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The Central American and Spanish Caribbean Systems of Justice: A New Focus for U.S. Development Assistance (Dialogue #50)

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PREFACE

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Development stragtegies have seldom addressed the justice systems, and discussions of their problems are notably absent from national and regional reports. The Kissinger Commission on Central America, however, found the situation of the judiciary sufficiently critical to development strategy that recommendations for assistance were included within their proposals.

The Commission's report noted that "in the absence of strong legal institutions, political, security and economic crises are magnified," citing El Salvador, where the "virtual collapse of the national criminal justice system" has occurred. While no other country now approaches the crisis level there, the systems of most of the other Central American and Caribbean republics present such significant administrative problems and low levels of public confidence that the preconditions for institutional crisis and collapse are present.

The Commission specifically recommended that the United States help strengthen Central American judicial systems to:

"- Enhance the training and resources of judges, judicial staff, and public prosecutors' offices.
- Support modern and professional means of criminal investigation.
- Promote availability of legal materials, assistance to law faculties, and support for local bar associations." (Report at p. 74)

Judicial systems throughout the region operate under

physical, financial and personnel conditions which range from severely inadequate to virtually neglected. It is difficult to truly represent the crisis which these systems currently face. The most fundamental problem is lack of fixed judicial tenure in office and very low salaries for judges, prosecutors, and other court officials. The endemic unavailability of basic legal materials to judges, prosecutors, and defenders in the region affects all aspects of the administration of justice. Extensive legislative and case reporting systems, as we know them, are non-existent in these countries. Typically, courts, judges, and prosecutors have no law libraries, and often operate from outdated versions of basic legal codes. Trial judges have virtually no access to the collected jurisprudence or recent decisions of higher courts for guidance, usually because such essential research tools do not exist or are hopelessly outdated. The result is that untrained and untenured judges often decide cases on the basis of incorrect legal principles, after delays counted in years. These poor conditions are the norm in national capitals and are magnified in the provinces. In turn, the confidence in the court system among lawyers and ordinary citizens is lessened. If the United States wishes to strengthen democracy here, urgent attention must be devoted to the fortification of this basic underpinning of any permanent democratic system.

Description of the Judicial System and Its Problems

Organization of Courts

The constitutions of Central American countries all provide for an independent judicial branch with a pyramidal

organizational structure. Normally there is a supreme court, an intermediate court of appeals, a trial court of first recourse for serious cases, and an inferior court of limited jurisdiction, akin to justices of the peace, for resolution of minor disputes. These constitutions have been especially influenced by that of the United States and contain exemplary guarantees for the autonomy of the courts and the safety of individual rights. However, in most of the countries, the presence of a strong executive has made true judicial independence a rarity. In all countries of the region, the judicial branch is constitutionally independent, but except for Costa Rica, the judiciary lacks such autonomy in practice. It is usually the worst organized, poorest equipped, and most underfunded branch of government.

The de facto judicial branch subservience to the executive has been especially pronounced in the Dominican Republic, where the courts have no control over their own budget or its administration. The Dominican judiciary is charged by law with administration of its own budget yet, in practice, the Procurator General, an arm of the executive, acts as the management agency with the sole discretion to authorize expenditure of appropriated funds, hiring of judicial employees, payment of salaries, purchasing, maintenance of courts, etc. This administrative dependency upon the executive branch effectively blocks the development of an independent judiciary.

In addition to traditional legal roles, supreme courts also play a critical management role since they are the supreme administrative body for the judiciary, exercising almost total

disciplinary power over all lower tribunals and their members.

Depending on the administrative scheme, they may also supervise a number of diverse functions, some of which would not be considered "judicial" in nature in the United States: 1) supervision of the judicial police (presently extant in Costa Rica only); 2) administration of judicial lay staffs, which in some cases may be quite numerous; 3) management of budgets for the entire national judiciary; 4) selection of lower court judges, often without any voice from the other branches of government; 5) promulgation of procedural rules for the administration of courts; and, 6) management of statistical collection of the court system.

While some supreme courts attempt to exert their disciplinary powers over lower court judges, they seldom possess the resources or skill to correctly supervise judicial discipline. This supervisory role should not be limited solely to disciplinary matter, but should also extend to evaluation of the factors which contribute to defects, such as delay, and provide solutions to these problems.

Though most members of the judiciary are legal professionals, in terms of their university degree, most judges from the supreme court to the lowest levels are totally unprepared to carry out the administrative functions assigned to them. As in the United States, these duties are delegated primarily to subordinates who are often lawyers themselves, and suffer the same lack of administrative training and interest. The U.S. judiciary, both federal and state, has recognized this problem and instituted reforms designed to develop a professional

administrative cadre. However, in Central America, counterparts to court administrators or clerks of the court are virtually unknown. Thus, in most cases, judges do not exercise their administrative responsibilities efficiently. This is due to a lack of human and financial resources, administrative experience, and/or the perception that administrative matters are not part of the judicial function.

This administrative disorganization is reflected at all procedural stages. In virtually every court, including some of the supreme courts, the filing systems range from unorganized to chaotic. There may be no filing folders, cabinets, typewriters, photocopiers or file retrieval systems. In some cases, files are simply piled on the floor. A constant source of case processing delay is the loss or disappearance of files.

While one may conclude that administrative duties are secondary to legal roles, and thus caseloads prevent the adequate development of supervisory duties, the legal output of many supreme courts is not extensive. In El Salvador, for example, the supreme court only reviews forty to fifty cassation appeals per year. This low figure may be accounted for in part by the explanation that few cases ever reach the supreme court due to the high number of prisoners awaiting trial, delays in the process, and the huge criminal and civil backlogs.

Judicial Selection

In all of the countries, all of the courts above the lowest levels require legal professionals to act as judges. However, in many countries, the lowest level judge frequently is neither a

lawyer nor even a university graduate and, in many instances, may lack even a completed secondary education. Especially in rural areas, this is the judge (juez de paz or de municipio) who handles most disputes and complaints. Yet he is the least educated, lowest paid and most neglected in the system, despite power to punish minor crimes, hear minor civil cases, and settle disputes by mediation. He also has the sole discretion to jail or release criminal suspects, and investigate major crimes for forwarding to the next level trial court.

Judges are selected in several ways in the Central American countries: 1) selection by the executive with the approval of the legislative branch; 2) selection by the legislative branch; 3) selection of supreme court by legislature with supreme court, in turn, naming lower court judges. In Honduras, the lower court judges name the justices of the peace. While in most of the countries, judges are prevented from other employment, this is not the case in El Salvador where they may act as notaries even while exercising judicial authority.

In every Central American country except Costa Rica, the absence of civil service security contributes to judicial instability and political interference for all judicial personnel. The most extreme cases of such interference are Honduras and the Dominican Republic since judicial terms end with those of the legislative and executive branches, resulting in massive personnel changes upon the election of an opposition party. Without tenure in office, a given judgeship may be held by a succession of appointees within the same presidential term.

Training of Justice Personnel

Training of judges is very limited in the region. The only formal judicial school is operated by the Costa Rican judiciary, but serves mainly as a training mechanism for administrative support personnel, providing legal education for judges in few instances. All of the other countries have expressed a desire to form judicial schools which would provide training for judges, prosecutors and public defenders as well as administrative personnel. Financial and other constraints have delayed implementation of such training programs. Honduras, for example, possesses the enacting legislation, but the supreme court has not promulgated the administrative regulations for establishment of such a training vehicle.

Training of other judicial support personnel has fallen to the judicial branch, since in most of the countries civil service protection for judicial employees has never been established. Panama had a career judiciary, but its system was abandoned in 1969 when President Torrijos abolished the courts. This lack of a judicial career has meant a lack of minimum hiring criteria, lack of job security, lack of a system for promotions or guaranteeing wage levels, and has compelled the judiciary to devote what little training resources it possesses to the training of inferior personnel.

While law faculties might provide practical preparation for a judicial career, regional legal education is tradition-bound, and short on practical training of any sort. Universities have also been seriously affected by the economic crisis. While some law faculties are interested in establishing special course

concentrations for judicial training, nothing has developed thus far. Virtually all law schools continue to rely on part-time faculty and the deanship is often viewed as reserved for those who can afford to take a leave of absence from their private practices. Library facilities have been curtailed and many of the law libraries are seriously deficient in maintaining even minimal collections.

Lack of Data

A problem common to all the countries is lack of reliable data on which to plan or evaluate the system. Costa Rica has developed a fairly sophisticated statistical system in recent years, but it is still maintained by hand and does not provide immediate information. The other countries are much farther behind, and it is impossible to plan for any reforms without including this important subsector.

Another area which is commonly deficient is the maintenance of criminal history data. This is sometimes kept and administered by the courts, but in most countries it is maintained by the police. This information is critical in making sentencing decisions and a further point of procedural blockage in those cases in which an inefficient system produces delays, errors and the potential for corruption.

Judicial Autonomy

Apart from Costa Rica, no strong independent judiciary exists in the region. The strength of Costa Rica's judiciary is largely due to three factors: first, there is a historical tradition of independence and popular support for such a notion;

secondly, supreme court judges are appointed to seven-year terms and may be reappointed; and, thirdly, their budget is guaranteed by the Constitution at 6% of the national budget. In order to maintain their independence, they have always formally requested the full amount, even though they may later return some portion to the national treasury.

While the constitutions of some other countries also provide a mandatory fixed percentage for the judiciary, it is rarely obtained in practice. Honduras, for example, provides for 3% of the national budget to be allocated to the judiciary, but the supreme court has never requested nor received the amount it is entitled to by law. Panama's judiciary has a 2% guarantee, under the new 1984 Constitution, and did receive a substantial budgetary increase--but not the allotted 2%.

Panama's new constitution also provided for ten-year terms for supreme court judges, with staggered appointments to assure continuity, an important step toward judicial independence. There is clearly a recognition through the region of the need to make judicial independence real. Some important steps have been taken, but a strong political will and a shared perception of the fundamental importance of independent judiciaries to true democracies are fragile commodities.

Procedure

The general design of a civil law system also provides judges with some functions unknown in the common law countries. Trials are divided into two phases: an instructional stage and a trial stage. The first involves all those actions which are taken in preparation of the charges against the defendant, and is

carried out by an instructional magistrate, or a public prosecutor.

Once a report of a crime is made, the instructional judge assumes control over the investigation of the offense. He determines the nature of the crime, supervises the questioning of witnesses, inspects the scene of the crime, appoints experts and identifies suspects. The potential defendant is then called to testify before this magistrate who takes a statement and enters it into the record. If an arrest is necessary, only this magistrate is empowered to order it. Once the suspect is in custody, the magistrate determines whether to release this defendant or to hold him in custody. All matters reviewed during this stage are set down in writing and placed in a file, which eventually embodies the case against the defendant. Upon completion of the investigatory stage, the instructional magistrate will forward the complete file to the prosecutor for review and thereupon the criminal action will be instituted on the basis of a filing document.

While the foregoing generally describes the instructional phase, each country in the region has assigned that function differently. The Dominican Republic has judges of instruction. Honduras, Panama and Costa Rica do not, having either merged that function with the trial judge or assigned it to the prosecutor. But regardless of which functionary has the task, the near total lack of investigatory resources and personnel makes effective investigation extremely difficult and often impossible. In most instances, the national police, often a part of the military, are

the only investigative forces available. The police may or may not cooperate with the investigating judge. In most instances, very little professional investigative skill is available, and the suspect's confession is the primary evidence.

In order to insure an objective trial, the evidence gathered by the investigating magistrate is referred to the appropriate trial court. This material is admissible at the trial but may be rebutted by the defendant.

Generally, the trial is not the public adversative proceeding as known in the United States. While in three of the countries, limited oral hearings are provided during some trials, at least for serious crimes, most trials are closed administrative processes. Honduras and El Salvador follow an exclusively written system in which criminal cases become "documentary contests--with each case being narrowed to sewn volumes in which the court is totally isolated from the accused and his background, and in which the judicial function is delegated to employees and minor functionaries (if not in the police)..." (Zaffaroni, 1982: 79). This feature, derived from the old inquisitorial system, still predominates in these countries.

Another feature common to these countries is the ability of the judiciary to proceed against absent defendants, and for the accused to be questioned before the judge without the presence of his defense attorney.

Delay and Preventive Detention

The need for personal action of the judge in so many procedural stages, together with the paperwork required in this

system produces one of the most serious problems of Central American justice: delay in the processing of judicial matters.

The procedural delay, combined with a preference for preventive detention, results in an inordinate percentage of the jail population being held in prison prior to trial. In a major study of all Latin American and Caribbean nations for which figures were available, Carranza, et al, found that the percentage of inmates awaiting trial ranges from 2.18% in Cayman to 94.25% in Paraguay, with a total average of 67.28% for the eighteen countries studied (Carranza, et al, 1983).

The following features reveal the latest figures on the amount of prisoners being detained prior to trial:

TABLE 1

Country	Year	Total Number of Prisoners	Percentage Not Sentenced
Costa Rica	1981	2407	47.40
Dominican Republic	1982	5355	79.88
El Salvador	1981	3402	82.57
Honduras	1981	1016	58.36
Panama	1981	2339	66.52

Source: Elias Carranza, Mario Houed, Luis Paulino Mora, Eugenio Raul Zaffaroni (1983), El Preso sin Condena en America Latina y el Caribe. San Jose, Costa Rica: United Nations: 22.

Generally the Latin American systems make excessive use of preventive detention, and after trial, harsh sentences are the norm with prison and fines being the two most prevalent forms of punishment. In some instances, the code presumes the

dangerousness of all detainees with prior criminal records, disallowing any judicial review of circumstances (El Salvador). In others, even if the codes allow such pretrial release, it is seldom applied by the judiciary who seem to prefer routine denial to pretrial review.

Prosecutors (Ministerio Publico)

The Public Ministry is a civil law institution common to all of the countries. The term describes a function rather than an institution. Its main task is to assure compliance with all laws as the prosecutorial branch of government. As such, its duty is both to protect society from law violators as well as to guarantee that the citizen is protected from governmental abuse.

The public ministry is exercised by law-trained persons (usually called a "fiscal") who may be a part of the judicial or executive branch, or both. In the Dominican Republic, the fiscales (prosecutors) are an arm of the executive, administratively and politically dominant, and have more effective control over the criminal process than the judges, who operate almost exclusively without administrative staffs. In Honduras, the reverse appears to be true. There, the public ministry is exercised by two sets of fiscales, one within the judicial, and one within the executive branch. However, those under the judicial branch have the only day-to-day role in the criminal courts, and even this is much reduced. The Honduran judiciary's fiscal is basically a woefully underpaid administrative assistant to the judge, who shuffles paper and rubber-stamps judicial decisions. The fiscales attached to the

executive perform almost exclusively as the defenders of the government in civil cases. Many fiscales are law students, working part-time. Thus in Honduras, though the judiciary is weak and inefficient, the judge still dominates criminal proceedings and due to the debility of the public ministry there appears to be less prosecutor-judicial conflict than in other countries.

In Panama, another variant appears. The public ministry's prosecution function is actively exercised by fiscales assigned to each court by the Procurator General. This official is the rough equivalent of the Attorney General of the U.S. A unique feature of Panama's system is the elimination (since 1941) of the judge of instruction (investigating magistrate), and the assignment of those investigating functions to the fiscales, rather than merging the function with those duties of the first level trial judge. Thus, Panamanian fiscales exercise both the investigative and prosecutorial functions, making them the strongest in the region both legally and functionally. This is the closest to the U.S. system where both activities are the responsibility of the prosecuting attorney.

Costa Rica, as might be expected, incorporates the public ministry under its uniquely dominant and well-financed judiciary. However, even here there are problems of conflicting functions and unclear lines of supervision. There is no law describing and limiting the functions of the Costa Rican public ministry or fixing its position within the judicial branch hierarchy. Costa Rica has recognized this problem and is currently working on reform proposals.

Generally, throughout the region the prosecutorial function of the public ministry has been emphasized over its duty as guarantor of individual legal rights. Its resources are seriously lacking for either function, particularly in the Dominican Republic and Honduras, and it is unlikely that it will prioritize the latter function when it cannot perform its prosecutorial role adequately.

Public Defenders

While this function exists in the region, it is virtually undeveloped. (Costa Rica is again the notable exception.) A 1980 Honduras law providing for a free public defender system has never been implemented. Panama has five public defenders for the entire country. They are underpaid and completely swamped with gigantic caseloads.

In some instances, judges may and do appoint private lawyers to defend indigents, but often the lawyer is diverted from the task by his own private practice and neglects pro bono cases. Court dates are missed, and the accused remains in jail. Another lawyer may be appointed or the judge may simply decide the case on what is in the file. Though the codes of ethics of the bar associations often impose an obligation to represent indigents, this is not commonly enforced.

The only other source of legal assistance is programs within the law faculties of some of the region's universities. These are of limited reach and concentrate mainly on civil and family disputes rather than criminal cases, although some are now beginning to focus toward student representation of criminal

defendants under the supervision of a law faculty member or other member of the bar.

It is thus not uncommon for a defendant to be unrepresented by counsel throughout the judicial process. The absolute right to counsel has not been legally established in the region. The public defender area is one of extreme and obvious need. Honduras, for example, has identified it as a priority and asked for funds to activate its 1980 legislation and organize a functioning public defender system. The law faculty at the University of Panama is also interested in developing this area.

Bar Associations

Bar associations (Colegios de abogados) have been slowly evolving in the region from social groups providing benefits to members toward greater public issue involvement. In some cases, there have been rival lawyers groups, usually having a particular political orientation. The concept of a compulsory integrated bar is of recent origin in most of the region. It exists in Costa Rica and Panama, and has been achieved recently in the Dominican Republic. Honduras has a single association, but membership is not compulsory and its only resources are members' dues. El Salvador has five separate and highly politicized associations.

While bar associations have not traditionally played a strong role in support of the judiciary or as pressure groups for law reform, that is changing in positive ways.

The Dominican Republic is a case in point. In the two years since passage of the law making membership in a national integrated bar mandatory, the resultant entity has evolved

rapidly into a significant pressure group and is actively backing President Salvador Jorge Blanco's efforts to enact a judicial civil service system. As part of the effort, the Dominican association has recently sponsored a National Congress on the Judiciary, which produced a detailed set of recommendations for achieving and assuring judicial independence. The Dominican bar has been a significant force in a recent nationwide judges' strike for higher pay and passage of the pending judicial career law.

While less focused in their goals than the Dominicans, the Panamanian bar is now publicly demanding judicial reform. In Honduras, the bar association as yet is neither very active nor very strong. The Costa Rican bar association is the strongest in the region, but there, most of the basic reforms needed elsewhere have already been achieved.

Indigenous Reform Efforts

Central American judiciaries have been cognizant of many of the deficiencies demonstrated by their systems and have initiated reform efforts to correct them. Honduras has just enacted a major revision of its criminal code as a result of recommendations by a law reform commission. El Salvador has created two commissions to review legal codes and make recommendations on the administration of justice. The Dominican Republic established a review team which has suggested major reforms in the administrative structure of the judicial system. Finally, Costa Rica has continually reviewed its system of justice and maintains an on-going commission composed of

principal actors from the legal community.

Past U.S. Legal Assistance Efforts in Developing Countries (Law and Development)

Assistance to Third World nations' legal systems is not a new concept and was once at the core of development ventures. Past efforts were embodied in the "law and development" program in Latin America.

American legal assistance to developing countries began immediately after World War Two and reached its zenith during the late 1960's. All of these efforts flowed from notions of the superiority of the American legal model as the means of reaching a democratic solution to development in the emerging nations (Gardner, 1980). The approach became operational in Latin America in the mid-1960's with the introduction of legal education reform projects in Costa Rica, Brazil, Chile, Colombia and Peru, under the auspices of the United States Agency for International Development and several American law professors.

In Latin America, the U.S. law and development movement encountered an entrenched legal culture, peopled by a large and powerful legal profession, trained in formalism and bound to European and national institutions.

The major obstacle to the American model was the nature of Latin American legal education. Law instruction in Latin America dates back to 1553, centuries before American law schools appeared on the scene. Latin American law schools introduce law through a lecture system, during a five year period, immediately upon graduation from secondary studies. Their approach to law is comprehensive, placing emphasis on philosophy and history rather

than the practical aspects of the profession, in sharp contrast to American legal education. American legal scholars, working in the law and development effort, attempted to shift the emphasis from this lecture method to Socratic principles and case studies, so prevalent in American law schools, with very little success. By the beginning of the 70's the optimistic projections of the innovators were reevaluated, and they tended to move away from basic reform of legal education to practical applications aimed at utilizing existing structures. In Costa Rica, for example, a comprehensive indexing system for existing legislative materials was introduced (Wroe, 1973).

Although it is difficult to summarize the basic flaws in the American development effort in a few words, the following may be pointed out:

1. Most, if not all of these efforts were conceived and planned in the United States, and not in the receiving countries. As such, many of these efforts were ethnocentric, developed by American lawyers who combined an almost religious belief in the certainty and transportability of the American legal model with only limited information and experience of the receiving countries.

2. Most projects were overly ambitious in their expectation that changes in the legal systems would translate into instant democratic models.

3. Perhaps the most basic flaw of these programs is that they sought to change institutions and principles which were at the cultural core of the societies which they were seeking to

alter.

4. The programs were often based on erroneous information, primarily resulting from the lack of empirical data available on the operation of the legal system.

5. They mistook the willingness of Latin Americans to receive funding for a willingness to accept the principles being exported.