannot ensure the provision of access to justice. The rationing of justice, leaving the poor to the forces of the marketplace (where they are unable to defend themselves), is wrong. Access to justice cannot do without government support, but more is required than simply government-subsidized programs. Equal and open access to slow and questionably neutral and independent decision-makers is unlikely to bolster the legitimacy of the rule of law. Access to justice has not been included in the World Bank program for judicial reform. Every effort should be made to place this on the agenda. Secondly, existing legal services programs focus on the defense of individual claims and are reactive and court oriented in nature. It is important to encourage the poor to turn to the courts. It is not enough to shape the rule of law in a way which increases the bargaining power of individuals and groups in the judicial process. Thirdly, there are issues that should be insisted upon in programs of reform: resources, judicial independence, the cost of litigation, the adjustment of procedural mechanisms of dispute resolution to the goals of efficiency and fairness, finding alternatives to expensive court litigation (e.g., ADR), changing the frame of mind within which lawyers operate, changing the image of judges and lawyers, and finally, changing legal education in order to sensitize students to issues relevant to the underprivileged.

Discussant's Comments (*Sérgio Adorno*)

Access to justice is to be viewed as part of an overall process of change in which civil society and political actors become actively involved.

Garro's proposal to analyze different legal assistance programs for the poor in Latin America is convincing. The exposition of existing legal services is reflective of the judicial reality of contemporary Latin American societies. However, the characteristics of these programs must be considered according to the social, political, and economic characteristics of each Latin American society.

A serious challenge to the democratization of justice is not only to make the courts and legal services available to all, but to change the conception of justice as individual and reactive.

There is a need for legal aid programs able to correct social injustices. Also, it is necessary to formally recognize those social groups that fight for their rights.

Proposals for reform, which include the independence of the judiciary, reduction of litigation costs, and creation of mechanisms which widen access of the poor to justice, are needed. However, Garro does not succeed in breaking from the traditional sociological profile of those citizens who fight for equal justice. It is necessary to take into account the authoritarian and conservative legacies of Latin American societies. Furthermore, the survival of authoritarianism shows that those who are committed to democracy have not yet succeeded in their fight. The judicial apparatus is itself a powerful obstacle to an effective distribution of justice, particularly for the poor.

The following issues need to be debated: Firstly, are the new forms of access for the poor effective in ensuring an accountable democracy? Secondly, why do authoritarianism and conservatism still exist, despite reforms which aim to open access to justice for poor people? Thirdly, are these new procedural mechanisms powerful enough to change traditional relations which constitute an obstacle to the consolidation of democracy in Latin American societies?

Floor Discussion

Jorge Madrazo (Comisión Nacional de Derechos Humanos, México) questioned whether or not distinct tribunals for indigenous peoples—staffed by indigenous judges and applying indigenous law—would increase access to justice. Garro replied that there was a role for customary or traditional law in dispute resolution, in so far as it was not inimical to basic human rights. In his view, creating separate tribunals was not desirable in principle: historically, such tribunals have been associated with the privileging of the claims of certain citizens. He was, however, more amenable to special tribunals where access to a tribunal was determined by the nature of the dispute in question rather than the status of one of the parties to the dispute. Mariclaire Acosta drew from her experience of separate tribunals catering for indigenous groups in Mexico. She observed that the issue should be seen in the context of calls for self-government. She stressed that access to ordinary court systems should still be addressed.

Ligia Bolívar was concerned that promoting distinct tribunals for indigenous groups might lead to "second-class justice for second-class citizens with second-class disputes." In her view, the nature of the dispute in issue should be determinative of both access to justice and any decision to compromise claims. Garro agreed that the nature of the dispute at issue should be the determinant as regards the application of alternative dispute resolution or extra curial dispute resolution processes. An issue of public noise is susceptible to community-based dispute resolution. By contrast, the matter of domestic violence is a public concern and should be dealt with in the criminal courts.

Paul Chevigny stated that the fee structure in the legal profession could impact upon access to justice. In particular, contingent fees could be of assistance in facilitating greater access to justice. Garro echoed these sentiments. He pointed out that some Latin American countries do allow contingency fees, without which many underprivileged plaintiffs would not be able to gain access to court. He observed that the provisions of the Law of Costs provided a disincentive to litigation, in so far as the losing party was required to pay the attorney's costs of the winning party.

Jean-Paul Brodeur emphasized that legal access was to a large extent dependent on the levels of legal education in a population. Adorno echoed this, pointing out that income was not the only determinant of access to justice. The generally conservative mind-set of judges and the wider problems of the construction of citizenship in society also impact upon access to justice. Education is vital: people will not feel encouraged to approach courts to resolve problems if they neither know their rights nor are aware that the court can address disputes involving rights. Madrazo cited the results of a survey in Chile, which showed that the underprivileged wanted education concerning the functioning of the legal system. He also advocated a broader interpretation of access to justice: This should encompass not only access to courts, but also access to the law-making process.