Rule of Law and Judicial Systems in the Context of Democratization and Economic Liberalization: A Framework for Comparison and Analysis in Latin America
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RULE OF LAW AND JUDICIAL SYSTEMS IN THE CONTEXT OF DEMOCRATISATION AND ECONOMIC LIBERALISATION: A FRAMEWORK FOR COMPARISON AND ANALYSIS IN LATIN AMERICA
Introduction

The recent incorporation of judicial reform in Mexico by Ernesto Zedillo as a major issue in the electoral campaign for the presidential elections of August this year is symptomatic of a more widespread concern on justice administration which has been growing in the last few years throughout Latin America. With the wave of democratisation a fever of constitutional reform and institutional redesign has swept the continent. This has come to include a more prominent awareness of the benefits of operative judicial systems as the newly founded regimes desperately seek legitimacy and consolidation in the face of economic adversity and evidently growing social hardship. The liberal discourse of democracy founded on rule of law in the current economic conjuncture thus gathers momentum. The convincing (and desirable) establishment of a working and workable rule of law regime and democratic state requires, amongst other things, a substantive review and over-hauling of the judicial systems as they exist, in the case of much of Latin America. What we find instead is an entirely derogatory image of corrupted and vitiated justice apparatus in much of the region: moreover, there now seems to be an awakening to the importance of the issue after decades in which the main concerns regarding political and state-building processes focused on developmental approaches and the desire to explain and understand the emergence of military authoritarianism —issues which were (and are) certainly worthy of detailed analysis and study.

A major challenge for the new democracies is how to tackle the task of democratic consolidation through the appropriate development of the state in terms of efficiency, internal coherence and social “embeddedness” necessary to support the legitimacy and endurance of the new regimes. Instead, we face a historic burden of large, and seemingly strong state apparatus, in reality highly inefficient, overly cumbersome and bureaucrataized, and prey to clientelism and prebendalist practices. The state apparatus in Latin America exhibits a structural incapacity to act in an authoritative and regulatory

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manner. What we find then, is a legacy of a weak and personalist, although extensive
state, with decreasing distributive capacity, and alarmingly lacking in transparency or
operative mechanisms of accountability. It is in this context that the role of the judiciary,
as a key organ in law-enforcement and rights protection, gains relevance in the
contemporary endeavours to acquire regime legitimacy and a meaningful form of
democratic practices.

On the whole, the literature on the rule of law and the insertion of the legal
institutions in the political processes in Latin America is limited. There is a body of
work from the 1960s and 70s which examined the formal legal institutions. With the
return to democracy much of the attention on rights in Latin America focused on the
highly relevant problem of how to come to terms and deal with the issue of the human
rights violations during the military dictatorships. Interest in the legal system has also
been the source of research in the field of sociology of law, in many instances following
the work carried out in the more established democracies. This has recently picked up
particularly in the study of alternative forms of conflict resolution which are manifest
in Latin American societies.

So far, much of the transition literature has grappled with the notion of arriving
at minimal democratic rules of the game, (regarding both the political and the econo-
ic), and pact and consensus building processes for this purpose. The challenge for
the process of regime consolidation implies that these very rules, assuming that they
are the right ones, are consolidated beyond merely contingent moments of transitory
compromise and political expediency, such that there emerges the basis for the
internalisation of these rules and the establishment of an operative rule of law founded
on democratic principles. In other words, the task at hand requires that the normative
implications of a democratic rule of law acquire a lasting and pervasive character in the
new democracies.

An explanation for the lack of comprehensive political studies of the judicial
systems in Latin America may be found perhaps in the notable absence in the past of
the judiciaries as important or relevant actors in the political processes of these countries
(there are significant variations on this from country to country). Typically, judicial
systems are weak, lacking in infrastructure and resources, and frequently associated
with corruption, inefficiency and over-bureaucratization. Moreover, there is a marked
(and well-founded) sentiment that the law does not apply equally to all, that impunity
is the norm for many, and there is a sense that some are above the law. The justice
system is key in this process.

Some examples are: H. Clagett, 1952, The Administration of Justice in Latin America, New York,
pp. 785-819. K. Karst, 1966, Latin American Legal Institutions, Los Angeles, UCLA.

This is highly relevant even with regard to how the democratic processes take place, as the manner
in which past abuses are punished or not, and how the truth of past violations is revealed, will determine
to some extent the quality, the credibility and even the legitimacy of the democratic process. There is no
clear answer with respect to this issue; however the problem is still very prominent in the political
processes of, say, El Salvador.
This paper will discuss the issue of the judicial apparatus and its role in the process of democratisation and state reform in a context of economic liberalisation.

1) The paper will identify the importance and relevance of the rule of law in contemporary political processes of democratic consolidation.

2) It will suggest the reasons and pressures behind the growing concern with legal forms and constitutional reform in the region with the process of democratisation.

3) This will be followed by a more detailed assessment of the judicial functions of constitutional and political control, and justice administration in Latin America. The aim here is to highlight some of the problems which confront the new democracies in terms of establishing regimes based on rule of law and constitutional legitimation.

The main premise of this piece is that in order to shed some light on the complex notion of regime consolidation, part of the problem lies in determining what type of democracy is being consolidated. One aspect which will determine the “quality” of democratic politics is the form of normative internalization and observance of basic democratic principles and values, not only at the level of the ruling (and competing) political community, but also at the level of society. This will determine the substantive as well as the procedural development of democratic rule. In the measure to which all members of society feel a basic (although not necessarily prominent) presence and awareness of binding rights and duties, and the minimum protection of these, as any modern democratic constitution will uphold, some assessment of how deeply embedded democratic values are in society can be ventured. As this paper will argue, there appears not to be a simple linear development of how this process of rule of law internalization takes place, nor when it can be said to have been completed (if ever at all to complete satisfaction, even in established democracies). Crucial to this process are those institutions which are an integral part of the notion and development of the rule of law, the most important of which is the judiciary. The breadth of the subject is such that here the object is to suggest a “mapping” and conceptual framework of these institutions as they operate in Latin America, with a view to encouraging further research in the field, rather than to provide conclusive evidence on the subject.

Rule of Law, Democracy and Democratic Consolidation in Latin America

It is not the purpose of this paper to enter into a lengthy discussion on the development of the concepts of democracy and rule of law. However, brief mention of these terms will be made in order to establish the importance of the legal system and the branches which are responsible for its observance, within the political process of rule of law and democratic consolidation.

The linkage between liberal democracy, the rule of law and legal systems is emphasized in the literature on political development of the Western world as a necessary, inevitable and desirable relationship. The term liberal democracy is value-
laden with concepts of rights and obligations in the relationship between state and civil society, a relationship the definition of which, nonetheless, has been in constant flux as the term liberal democracy has come to mean different things at different historical moments in the contexts of different countries.4

The rule of law in the Western liberal conception essentially originates from two objectives and means two things. On the one hand it emerges through the ages from the desire to curb the power of the rulers and, in the modern conception of the state, in its scope of action vis-à-vis the governed or society.5 Essentially, it appears as a control mechanism by which the state and the rulers are limited and can be brought to account according to established normative criteria (whether embodied in a written constitution or not), which regulate basic principles of the function and areas of competence of the different branches of government. For this to be operative, the rules must be substantively binding and overriding.

On the other hand, rule of law refers to that set of established normative rules and values, of a general and impersonal nature, which order the relationship between the state and society, and between the individuals of society. At this level, from a positive viewpoint, the rule of law signifies the aspiration of a well-ordered and harmonious society best achieved by the observance of these rules, rules which embody both rights and obligations. From a negative viewpoint, the rule of law of the liberal state is perceived as a mechanism of social control through the coercive apparatus of the state which, in effect, operates in the interest of the dominant political and economic sectors, and the preservation of an unequal capitalist social order.

The relationship between liberal democracy and rule of law is upheld as necessary and inevitable in that the contemporary definition of democracy implies a series of normative rules and rights in order that it become operative and desirable. The rule of law in democracy entails the normative and institutional embodiment of the state's authoritative and legitimate capacity of law-enforcement within the boundaries of a national territory. Paradoxically, the relationship between constitutionalism and democracy is also one of tension.6 The discourse of liberal democracy carries implicitly an

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4 Liberalism changes its meaning over time in accordance with the interests and sectors which claim and find affinity to it, and promote it. This is also true for democracy. J.E. Faria, 1989, “O modelo liberal de direito e Estado”, in J.E. Faria (ed.), Direito e justiça: a função social do judiciário, São Paulo: Editora Atica, pp. 19-36.

5 The modern state notion of rule of law emerges in the form of the end of absolute monarchy, with the rise of capitalist development.


This tension operates in the degree to which the rule of law implies the limitations of freedoms, and therefore limits the democratic strain on the regime. One immediate example is the “undemocratic” aspect of judicial review which acts to protect constitutional principles from what might even be majority, and arguably representative public opinion. Herein lies one of the difficulties of the principle of separation of powers of the constitutional state.
an allusion to a constitutional juridical order which will determine the normative rules and rights which order the relationship between state and society. The principles of this liberal democratic discourse have changed since the liberalism of the 19th century, which emerged with the rise of capitalism. Old style Marxist critique of the liberal notion of democracy and rule of law denounced the bourgeois element of capital domination alongside liberal rights based on the protection, above all, of private property. By contrast, classical liberals rejected the promotion of the public and social sphere of rights at the expense of the private individual and capitalist development which more “popular” or participatory notions of democracy brought with them.

At this moment, it would appear that reconciliation between the two viewpoints has become predominant in Western political thought. On the one hand, the left seeks to come to terms with the positive aspects of the liberal democratic state, all the more so with the debacle of the orthodox left, and in recognition of the complexities of social and economic development which modernization has brought with it. This trend is becoming increasingly evident within the Latin American left. On the other hand, the general consensus of the “liberal” faction, even in its most extreme form, has come to take for granted the expansion of certain social and economic rights as integral in the concepts of human and civil rights. These rights, in the Western political trajectory, were essentially consolidated with the integration of labour. Although, how current neo-liberal policies will alter the status of some of these rights remains to be seen.

Even so, can we speak of a universal consensus on the definition of rights and rule of law in a democratic state? The variations of the constitutional content of these are innumerable, as is the extent to which they remain as purely enunciatory formats and correspond or not to the reality of a national context. What is notable in the case of Latin American constitutionalism is precisely its characteristically consistent aspiration.

There is a further tension in the liberal state, in the extent to which the principles of liberal democracy grant a degree of inequality, through the social and economic structure which they preserve (namely, capitalist development), thus restricting the possibility of redistributive justice and the equal access to rights on the part of all citizens. At a theoretical level, Rawls justifies the inequalities of the liberal state in terms of how these provide the necessary conditions for the improvement of the welfare of all citizens in the measure to which they provide the minimum incentives for the development of a particular society. However, the redistributive element is crucial through the minimum provision of welfare mechanisms which will ensure that benefits will reach the most disadvantaged of sectors.

7 See N. Bobbio, 1986, El futuro de la democracia, Mexico City, Fondo de Cultura Económica.
8 Luciano Oliveira, 1993, “Los derechos humanos como síntesis de la igualdad y la libertad,” Nueva Sociedad, no. 123, pp. 124-135, talks about the difference between “derechos-libertades”, which correspond to the liberal conquests of individual rights, and “derechos-créditos” which refer to those social rights concerned with promoting social and economic equality. The author argues that the two are not incompatible, and that a process of reconciliation between the two is manifest in the Latin American context with the current wave of democratisation.
9 This is certainly evident in the expansion of the definition of human rights in the United Nations charter of 1949. The Constitution of 1917 in Mexico was an early example of a constitutional framework which reflected this approximation between liberal concerns of rights of the individual, and the expansion of social rights.
towards the most modern and advanced forms of constitutional democracy. In the 19th century, Latin American texts rapidly incorporated the most advanced features of liberal constitutionalism, often well ahead of their European counterparts. And the 20th century saw the early drafting of "social" and statist constitutions in many countries of the region, with great enthusiasm, yet a persistent failure to live up to the aspirations contained in them.10

We can, however, say that the contemporary notion of liberal democracy is defined not only through the compliance with certain procedural requirements, notably of a political nature (namely free and periodic elections, political competition, representation, etc., following Dahl's model of polyarchy), but also through the real application and realisation of a rule of law regime, by which the constitutional principles of rights and obligations (following whichever social and economic precepts) are minimally observed throughout state and society. O'Donnell11 duly reminds us that democracy must go beyond purely procedural prescriptions, and that the state is more than the public bureaucracy and government institutions. It is also an integral part of the complex interrelationship of state and society over a delimited national territory. Within this, the notion of citizenship is not limited to the respect of certain political rights, but also to the daily interaction of individuals, and individuals and the state, along a set of legal parameters which provide, ideally, a framework of predictability or reliability.

It is worth noting that the fact that the reality of such relationships does not correspond to the formal prescriptions established in the constitutional texts and legal codes, does not necessarily imply the total absence of order and predictability. What we are talking about here is the existence of unwritten rules, whether dictated by forms of clientelism, custom law, informal rules, or even corruption networks, but which nonetheless provide points of reference by which the members of a society make decisions.12 What remains in question is not that the lack of rules implies chaos and disorder, but rather that the disfunction between the formal and the reality presents significant obstacles for the process of identification and internalisation of a rule of law.

10 F.X. Guerra, 1992, “Les avatars de la représentation au XIXe siècle,” in G. Couffignal (ed.), *Réinventer la démocratie: le défi Latino-Américain*, Paris, Presses de la Fondation Nationale des Sciences Politiques, pp. 49-84. Here the author refers to the "precocity" of Latin American constitutionalism, in as far as it is incorporated significantly into progressive and liberal-democratic characteristics, often well in advance of their European counterparts —by contrast, the reality rarely corresponded to these constitutional aspirations.

The 1917 Constitution of Mexico is a formidable example of a text which incorporates revolutionary concerns of social reform, yet significantly retains important elements from the liberal tradition.13 G. O'Donnell, 1993, "On the State, Democratisation and Some Conceptual Problems: A Latin American View with Glances at some Postcommunist Countries," *World Development*, vol. 21, no. 8, pp. 1355-1370.

12 For example, it is expected that a policeman in Mexico City will happily take a bribe for a minor traffic fault, and the interaction follows a predictable pattern of unwritten rules. It would be more surprising to find a policeman who categorically and scrupulously insisted on fining the citizen in accordance with the legal traffic code.
which is upheld by a discourse of liberal democracy. It is this gap between the formal and the real which allows for arbitrary and discretionary practices. However, if an operative rule of law regime, as both political theorists and sociologists of law have observed, the latter on the basis of ample empirical work, is an unresolved challenge even in the most established of democracies, then the prospects for the consolidation of rule of law regimes in Latin America are, it would seem, bleak indeed.

The separation of powers lies at the heart of constitutional democracy, and represents a key element in the endeavour to establish legitimate rule of law. If we maintain that rule of law is essential to democratic consolidation, a key institution in the task of law-enforcement (both in terms of protection of rights as in terms of enforcement of rules), and specifically adjudication, is the legal system and judicial apparatus. With the judiciary those institutions which participate in the task of law-enforcement across the national territory are also important (including the police forces, the attorney generals’ offices, the prison system and so forth). Both as guardians of the law and constitutional principles, and as administrators of justice, the proper functioning of these organs plays a crucial role in the process of democracy building. This implies a degree of political independence, adequate and well-allocated resources and infrastructure, professional competence (which requires well-defined and non-political recruitment and appointment mechanisms), social and territorial presence and penetration of the legal system, and finally adequate legal and procedural codes.

Through an assessment of how the judicial system operates, we can build some picture of the degree to which a rule of law exists, and of state presence or embeddedness in society. In other words, an appraisal of the justice system can provide us with a measure of the substantive and normative internalisation of democratic values, rights and duties at the level of both the political elites and society at large. The connection between an operative legal system and a democratic process is highly relevant, precisely because of the emphasis on the principles of law-abidance and rights protection which lie at the heart of constitutional democracy.

However, while democracy in its most substantive form implies the existence of an operative legal order, general in nature and with access for all, the boundaries between democracy, rule of law and a working justice system are by no means clear or well-defined. If on the one hand democracy implies the aspiration to a rule of law system, it is also the case that a working democracy in minimal procedural terms does not necessarily imply the existence of a satisfactory justice system, and hence, rule of law regime. Equally, authoritarian rule does not necessarily exclude the possibility of the existence of rule of law and a working justice system which operates with a reasonable degree of impartiality, effectiveness and transparency, at least in those matters which do not confront visible political decisions. The justice system under Franco might be cited as a relevant example of a working justice system far more satisfactory than many judiciaries in Latin America.\(^\text{13}\)

\(^{13}\) J.J. Toharia, 1975, “Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain”, *Law & Society Review*, vol. 9, no. 3. Toharia explains this in terms of the limited capacity
In the same way that there is no clear distinction between a regime type and rule of law, nor is there a clear demarcation between the existence or not of rule of law. Indeed, the norm in Latin America is that formal judicial systems do exist, and in some measure, do fulfill the functions of justice administration and constitutional control of legality. That these functions are not fulfilled adequately, or to a minimum degree of satisfaction is also evident (the variations are significant from country to country).

If we examine the legal and constitutional tradition in Latin America, we discover a keen attachment to formal juridical means of regime legitimation. There is a strong legalistic discourse since independence, as newly independent nations sought legitimation through constitutional means. In spite of the persistent failure to live up to the principles of constitutional rule, the language of constitutional legitimation has remained present even under the most authoritarian regimes.

Moreover, there is a visible legacy of judicial structures and legalistic traditions, rooted in the imperial institutions of law and order, which were rapidly consolidated under the newly independent republics. These have been maintained and strengthened over the 19th and 20th centuries, through growing infrastructure of the courts, and revision of legal codes. The latter were initially modeled around (and sometimes even directly copied from) the Napoleonic codes based on Roman law. Thus, we are dealing with countries which have often elaborate and seemingly well-developed legal codes. The problem of law administration, then, does not necessarily reside in the "formal" aspects of law. Moreover, on a day-to-day basis and in the routine matters of legal administration it is clear that at a basic level a unified system of justice operates, however inadequately or minimally. In some matters of law or areas of litigation it is even the case that the system works reliably and with an acceptable degree of impartiality; in others, clientelism and corruption are the order of the day.

At different stages in the political development of the countries in the region, the legalistic tradition, and by extension the legal profession have been at times more, or at times less prominent in the process of nation and state building. With democratisation in the 1980s and 1990s, the legalistic concerns of state-building and democratic construction have come to the forefront of political reform (amongst these concerns is the working of judicial systems and their reform). This is evident from the numerous institutions and academic cum public policy seminars and debates on matters of institutional design throughout the region. Equally, the prominence of the Supreme Court has increased in political events — as part of democratic rule.

of the courts under Franco in some matters notably of a political nature, for which special tribunals were established. By contrast in other matters of litigation the normal courts were given considerable independence. This was complemented by a "escalofón judicial" based on meritocracy, professional examinations, resources, etc. Although recent events have shown the guardia civil to have been headed by Roldán, guilty of massive corruption, on the whole the societal perception of the police force, whilst it was certainly intimidating and politically reactionary, was one of non-corruptibility. The guardia civil under Franco presented an image of reactionary law and order, but nonetheless, predictable law and order.

14 CAPEL, IIDH, even the international financial organisations indicate a preoccupation with these matters.
Thus, prominent in the discourse (if not in the practice) of regime consolidation and institution building is the question of democratic rights and rule of law, as part of the aspiration to achieve regime legitimacy through transparency, accountability, and by extension a more profound questioning of a behaviour and tradition of impunity on the part of the elite sectors in Latin America. If we now place this in the context of economic liberalisation, and all its implications with regard to the role of the state, as is occurring in the region, the challenge is all the greater for the new democracies. On the one hand there is a need to make effective the promise of democratic rights (beyond the mere act of voting), such that these become accessible and manifest at all levels of society. This is all the more so in a context of “state-shrinking”, and thus the reduction of previously used (if more often than not in the form of damaging clientelism and patronage) redistributive mechanisms.

Institutional and legal reform requires, however, not only formal mechanisms which will strengthen independence and impartiality, and promote accountability and transparency. It also requires resources, investment and a whole change of illiberal habits based on political manipulation, clientelism, and inefficiency. A further problem is that of territorial and social penetration, as O’Donnell rightly points out. Justice mechanisms and access to the law face unresolved challenges even in established democracies, where the expansion of political, social and economic rights led to an explosion of litigation cases, and thus, serious case over-load in the courts. If this is a problem for established and developed democracies, which can count on more or less credible and impartial justice systems, the difficulties for Latin American countries seem all the more formidable. It is not only a question of a better distribution and usage of scarce resources, but that resources are increasingly critically lacking. This is particularly problematic in countries where not only are rights not adequately protected or filtered into society, but there is no habit of this either (over-generalisations, however, should be avoided).

Whilst we might well explain the developments which build up to democratic consolidation and state reform, and even draw some useful conclusions with recurrent patterns through the lessons of history, it is much harder to establish any clear prescriptive recipes for a due reform of state institutions in general, and the judicial system in particular.

Before venturing into a closer examination of the judicial systems of Latin America, it is worth pointing out where some of the pressure for judicial reform is coming from.

[15] Boaventura de Sousa Santos (1989), “Introdução a sociologia da administração de justiça,” in J.E. Faria (ed.), 1989, op. cit. pp. 39-65. De Sousa Santos describes this explosion in litigation as taking place in the 1970s, a period which coincided with the beginnings of economic decline in the Western world. Thus, it coincided with the shrinking of state resources which affected the capacity of justice apparatus to administer justice, and to deal with the growing caseload of litigation. On the other hand, the universalisation of the notion of citizenship, democratic rights and equality before the law created greater pressures on the courts, which, in addition, are more in the public eye than before.
Growing Demand for Operative Judicial Systems in Latin America

The current concern with reforming the legal systems in many countries in the region is the fruit of a number of converging forces and causes both of a domestic and international nature. How these forces will interact, and the strength of their impact will doubtlessly affect the nature of legal reforms when, and if, these take place. This section briefly examines some of these causes. Four sources of pressure can be identified.

Firstly, with democratisation and the expansion of the franchise there emerges the notion of citizenship and civil society which, in the discourse of the new liberal democracies, is called upon to participate politically and to exercise democratic rights. As there is greater awareness of these rights and what they should entail, there is a growing public pressure for effective rule of law. This is further encouraged by mass media, more schooling and a universal message of what the benefits of democracy ought to be. Latin American societies (with enormous variations; Uruguay by no means shares common socio-economic features with, say, Guatemala) represent highly complex and heterogeneous societies, such that there are enormous differences with regard to how different sectors are immersed or not in the formal and bureaucratic procedures of democratic citizenship. Social changes, which are both a result of and parallel to the establishment of neo-liberal economic policies, whilst they appear to reflect a greater degree of social fragmentation and disintegration, also present a society more demanding of due respect and protection of certain basic rights. This is all the more so as “state shrinking”, cuts in the public sector, and weakening of labour movements (as in the case of Bolivia) have had the effect of diminishing other channels for the articulation of demands, normally of a social or economic nature. (These demands were not necessarily adequately satisfied before, but the sense of loss is nonetheless felt by the "losing" actors.)

The creation of such institutions as the Comisión Nacional de Derechos Humanos (CNDH) in México has had some impact on the process of conscience raising, despite its limited, and purely advisory role, (and that it has not always shown itself to be impartial or independent). However, its mere public presence is of some consequence. Much of this “conscience” raising and greater public visibility and hence, scrutiny of the courts was to some extent prompted by the denunciations of human rights violations under military rule in South America. This appears to be the case from recent research in Argentina by Smulovitz. This is also evident in the democratic process of Bolivia.

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16 This is evident from the research by Smulovitz in Argentina. Resorting to the courts has promoted to some extent the habit of resolving conflicts and disputes through judicial mechanisms. However, the greater recourse to the courts, and the greater public and media attention on the courts has also led to a greater disenchantment with the reality of judicial procedures which are viewed as slow, heavily bureaucratized, politicised and inadequate for the needs of a democratising society. (Nonetheless, this new “awareness” of the relevance of legal forms for the protection of rights has prompted the debate on the need for reform at the level of the policy-makers -this is manifest in the series of judicial reforms,
where the Supreme Court gained considerable public prominence with the handling of the trial against General García Mesa.

A second pressure for the growing awareness of legal reform stems from the demand for the effective protection of civil and human rights encouraged by the growing presence of international agencies, both public and private, which “specialise” in the subject. Non-governmental organisations have played an important role in conscience raising and denunciation on issues of human rights (since before transitions to democracy). Added to this is the official discourse of the United States, although certainly not entirely consistent, which has taken on board the promotion of human rights protection, legality and judicial reform in Latin America. This has in part taken the form of anti-corruption campaigns, often linked to drugs issues.

A further pressure for the establishment of a more predictable and reliable system of rules and legality stems to some extent from certain business sectors (those more in tune with economic liberalisation) of the economic elite. This pressure is by no means consistent, nor representative of the entire business community of these countries, much of which in fact benefited from past discretionary practices of state capitalist development where judicial scrutiny was not effective. However, there is some indication that the establishment of a legal framework which offers minimum guarantees of impartiality and predictability might lead to greater levels of confidence in the economy on the part of potential investors, at least for as long as they perceive that their interests will be advanced by the legal and constitutional order. A working legal framework which guarantees the protection of private property and curbs the threat of state intervention may well find keen support among certain business sectors — ultimately key actors in the consolidation process of capitalist liberal democracies to which many of these countries aspire.

Here, in particular, we are dealing with a number of aspects of both the legal system and the “ideological” premises of economic liberalisation. With respect to the latter, a major concern for capital is the establishment of clear rules regarding the content and definition of property rights, and the scope of legitimate state action and and at least, judicial debate in congress since the early 1980s). C. Smulovitz, 1994, “El poder judicial en la nueva democracia Argentina. El trabajoso parte de un actor,” paper presented at LASA.

It might be the case that the restraint on the part of the Mexican state in the handling of the Chiapas uprising in January of this year in terms of human rights violations was in part a consequence of the greater international scrutiny on the internal affairs of Mexico — somewhat linked to the signing of NAFTA.


Specifically related to this is the creation of special drugs courts in some of the coca producing countries, such as in Colombia and Bolivia. In Bolivia, drugs courts were created with specialist staff, and semi-independent from the formal justice system, although ultimately accountable to the Supreme Court. This has not, however, been free of considerable national concern on the question of sovereignty. See also E. Gamarra, 1991, “The System of Justice in Bolivia: An Institutional Analysis”, paper for the Centre of the Administration of Justice, Florida University.

This is evident in the discourse of the business elite of Chihuahua in Mexico.
intervention. Similarly, labour legislation, founded on statist principles, and which provided the basis for a more rigid labour market, has come under much pressure with liberalisation, to provide incentives for capital investment.

A final source of pressure, and intimately linked to the above, results from the current global context of economic liberalisation and internationalisation of capitalist development. Not only international public financial agencies, but also potential foreign investors encourage the establishment of regulated and predictable rules of the game. Some analogies can be found with the period of economic liberalisation at the turn of the century in many Latin American countries and the impact that this had on legal structures and regulation. This period saw important advances in institution building, not least of which was the enhancement of the judicial systems. A similar current might be detected now.

That some of these sources of pressure will operate with greater effect on the reform of legal structures may, however, lead to a dualistic development of the justice system. It is possible to envisage considerable progress in legal reform in some areas of litigation, say, those which concern the modernising sectors of the economic elite in matters of an economic, business or financial nature (namely, those sectors which have greater lobbying power and are perceived as more directly relevant for growth and economic development); yet other areas of litigation and access to justice may remain untouched, corrupted and persistently lacking in infrastructure and resources. It remains to be seen how these pressures will operate and interact to have a bearing on judicial reform in Latin America. There is, here, an unclear connection between the "ideological" premises of the current economic policies, and the type of democracy which these entail. This parallel process of democracy building and neo-liberal economics implies, for instance, the necessary creation of a good "business climate" for democracy, a consequence of which is the loss of rights on the side of labour. What needs to be questioned is that whilst a good business climate is arguably desirable for economic growth, and by extension, conducive to democracy, we must forewarn against the implied inevitable causal relation between protecting the interests of capital and democratic consolidation. Free market economics does not ensure democratic consolidation. And democracy surely involves considerably more than providing a good business climate.

There is no doubt that the judicial apparatus, in spite of the pressing need for its reform in much of Latin America, is probably one of the institutional aspects most resistant to change. The consolidation of an effective system of rule of law requires not only the reform of the necessary legal and constitutional texts (sometimes those in

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21 The NAFTA negotiations have already had some impact on trade legislation and the procedures for bilateral conflict resolution. Arbitration of conflict in this field is now dictated by legal provisions which depart from the Mexican legal tradition through the incorporation of mechanisms more akin to Anglo-Saxon litigation (such as the incorporation of oral hearings etc.). See G.R. Winham, 1994, "What Mexico can expect from NAFTA Chapter 19: Review and dispute settlement in anti-dumping and countervailing duty matters," public address delivered at El Colegio de México, Mexico City.

22 The Kemmerer missions were a visible manifestation of this.
existence are not necessarily bad, but merely not abided by). In the long term, an effective reform of the legal system requires also substantive changes in the political culture, value system and expectations of a society and political class.\(^{23}\)

Because of the complexity of Latin American societies, in terms of the great socio-economic inequalities and ethnic and regional heterogeneity, the latter point is of particular relevance. Immersion in and contact with the notion of democratic rights carries a broad variety of meanings and reality for the different social sectors of these societies. Democratic rights do not mean the same thing for a rural worker as for a modern urban businessman. A study of the rule of law in Latin America requires, thus, the elaboration of an analytical framework which can take on board these differences, and how they affect the immersion and operation of the legal system in society. (Again, these differences are also evident in established democracies —enough evidence indicates that a coloured youth in Los Angeles can expect worse treatment from the legal authorities than a white suburban middle class youth). These differentiations are all the more evident and dramatic in much of Latin America.

The following sections will examine more specifically the problems of justice administration in Latin America from the two perspectives outlined in the introduction, namely, with regard to the political function of the judiciary and to the social function of rule of law.

**Judicial Review and the Justice System**

There is little doubt that the prominence in political events of the judicial apparatus has increased enormously with the return to democracy to much of Latin America. Supreme court decisions now have an important bearing on the turn of events, all the more so, as the expectation increases that these decisions might critically affect public policy, or political directions. In great contrast to the military regimes where the judiciary lost virtually all presence in political events, some degree of judicial constraint is now much more visible. To name but a few examples: the decision by the Supreme Court in Brazil to impeach Collor de Mello and the position of the Supreme Court against Carlos Andrés Pérez in Venezuela.

The relevance of an independent judiciary in democratic politics as the supreme guarantor of constitutionality and legality has been at the heart of the doctrine of separation of powers in the liberal democratic tradition —namely through the principle of checks and balances.\(^{24}\) At a basic level, in democratic rule, the judiciary fulfills the role of constitutional guardian in the safeguarding of constitutional rights and principles against the acts and possible abuse of power of the other branches of the state.

How this function operates will be largely determined by three factors. Firstly, the


\(^{24}\) The judicial system is but one form of checks and balances in democratic regimes. Such mechanisms as the figure of "contralor general" provide important means of checks and balances.
degree to which the judiciary is effectively independent and autonomous in its role of
adjudication from the other powers of state, and other political or economic pressures. This is largely determined by appointment procedures (in the case of Latin America, continuity of constitutional rule), and financial autonomy. Secondly, the scope of control powers attributed to the judiciary in terms of constitutional control and judicial review. And finally, the extent to which the judiciary in a specific country makes full use or not (for whatever reasons) of its powers in its relation with the other branches of state.

These factors are intimately interlinked. In the measure to which a judicial system lacks autonomy, it is unexpected that it will pass decisions or exercise constitutional control with an adequate degree of impartiality. On the other hand, even if independence is guaranteed, if the scope of action is constitutionally limited, then the impact of the control mechanism on the political system will be reduced. And finally, a constitutional text may well prescribe an optimal balance of independence and judicial review powers, but these might not be effectively put into practice for reasons which range from lack of resources, to regime instability, to the powerful presence of undemocratic practices and forces (as in the case of much of Central America).

There is no clear format for the best balance between these factors, nor indeed universal consensus on their design. There are significant variations on how the judicial function of control of legality and constitutionality has developed, according to legal families (custom law or Roman law), and whether constitutional principles are fundamentally founded on the notion of separation of powers or not. Continental European countries founded on code law exhibit a different notion of constitutional review (on the whole more limited) from that which has developed in US constitutionalism, or Anglo-Saxon law. Latin American constitutionalism, interestingly, whilst inheriting the tradition of European code law, rapidly incorporated the US model of separation of powers. Latin American constitutions provide unequivocal statements on the principle of the independence of the judiciary, and its sole responsibility to the supremacy of the law and constitution. This involves attributing to the judiciary the task of constitutional guardian and judicial review (although the mechanisms through which this is determined vary considerably throughout the region, as does the extent to which they are effective). The prevailing reality seems to have been the inability of the supreme courts to assert their political function effectively. A generalised image of

25 It is worth pointing out that there is no clear consensus in the Western political literature on how this independence is best fulfilled without compromising the principles of democratic representation. On the whole, however, it is maintained that judicial independence enhances impartiality in the process of rule adjudication, and that it helps to isolate judicial decisions from outright political interference.

26 José María Rico and Luis Salas, 1990, Independencia judicial en América Latina: replanteamiento de un tema tradicional, Miami, Centre for the Administration of Justice.

27 Ibid. Here, the authors remark on the origins of the different developments of judicial review and constitutional control throughout the Western world. On the whole it is suggested that continental code law countries share an image of a less independent judicial branch (but not necessarily, as a result of this, lesser credibility) than custom law countries, where generally constitutions provide for a more explicit principle of separation of powers and judicial independence.
supreme courts in the region is one of weakness, corruption, over-politicisation and general subordination to the executive. In fact, the variations on the judicial function across the region are great. The Supreme Court of Costa Rica has little in common with how this branch has operated in El Salvador.

A number of studies exist producing typologies of the supreme courts in Latin America with regard to their relationship to the political system. Regarding the independence of the supreme courts of Latin America there is a general opinion that they are politically dependent, and dominated by the political environment in which they operate. Several factors, both external to and inherent in the formal constitutional provisions with regard to the judicial function help to explain this weakness.

Firstly, the executive is characteristically, both formally and in practice overwhelmingly powerful (again, with considerable variations) with respect to the other branches of government. This has resulted partly in the inhibition of the practice of judicial independence vis-à-vis political pressures and executive orders, particularly regarding politically contentious affairs. Mexico represents an example of this where the Supreme Court, it seems, practices a role of self-limitation with regard to its usage of the juicio de amparo (to be discussed below). On the whole, in cases which are not politically important, it would seem that the Supreme Court acts with a relative degree of independence and impartiality in questions of amparo constitucional; when the issue is highly political, as was the case with the nationalisation of the banks in 1982, the Supreme Court did not hesitate to side with the government. In Bolivia, after democratisation was well on its way, the executive still retained a traditional attitude of arrogant subordination of the judiciary. What is novel here are the attempts of the Supreme Court (if not always necessarily with the interests of political impartiality in mind) to confront executive decisions and orders on the basis of judicial independence and constitutional rule of law. By contrast, The Colombian Supreme Court has on several

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28 José María See Rico and Luis Salas, 1990, op. cit.; Joel Verner, 1984, “The Independence of Supreme Courts in Latin America: A Review of the Literature”, Journal of Latin American Studies, vol. 16, pp. 463-506; and K. Rosenn, 1974, op. cit. Verner classifies Supreme Courts in Latin America into the following groups: 1) independent-activist (Costa Rica); 2) attenuated-activist (traditionally Uruguay and Chile before military rule); 3) stable-reactive (Mexico, largely as a function of the relative stability of the regime); reactive-compliant (Argentina, Brazil, Colombia and Venezuela, the former two largely as a consequence of regime instability, Colombia, in spite of its relatively independent structure has been subjected to political turbulence, and the Venezuelan Supreme Court lacked constitutional tradition prior to 1958, and its current structural composition allows for considerable political influence); 4) minimalist courts (Peru, Ecuador, Bolivia, Panama, El Salvador, Guatemala and Honduras).


31 Since 1982 on several occasions the Supreme Court and the executive have been at odds to the degree that the executive has attempted to replace members of that tribunal through impeachment trials in congress (significantly unsuccessfully so). See chapter in Pilar Domingo, 1993, “Political Role of the Judiciary”, Democracy in the making? Political Parties and Political Institutions in Bolivia: 1985-1991, Ph.D. Thesis, Oxford.
marked occasions confronted the executive on questions of unconstitutionality. (This in part reflects the traditional constitutional independence of the judiciary in Colombia, but also, relative regime stability, if not political stability.) Secondly, political instability, and, in many countries, the absence of a tradition of democratic practices, has severely undermined the institutional continuity which arguably is required in constitutional rule for different branches to develop and accommodate over time to their functions. Abrupt regime changes have frequently led to arbitrary changes in judicial posts and at times have led to the outright public restriction of the judicial function. This was the case in Argentina in the different regime changes, particularly since 1955 after which the practice of replacing the entire Supreme Court became the norm (prior to this judges were only replaced selectively). In 1990, Menem assured majority support in the high tribunal through the addition of four members. Similarly, Bolivia has an impressive record of Supreme Court turnover with every change of regime throughout its history. Military rule in Uruguay abolished the notion of judicial independence through an Institutional Act in 1977. In Brazil, habeas corpus was suspended for political offenses, and judicial powers were transferred to special military tribunals. Interestingly, in 1973 Pinochet did not change the members of the Supreme Court in Chile. Whilst in the South American countries, democratisation has quite substantially reversed these practices of blatant disregard of judicial independence (now the question is more of degree and gradual accommodation to democratic practices, but the formal appearances are more consistently respected), the situation has been and still is highly critical regarding the position of the judiciary in much of Central America (El Salvador and Guatemala in particular). To this is added, even in times of democratic rule, the constant reforms of constitutional texts which undermine institutional continuity and thus stability, as processes of accommodation to new rules take time.

For instance, on the procedure for constitutional reform which would have strengthened the executive proposed by President López Michelson and accepted by congress in 1976, but denied on constitutional grounds by the Supreme Court; in 1979 when President Turbay attempted to reduce the powers of the judiciary; in 1982, against an executive decree of economic emergency; in 1985 when there was an attempt to increase the jurisdictional attributes of the police; and recently when the Supreme Court declared the constitutionality of the consumption of marihuana. (Most of these examples cited from J.M. Rico and Luis Salas, 1990, op. cit. pp. 18-19.)

Catalina Smulovitz, 1994, op. cit.


There are an estimated 200 constitutional texts in the history of Latin America since independence. Some countries, more so than others, have been particularly prone to frequent constitutional reforms, (for instance Bolivia with its sixteen constitutions and Venezuela with its 22). These reforms have not always signified profound alterations in the judiciary. However in Bolivia, they have frequently been used as an easy excuse to justify changing the members of the Supreme Court.

Mexico has seen over 400 amendments to the 1917 Constitution, with varying degrees of impact on the political system. The congressional PRI majority, however, has meant that reform to the Constitution has never, at least in the short term, fundamentally altered the political system.
Thirdly, lack of resources and low salaries (again with considerable variations throughout the region) undermine impartiality and breed corrupt practices. Moreover, low salaries lessen the public prestige of judicial appointments. (This is especially so for the appointment of judicial positions below the supreme court.) Financial autonomy contributes considerably to judicial independence, as does the extent of the resources. How the budget is allocated to the judicial apparatus varies considerably from country to country. Certain constitutions in the region establish a fixed percentage of the national budget which is to be allocated to the judiciary. On the whole, the real percentage of the budget committed to the judiciary has not increased with democratisation—if anything it has decreased, in some cases in clear contravention of constitutional criteria for judicial budget allocation. If we add to this that with structural and fiscal adjustment the 1980s have seen a reduction in state spending then the implications for judicial resources are fairly grim—all the more so given that with democratisation caseloads will increase, as people have greater faith and expectations in the justice system. With regard to salaries, these on the whole are not very high (again this varies considerably), and are certainly less than what can be made in private practice. This, it would appear, has the implication that the better jurists will move into private practice rather than remain in the public sector. On the whole there is little literature available on expenditure regarding the judiciary in Latin America, the allocation of resources, and the salaries of judges.

A final feature which will affect judicial independence is that of appointment procedures and tenure. This again varies enormously across Latin America (as it does in other established democracies). On the whole the appointment procedures are not excessively more politicised than in other more established democracies. There is normally a combination of selection from lists of candidates drawn up either by congress, the executive or the supreme court, which are then selected by another branch, and sometimes with the approval of the third branch (the least frequent is the participation of the supreme court in the appointment procedure—the most notable exception

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37 6% in Costa Rica, 3% in Honduras, 2% in Guatemala, Panama and in the 1979 Constitution of Peru. Invariably these percentages are not respected. In Costa Rica the average real percentage of the national budget is of 5% and in Honduras of 1.4 percent. J.M. Rico, and L. Salas, 1990, op. cit. In Peru the budget of the judiciary since 1980 only exceeded 1% of the budget in 1990. (See C.A. Parodi Remón, 1993, "La administración de justicia en el Perú", in José Ovalle Favela, ed., 1993, Administración de justicia en Iberoamérica, Mexico City, UNAM, pp. 99-100. In other constitutions there appears no fixed percentage. In Colombia the percentage of the national budget has averaged 2.8% in the years 1972-1987, and since 1983 has been declining (1.9% in 1987); in Bolivia and Ecuador in 1988 the judicial budget represented 0.9% and 0.7% respectively; and in Venezuela in 1985 the percentage of the national budget was 0.5%. J.M. Rico and L. Salas (1990), op. cit. pp. 32-33.


being that of Colombia). As mentioned above, more damaging has been the disrespect of these provisions under authoritarian rule, than the provisions themselves. Equally varied is the duration of judges’ mandates in the supreme courts. Only five Latin American countries have life appointments (Argentina, Brazil, Chile, Mexico and Paraguay), the rest ranging from four to ten years. Interestingly, Costa Rica has a tenure of 8 years, renewable after that every four years. What gives the Costa Rican system permanency is the provision that a supreme court member is denied renewal only in the event that two thirds of congress votes for the denial. Whilst the lack of life tenure arguably mars the principle of judicial independence, in that supreme court members will be more prone to want to please political interests for their renewal, as long as renewal does not coincide with government elections there is scope for some independence. Time-tested repetition of these procedures will give them a greater degree of stability and continuity which will foster judicial independence and strengthen the principle of separation of powers. Again, the historical burden of regime rupture and its consequences on judicial tenure is still present in the politics of judge selection and in the behaviour of judges.

Perhaps of more consequence is the general lack or inadequacy of institutionalised professional assessment mechanisms of the judicial staff (or escalafón judicial), especially if we contrast Latin American countries with their continental European counterparts where professional competence is based on competitive examinations. Requirements for appointment to judicial positions, and notably to the supreme courts, rarely go beyond the form of constitutional statements (ratified in legal codes) of a very general nature (age, years in the legal profession, years in the judicial system). On the whole, what prevails is the image of political appointments to the judicial system, based on clientelism, patronage and friendship networks.

With regard to the question of judicial review and control of constitutionality, several obstacles have been pointed out in the literature. Firstly, there is the limitation of the scope of judicial review, which normally takes the form of amparo constitucional or variations on this. What prevails is a form of an appeal of unconstitutionality of a law or act which can be contested by a claimant. If the court rules in favour of the claimant, then the law is not applied to that individual, but legislation is not automatically revoked. This limits the impact of court decisions on the other branches of

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41 Tenure and appointments procedures in Mexico have been amended a number of times since 1917. At present, Supreme Court judges hold life tenures and are appointed by the executive, subject to approval by the Senate.

42 Lower appointments are normally carried out within the judicial system. If the Supreme Court appointments are vitiated from the top with political appointments, then the likelihood that lower appointments will be subject to clientelism and patronage is greater.


power. On the other hand, it can be argued that by its very limited nature, it allows for judicial decisions to be taken more freely, as the consequences will not be far-reaching in terms of legislation and more effective control on the other branches of government. In México the *amparo constitucional* appears to work with a certain degree of impartiality and effectiveness in cases which do not conflict in a highly politically visible manner with the executive. One explanation might well lie in the limited impact of court decisions on matters of constitutionality, which will only protect the individual claimant, but will not revoke the unconstitutional norm. There is a further argument that suggests that code law leaves less room for judicial interpretation as the law is more explicit than in custom law.

Recent discussion on the question of judicial review and its generally limited nature in Latin America has prompted great enthusiasm for the creation of constitutional tribunals, separate from the Supreme Court, and with the exclusive task of reviewing the constitutionality of legislation and executive acts. To some extent this is prompted by the success with which the Spanish constitutional tribunal is perceived. However, it is far from clear how the creation of a special tribunal on constitutional matters would be free of the vices of over-politicisation, lack of independence and professional competence, and lack of adequate resources which afflict many of the supreme court systems in Latin America. Unless these problems are tackled, there is little reason to suppose that an additional institution in the form of a constitutional tribunal would be more suitably equipped to make better decisions on matters of judicial or constitutional review.

Again, more damaging than the limited nature of judicial review to the rule of law, are the above reasons related to undemocratic traditions which have inhibited the full development of judicial review practices and habits. It should be remembered that the political importance and high public reputation of the Supreme Court in the US has taken decades of state-building to consolidate itself. Moreover, it is not necessarily the case that Latin American countries should aspire to the US model, but might do well in looking to their continental European counterparts of the code law tradition which, with a much lower political profile, nonetheless minimally fulfill the task of constitutional control.

A final problem afflicting the development of an independent judicial system is the question of corruption and more recently the intimidating strength of drug mafias. The latter have certainly had a highly negative impact on judicial independence in Colombia through the assassination of judges. A notable political problem, and one

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45 See Casanova, op. cit. The political crisis which ensued in Bolivia in 1990, when the Supreme Court challenged the constitutionality of a budget law, however, offers a clear example of traditional executive disdain for judicial decisions which contravene political decisions. The case of unconstitutionality, equally of *inter partes* and not *erga omnes* effect, led to a major political upheaval as the executive attempted to impeach those members of the Supreme Court who voted against the budget law.


47 In 1987, the count was up to 53.
which is rapidly eroding the credibility of the new democracies, is that of corruption in high public office. This reflects long-standing habits of impunity once in power, and the tradition that the judiciary will not act as an effective watchdog. Corruption scandals have become notable throughout Latin America; in Brazil, with the president and later congressmen, in Venezuela, and recently in Bolivia, with the accusations against Paz Zamora for alleged links with the drugs mafia. In some cases, as in Italy and to some extent Brazil, once the ball begins to roll in corruption correction, public opinion and public pressure gathers momentum, to the point that legal scrutiny becomes highly demanded and eventually is addressed. However, it is still not the case that combating corruption in high office is systematically undertaken by the law-enforcement agencies and that the mechanisms of checks and balances, or that transparency and accountability exist. Nor are the boundaries of corruption and impunity clearly demarcated, even in the best of democracies.

While these problems have largely inhibited the development of credible judicial branches, and effective guardians of the constitution, the pertinent question at this moment is what is required for this state of affairs to change for the better in the current context of democracy building and institutional design? It would seem that the problem of judicial independence and constitutional control goes well beyond the constitutional and legal prescriptions, but in fact reflects a lack of rule-observance and law-abidance, and long-established habits of impunity and disrespect for the law. The passage of time and accommodation to institutional continuity and constitutional habits (which are far from being achieved) go a long way toward fortifying the judicial function.

For now, some optimism can be drawn from the growing presence of judicial decisions and court activism in political affairs, and from the growing public scrutiny of law-enforcement. The latter creates by no means negligible pressures on the institutions of law-enforcement. However, it is worth stressing, that however commendable judicial autonomy from governmental and political pressures might be, no less so is immunity from the “plebiscitary” pressures of over-heated public opinion. The impact of public pressures through the mass media can also be a threat to the principle of judicial independence in court decisions, all the more so in the absence of strong and consolidated court institutions.

It would seem that the process of self-assertion of the judicial function and rule of law building needs a longer time span than the process by which political agreements on minimal democratic procedures are arrived at during transition processes. We cannot, however, over-stress the differences which distinguish the judicial role of politics in the different Latin American countries. The above merely aims to present some of the key problem areas in the development of this, many of which recur in several of the new democracies. On the whole there is the sense that those countries with the longest democratic tradition (Costa Rica, Chile and Uruguay, the latter two at least before 1973), present the most developed examples of independent judicial systems.
Administration of Justice

The administration of justice is a key area of democratic politics in supporting the connection between state and society on the basis of the legal and constitutional legitimation of the regime. An assessment of how justice administration works will reflect to a large extent the degree to which the rule of law is rooted in society, and ultimately the extent of the authoritative and legitimate presence of the state apparatus. The operation or absence of an impartial and minimally trustworthy legal system, as well as access to the legal system can reveal much about the normative entrenchment of rule of law and democratic values in a given society. And this is particularly relevant for Latin American societies, where not only do we face the limitations of highly inefficient state structures, but where the cultural and regional diversity (with widely varying degrees of immersion in a national, let alone democratic project as well as the extremity of socio-economic differentiation) is likely to produce an unequal distribution of the benefits of democracy, and more specifically, a highly stratified application of the law. Moreover, we are dealing with differentiated perceptions of what justice is and how to deal with the law, and indeed, in some instance, with altogether different world-views (say, in indigenous communities). The implications of this for regime consolidation in the new democracies are by no means minimal.

This section will examine three aspects of the administration of justice and recurrent characteristics throughout the region: the formal aspects, that is, how the justice system should work, its procedural aspects and what shortcomings are evident; the problem of access to justice and how this is manifest in many of the new democracies; and finally, alternative, or informal mechanisms of conflict resolution, with particular emphasis on those areas where these emerge in the absence of the formal mechanisms. The challenge for the modern liberal democratic state is to provide adequate mechanisms by which legal systems provide minimum conditions of equality before the law and impartial protection of civil rights. In fact, this is still an aspiration even for the most "consolidated" of democracies.48

Again, we are talking about highly complex and diverse mechanisms and procedures, and over-generalisations should be avoided. The aim here is to highlight some of the more important aspects with regard to the task of democracy building in highly complex and heterogeneous societies.

Formal Features of the Administration of Justice

Many of the problems mentioned above afflicting the judiciary in its "horizontal" role of checks and balance in the political system are equally obstacles to the function of the administration of justice, that is, to the role of protection of rights and law

enforcement in society. Namely, the problem of resources, recruitment in the absence of well-operating "escalafofes judiciales" (or professional assessment mechanisms), regime changes and lack of institutional continuity. Moreover, it must not be forgotten that the question of justice administration depends not only on the formal judicial apparatus, but also on those other institutions which are active partners in the task of law-enforcement and rights protection (particularly in penal law), which include the "ministerio público" (or attorney general's office), and the police force. Added to these are those specialised tribunals, typical of much of Latin America, which deal with specific conflicts such as labour or agricultural tribunals (many of which fall outside the jurisdiction of the formal justice apparatus and depend on the executive; and more recently, special drugs courts, as in Bolivia and Colombia).

Of particular consequence is the question of scarce resources, which becomes particularly critical in the current context of "state-shrinking". We are already dealing, in most of Latin America, with a situation of the limited and inadequate "physical" presence of the judicial apparatus in many social spheres. This clearly inhibits the proper administration of justice, and the positive connection between the democratic state and society. The lack of resources implies low salaries for judicial staff (with the bitter reality that public sector wages have declined considerably in the last decade), which implies poor working incentives. One effect of this is that the better lawyers move to the private sector where the earnings are far greater. Insufficient resources and inadequate infrastructure aggravate the problem of case backlogs, which is further exacerbated by the highly bureaucratic and complex nature of legal procedures (written procedures prevail both in penal and civil litigation). However, it is worth stressing that increased resources are of little avail if allocation structures and institutional administration are not improved and rationalised.

One major problem of code law in Latin America is that the web of complex administrative procedures and the abundance of written and complex paperwork, added to the historical propensity of excessive state bureaucratization, act as a major obstacle to the principles of transparency and efficiency.

Concerning some aspects of non-penal litigation, it is fair to say that there are areas which work with far greater efficiency than others. In Colombia courts are, it seems, relatively effective in conflicts between institutions and individuals in such areas as debt collection, repossessing property, or mortgage payments. Similarly, corporate law is on the whole fairly effective. This reflects in part the presence and pressure of stronger interests to promote the efficiency and modernisation of the legal mechanisms of certain legal areas. It also reflects the access to a justice apparatus by certain sectors who have more legal information at their service and can afford better legal advisors.

49 G. O'Donnell, 1993, op. cit. refers to this as the brown areas which the state mechanisms of law-enforcement and rights protection do not reach. This has been amply documented in recent literature on the legal sociology of several countries of the region.


or lawyers. Influence here operates not only through the formal channels, but also through informal friendship and clientelist networks. The modernisation of litigation areas which promote foreign investment interests is also more likely. The danger here is the modernisation of certain aspects of the system of justice administration, and the neglect of others where the presence of demands and pressures is less articulate and, in the current climate of economic reform and "low-intensity" democracy, less urgent - it would seem.

Reforms in certain areas of civil litigation and conflict resolution, however, also respond to pressures of political expediency. At times, political decisions of a judicial nature are taken prompted by the reality of potentially socially volatile situations which are formalised through the legal channels and benefit the lower social groups. This was arguably the case with the legal mechanisms established for speedy land reform in Mexico and Bolivia at the height of the revolutionary processes, mechanisms which have later declined in efficiency. This form of political pressure seems also to have been present in much of the way that the issue of marginal urban settlement was settled in Mexico since the late 1970s, in favour of the new immigrants. By contrast, in Brazil, according to one study, land law is so contradictory and complex that urban land usurpation has become a sea of bureaucratic complexity and irregular ambiguities, with few prospects of prompt resolution. Often the latter takes the form of extra-legal or informal deals and negotiations between fraudulent land salesmen ("grileiros") and the new urban dwellers. Invariably, land dispute resolution in the favelas operates to the detriment of the new urban migrants. Of interest is the growing impact of NGO work in articulating land claims and protecting the urban dweller from fraud. It remains to be seen whether the events of January in the state of Chiapas in Mexico will prompt the political will to attend to the local demands for justice in the impoverished region. From having been one of the poorest regions in which local caciquismo predominated, and where legal channels of redress were practically inoperative, there may now be a greater investment of legitimacy capital through the establishment of fairer mechanisms of law-enforcement. (This was already apparent in the resources which Pronasol destined for Chiapas in 1993 - it seems, however, not soon enough.) On a broader level, this may have contributed to the current talk of judicial reform in Mexico.

The shortcomings of civil litigation already pose serious obstacles for justice

52 This is already the case in trade law in Mexico since the signing of NAFTA.
53 This, in part, also reflects the shifting of political concerns and demands. The emphasis on land distribution has shifted to concerns more related to such problems as access to credit and development infrastructure.
54 A. Azuela de la Cueva, 1989, La ciudad, la propiedad privada y el derecho, Mexico City, El Colegio de México.
55 See J. Holston, 1991, "The Misrule of Law: Land and Usurpation in Brazil", Comparative Study of Society and History, vol. 33, pp. 695-725. It is important to mention the impact of NGO work and grassroots organisations devoted to the protection of the interests of the urban migrants for the obtention of land and housing deeds. There is a visible process of learning to use the irregularities and contradictions of the law for the benefit of the most needy.
administration, but penal law and its application is without a doubt the most problematic area. It is here where not only is unequal access to justice most blatant, but where there exist outright violations of human rights.

Purely at a formal level, whilst constitutional texts throughout the region incorporate the evolutionary phases of liberal rights and democratic conceptions, closer scrutiny of penal and procedural codes reveal at times marked contradictions in terms of human rights protection.\(^\text{56}\) One notable problem is that of the frequent usage of preventive detention before trial.\(^\text{57}\) This becomes particularly alarming given the slow court procedures—speeding up prosecution procedures often involves bribing court officials. Moreover, although legal defense is in principle guaranteed in the constitutions, the availability of legal aid is often critically limited, with the result that the penal process is further retarded. The caseload in penal procedures adds a further burden on the system with the increase in crime rates. Prison conditions are generally highly inadequate, over-populated and insalubrious.\(^\text{58}\) If to this we add a tradition, reinforced by the military regimes of the 60s and 70s, of persistent violation of civil rights, even by the rules of the existing penal codes, then the reality of rights protection is grim indeed.\(^\text{59}\)

Little is known about the internal structures and organisation of police forces in Latin America.\(^\text{60}\) The general impression is that they are poorly trained, earn very low salaries\(^\text{61}\) and do not represent a trustworthy image of reliable law-enforcement. A further problem is the lack of internal checks and control mechanisms on police corruption.\(^\text{62}\) With the increase in crime rates in most of Latin America, and the public sentiment that public security and civic disintegration is a major social problem, what has been witnessed is the proliferation of private security forces (and, in the case of the


\(^\text{57}\) In El Salvador, Dominican Republic and Uruguay, over 80% of the prison inmates are awaiting a verdict. In Bolivia, Panama and Paraguay this percentage rises to 90%. J.M. Rico and L. Salas, 1993, op. cit., p. 34.


\(^\text{59}\) M. Abregú, 1993, “La violencia policial en Argentina”, Nueva Sociedad, no. 123, pp. 68-83. Here the author presents the example of Argentina where a decade into democratic rule shows little improvement in the behaviour of the police force, in spite of recent legislation aimed at curbing arbitrary action. There is a perpetuation of violent methods in the policing apparatus and by extension in the justice system which turns a blind eye to these violations.


\(^\text{61}\) This is certainly the case in Mexico, where recently a police demonstration in Mexico City saw a member of the police force publicly justifying on national news police corruption as a way of making up for highly inadequate wages. There is currently a major concern with police reform in Mexico, and already reforms in the training and professionalisation process have been adopted. It will take some time, however, before a qualitative change can be perceived.

\(^\text{62}\) These have developed in some countries in Europe and in the US in the form of special investigative police branches solely in charge of police disciplinary action through monitoring and checking mechanisms.
killings of street urchins in Brazil, of virtual death squads who take it upon themselves to do justice). This, potentially, has major negative implications for the notion of public order, and the monopoly of force (and therefore, more accountable force) in the hands of the state.

Penal law is far from achieving acceptable standards under democratic rule of rights protection and due process in much of Latin America. Again, over-generalisation should be avoided and more empirical research encouraged.

With regard to the problem of law and order, and more specifically the presence of drug cartels, some mention should be made of the creation of special courts and police force jurisdiction in the war against drugs, largely promoted by US pressure in the Andean countries. These courts have raised sharp criticism of constitutional and civil rights violations, through the active presence of US DEA officials, in terms of foreign infringement on national sovereignty, and finally, in terms of what is perceived as a highly suspect form of militarisation in coca producing areas. Moreover, their success in effectively curbing the drugs trade is highly questionable.

Neither penal nor civil litigation develop along linear or parallel lines. Nor is it clearly evident what path or what reforms best lead to the modernisation of the justice apparatus so that it can keep up with changing, and increasingly more complex and more demanding societies. Justice, due process, and rights protection is a far more manifest public demand in the democratic experiences of the last decade in Latin America than ever before. Yet the obstacles to achieving a better state of justice administration are far from being overcome.

Optimism can be drawn from the greater public scrutiny of justice mechanisms than ever before. (For instance, the recent corruption scandals throughout the continent, mostly unprecedented, do not reflect greater levels of corruption, but a greater demand for accountability and legal scrutiny). Similarly, there does seem to be a more sincere intention of judicial reform than before and in keeping with the democratic tide. How much and how quickly reform will significantly improve the formal aspects of justice administration remains to be seen. Whether these remain as purely declaratory statements rather than real and effective reforms also remains to be seen. Moreover, the "prescriptive" aspect of judicial reform is far from clear. Good intentions do not resolve the question of how reform should take place or what needs reforming.

63 R. Laserna. 1994. "Las drogas y la justicia en Cochabamba: los 'narcos' en el país de los culpables," paper presented at LASA. Here the author presents evidence to the effect that the drugs law, Ley 1008, with the creation of special prosecution procedures for suspects of coca leaf trafficking reveals highly detrimental results in terms of civil rights protection in the main coca producing area of Bolivia.

64 We should not forget, however, that several European countries have resorted at times to dubious prosecution mechanisms for "special" crimes against the state. The terrorist legislation in the United Kingdom by no means meets the human rights requirements of the European Community; and the West German handling of the Baader-Meinhof group in the 1970s was equally questionable.
Access to Justice, and Informal Mechanisms of Conflict Resolution

The problem of justice administration lies not only in the limitations of the formal mechanisms of litigation and law-observance (which are present in the most effective legal systems of consolidated democracies), but also in the social, economic and cultural environment in which the legal system is rooted. In particular the realist school of legal thought (which prompted a world-wide access to justice movement) took on board the concept of equality before the law, and its inadequate manifestation in the reality of justice administration — that is, studying in greater depth those “contextual” factors, as opposed to the purely dogmatic or formalist analysis of the law, in complex societies which inhibit the realisation of effective rule of law.

Cappelletti points to three major obstacles which hamper the proper administration of justice. Firstly, the economic obstacle of the costs of litigation (which I will return to below). Secondly, the organisational obstacle, especially with regard to collective rights which are more difficult to sue for on an individual basis (for instance in the cases of environmental damages, or faulty consumer goods). This is particularly symptomatic of modern and complex societies. And finally, procedural obstacles, in that formal legal means do not always offer the optimal solution to the conflicting parties (in that one normally wins at the expense of the defeat of the other, and arbitration or conciliation may provide a more acceptable solution to the conflicting parties). Informal mechanisms will be discussed below.

The economic obstacle is general to capitalist societies, as the costs of civil litigation are high and legal procedures slow, and often the benefits not clear. Legal sociology has produced ample evidence to the effect that the lower the social status of the potential claimant, the less the likelihood that formal channels of dispute solution will be resorted to — thus marring the principle of equal access to justice. The dramatic socio-economic inequalities in Latin America make the economic obstacle all the more critical.

Problems of access to justice in Latin American societies are exacerbated by additional obstacles. At a basic level, there is the “physical” or geographic remoteness

66 The access to justice movement has been mostly concerned with civil litigation as that part of the law which requires “voluntary” action on the part of the claimants, as opposed to penal law, where the moving actor is the state in defense of the public good. This approach towards legal modernisation reflects an attempt to take on board those inequalities of capitalist societies which are reflected in the access to justice, by suggesting legal reforms and alternative mechanisms of dispute resolution which can help to fill in where the formal justice apparatus does not reach. One notable area where reform has been effective in developed democracies has been the creation and promotion of legal aid services.
67 The creation of specialist commissions dealing with specific rights is an attempt to address this question. The creation of the “ombudsman” figure is an example, and specifically in Latin America there are the examples of the consumer rights commission created in Brazil in 1990, or the creation of the “Comisión Nacional de Derechos Humanos” in Mexico in 1991.
69 Boaventura de Sousa Santos, 1989, op. cit.
and distance for large sectors of the population from legal structures, court-houses and judges. This is typical in rural areas. A rural dweller will think twice before travelling for miles to immerse himself in the complexities of formal litigation procedures in order to resolve a conflict. This is all the more so if there exist traditional or “informal” local channels of conflict resolution. More problematic is a situation where conflict arises between a rural worker and a land-owner.70

To these economic and geographical problems must be added further social and cultural obstacles or deterring factors. Firstly, there is at a certain level of society the problem of limited awareness of civil rights, and thus of when these are being violated or when there is a justified reason to make a legal claim. This is particularly evident in ethnically and culturally heterogeneous societies such as Bolivia, Brazil, and Mexico, where it can be expected that the typical experience with Western legal concepts is one of alienation.71 This is accompanied by the lack of information and knowledge of how to use formal legal channels.72 Furthermore, common in the lower social groups is a sense of great distrust and rejection of state apparatus, in part reflecting disenchantment with their incapacity to represent the least well off. And finally, it is often the case that the legal situation of the potential plaintiff is irregular (for instance, the lack of legal identification documents), the lower or more marginal the social status. This acts as a powerful deterrent to resorting to the formal justice system.73

These conditions are real in Latin American societies, and present problems of rights protection and conflict resolution which often elude the formal justice apparatus altogether. Hence the recourse to informal justice mechanisms. Informal justice covers a broad spectrum of negotiation, conciliation and arbitration mechanisms, ranging from legal arbitration in corporate business, to local and/or indigenous traditions and rules in rural communities, to the more recent manifestations of informal arbitration in marginal urban settlements. Here we are interested in the latter two.

Informal justice for the poorer or more marginalised sectors emerges, then, as the best alternative for conflict resolution. It is cheap, speedy, effective, devoid of the bureaucratic complexities of formal justice, and is conducted in an accessible language for the conflicting parties. Moreover, as it takes place at the very local level where the conflict originated, then it tends to take more into account the context of the dispute and the unwritten rules and norms of community life.

At a rural level this takes the form of traditional conflict resolution. This is normally the case when dealing with disputes between relatively equal individuals or


72 Much effort is devoted to this problem of information diffusion and legal aid by NGOs.

parties, but cannot substitute formal justice for such crucial aspects as the obtention of legally recognised land deeds. It is here that inequalities become most blatant, and arbitrary and discretionary practices most evident. Even if informal deals are arrived at when the conflicting parties are not of equal social standing, these often are the result of intimidation or the threat that unless the deal is accepted, the poorer party will have to confront the formal justice system where his chances of success at that local level are probably worse. This is particularly so in rural areas where agrarian reform has not been implemented by the central government. At an urban level, again, parallel arbitration mechanisms arise in the absence of the presence of the formal justice apparatus, and largely as a result of the above conditions of alienation. It takes the form of local community associations, sometimes with the support of NGOs. Normally these associations are made up of the more respected local inhabitants.

Informal mechanisms of conflict arbitration by all appearances are effective. And, moreover, there is a growing literature which encourages some form of incorporation or formalisation of these locally led procedures, on the basis that they promote greater grassroots participation and represent a more democratic form of justice—all the more so given the inherent contradiction between the notion of the liberal capitalist democracy and effective real equality before the law and access to rights.

However, we should not lose sight of the fact that these parallel forms of justice are to a large extent an alarming symptom of the incapacity of the state, and now the democratic state in Latin America, to deliver even minimally on its promises of basic civil and democratic rights to society. Moreover, whilst these informal mechanisms certainly appear to work amongst equals, they do not replace the formal legal requirements, say of land or housing deeds. It is here that the problems of access to justice, information and legal advice become critical.

It is precisely through these manifestations of informal justice mechanisms that the weakness of the state apparatus is most evident, and where the long-term viability of rule of law entrenchment becomes highly questionable. The justice system is but one aspect of the state. Where it fails to operate is a reasonable indication of the absence, and consequently, incapacity of the state to consolidate its rule. Thus, at a very local level we witness a curious blend, or symbiotic relationship of informal practices and traditions, mixed with some degree of formal state authority, not only regarding justice administration, but more generally law-enforcement and decision-making processes. Whilst on the one hand this might be seen as a form of peaceful cohabitation between the formal and the traditional, say, in rural areas; on the other hand the absence of impartial rule of law arguably provides dangerously fertile ground for precisely those

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75 J. Holston, 1991, *op. cit.* This case study reveals the notable preoccupation of urban settlers to secure their property through formal legal recognition of their land deeds.
discretionary and arbitrary practices which allow for impunity and threaten the prospects for the establishment of democratic and pluralist values.

**Concluding Remarks**

This is only a summary and perhaps overly superficial presentation of the complex reality of the political role of the judiciary in Latin America. Systematic research is lacking. There are few comprehensive studies which examine the judicial system in Latin America from a political perspective. With regard to the administration of justice, and its penetration into society, more research is necessary regarding procedural aspects, access to justice and the presence of alternative justice mechanisms. The differences which separate Latin American countries in the specificities of their judicial traditions cannot be over-stressed. Constitutional prescriptions are only an initial guideline, for the same rules applied in different countries will develop along different paths in accordance with the complexities of the political, social, economic and cultural surroundings. One aim of this paper is to prompt further research on the question of judicial performance in the new Latin American democracies. Only thus can we begin to build an accurate picture of how democratic rights are effectively reflected and permeated throughout state and society.

Moreover, without minimally effective mechanisms of rules of law, which is highly relevant for the question of regime consolidation, two fundamental aspects of constitutional government are not fulfilled; namely, the task of checking the state and limiting the abuse of power, and subjecting government to controls of transparency, accountability and constitutionality; and secondly, providing the necessary conditions for the minimum protection of constitutional rights at the level of society through impartial and accessible justice mechanisms. The former strengthens the foundations of the constitutional legitimacy of the regime and the latter promotes the internalization of democratic values, in the degree to which the benefits of democratic rule are seen to be reaching society in general.

Whilst these are explicit principles in the constitutional texts of the region, the reality of rights protection and law-enforcement in the new democracies leaves much to be desired. Far from achieving optimal standards of respect for constitutional rights and guarantees, these countries face severe obstacles to the realization of this aspiration. The prevailing image of impunity and corruption will severely undermine regime legitimacy, and the lack of perceived rights and guarantees erodes the prospects for binding loyalties to democratic rule at a societal level. Indeed, if we compare the progress made in the more formally procedural aspects of democratic rule, namely free and competitive elections, the judicial aspect lags very noticeably behind in the consolidation processes. The danger lies in the implications this has with regard to the internalization and entrenchment of democratic values in the region. This has already taken its toll in Peru since the Fujimori self-coup, which saw the reversal of the political process, and of democratic rights and guarantees.
Thus, the judicial system provides an important pillar of support in the process of state reform and democratic consolidation. At one level it is the key to addressing the problem of impartial, effective and predictable law enforcement essential to the consolidation of rule of law and state governance across a national territory. At another level, how and where the justice system operates offers broader implications with regard to the extent of state embeddedness and, moreover, the extent of the normative entrenchment of rule of law. The degree to which the democratic state cannot enforce its presence in an authoritative and legitimate manner marks the boundaries of its limitations—the justice system is but one manifestation of this. The absence of democratic rule of law allows for discretionary and arbitrary political and decision-making structures and practices. We should point out, however, that the incapacity of the legal apparatus and, more generally, the state apparatus does not necessarily imply regime instability or even regime crisis. Inefficient state structures can prove to be highly resilient, leading often to regime inertia, hence the term low intensity democracy.

Judicial processes, in all their complexity and different aspects of social life which they touch upon, evidently do not reflect an easily traceable or linear direction of development. Some areas progress, whilst others deteriorate. Ideally, even if this is the case, the differentiated changes in justice mechanisms will correspond to the changing needs of society. However, this appears not to be the case in the region, and it is possible to envisage the uneven development of different areas of adjudication. The current economic context suggests that this could involve the development of those areas most relevant for the economic projects of liberalization and capitalist growth. This in itself is by no means undesirable. The danger lies in the extent to which the current experiments in state-reform will include sincere as well as correctly targeted attempts to reform those areas of justice administration which can benefit broader sectors of society than so far has been achieved in social and economic terms.

The current economic constraints of recession, inflationary pressures and fiscal restructuring do not bode well for the resources required for a major over-hauling of the justice apparatus. However, as important as availability of resources may be, one of the major problems is that of a much needed rationalization and resource allocation reform of judicial budgets. From the available information, how this can be best achieved is far from clear.

Optimism can be drawn, nonetheless, from what appear to be genuine concerns with reforming the long-neglected judicial apparatus in much of Latin America; already many of the new democracies are undertaking gradual legal reforms in different areas of civil and penal procedures, the strengthening of the "ministerio público", police reforms and so forth. Similarly, the increased presence of supreme court decisions in political events throughout the region might denote a process of judicial self-assertion in the political systems of the new democracies, such that we can speak of a gradual entrenchment of effective separation of powers. Equally, greater public scrutiny and demands for accountability and transparency of government are arguably having a positive impact on the democratic process—as long as expectations are not completely
disenchanted, and regime legitimacy eroded before progress is minimally seen to take place in these aspects.

It would seem that the process by which constitutional norms and rule of law becomes fully entrenched and binding in Latin American societies is bound to be slow. It involves not only actual formal reforms, but also a profound change in illiberal habits and discretionary practices of “rule-bending” at all levels of state and society. It would be unreasonable to expect the new democracies to achieve this more rapidly than the experiences of democracy building in the more developed countries where, after all, constitution and rule of law building has taken decades, and even centuries.