

**From legal poverty to legal agency:
Establishing the rule of law in Latin America**

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March, 2009

Latin American democracies must successfully establish a democratic rule of law or face the continuing erosion of their legitimacy and ongoing threats to the stability of their governments, if not the regime itself. It is true that Latin American countries have made stunning advances over the last three decades in the extension of political rights to their population, in the formal inclusion of marginalized groups, and in the assertion of civilian control over the military. No one in the late 1970s or early 1980s would have predicted thirty years of nearly uninterrupted and universal electoral democracy in Latin America, or the major advances in formal rights posted by indigenous groups, women and racial minorities. And yet dissatisfaction and malaise plague many of these democracies, stemming in large part from the failure of democratic governments to deliver better life chances and improved living conditions. In Marshall's (1950) framework, many Latin American democracies have largely failed to deliver a more complete civil and social (and economic) citizenship to match the rise in political citizenship. One very important component of this failure to deliver a better life is the failure to establish a full and effective democratic rule of law.

¹ Special thanks go to Scott Mainwaring and Henry Dietz for helpful comments and suggestions, and to Ashley Bryan for excellent research assistance on this project.

In this essay, I will explore the various ways in which this failure is manifest, analyze the root causes of the failure, and offer some general guidelines for possible solutions. At the very outset, however, I should recognize that for two reasons, this essay is destined to be an incomplete treatment of the topic. In the first place, Latin America's experience with the rule of law is incredibly diverse. Mexico, Colombia, and Brazil have longstanding issues with violent crime, primarily tied to drug trafficking. Honduras, Guatemala and El Salvador also suffer from high levels of violent crime, but this time mostly tied to the youth gangs that have proliferated recently. Compared to Colombia, Panama does not suffer from crime in a significant way, but has weak judiciaries, whereas Colombia's Constitutional Court has become a model for the region. Chile has low levels of corruption, while places like Bolivia or Haiti have higher ones. One must generalize, as it would take far too long to detail every country's own reality, but drawing generalizations is a dangerous game.

Secondly, every issue raised in this essay – the causes of and solutions to crime, the means and goals of judicial reform, the pros and cons of informal legal systems and legal pluralism, the causes of and cures for corruption – has and deserves an extensive literature. Moreover, there is seldom a consensus in any of these literatures on what the best solution might be, beyond a general agreement that solutions must be tailored to the specific country and situation at hand. And, indeed, most of the solutions attempted to date have failed to produce fully satisfactory outcomes – this essay comes on the heels of more than a billion dollars of “rule of law” reform. Here, then, I can do little more than outline general guidelines that should, on the basis of the best research to date, help in designing actual, technical reforms. I will address what I take to be the most significant problems for democracies in particular – either because they threaten support for democracy, or

because they impede the exercise of democratic rights, or because they affect large numbers of people in a significant way; and I will discuss a few solutions that I think are illustrative or sufficiently comprehensive to strike at a number of problems at once.

In order to set the conceptual foundations for this discussion, we must first clarify what we mean by the rule of law, and what we hope to achieve by it. The concept is notoriously polysemic: various organizations pin the “rule of law” label on the program of the day, attributing a wide variety of benefits to it and meaning a diversity of things by it. Discussions of this conceptual and definitional confusion are nearly as frequent as discussions of the rule of law itself (see Domingo and Sieder 2001; Kleinfeld 2006; Santos 2006; O'Donnell 2004; Trebilcock and Daniels 2008). Given the focus of this project on the challenges democratic regimes face, and on the threat of these challenges to the stability and quality of democracy itself, I will avoid most of the terminological debate, adopting a definition that includes more than the effective application of rules – what might be called *rule by law* (Holmes 2003). By rule of law, here, I mean to address the construction of a *democratic* rule of law, defined as the consistent application, without regard for social position, of formal norms congruent with a democratic political regime, and the effective protection of core democratic rights against incursion or neglect by state or social actors.

This definition has more in common with what have been called the “thick” definitions of the rule of law (Trebilcock and Daniels 2008: 16-20), but it avoids, for now, getting into the thorny normative issues these definitions require. It also avoids the detailed listing of institutional arrangements and substantive requirements on which other “thinner” definitions rely (see, e.g., Raz 1979; Fuller 1969), leaving this more empirical discussion for later.

As thus conceived, and as Magaloni (2003) also notes, the rule of law has two dimensions. It must, in the first place, address the Hobbesian dilemma, structuring and empowering a state that can protect us from the depredations of our fellow citizens. The evident failure of many countries to solve this dilemma is at the forefront of citizens' concerns about the rule of law in the region. Violence, crime, and the lack of effective means for enforcing contractual and other rights vis-à-vis more socially powerful actors have earned legal institutions much of their current disrepute. It is blatantly obvious that state law cannot serve this Hobbesian function if the state does not in effect exercise near monopoly control over the production of violence. The first crucial task in establishing the rule of law, then, is ensuring that the social production of violence is subject to credible, if not perfect, control by the state. But the protection of rights vis-à-vis fellow citizens goes far beyond controlling violence; employees must be able to challenge denials of labor rights, single parents must be able to enforce support obligations, property owners must be able to protect their homes or land against incursion.

Second, the rule of law must solve the Madisonian problem that arises precisely from the solution to the first dilemma. It must restrain this necessarily powerful state from itself preying upon citizens and violating their rights. Here again, notorious deficiencies in the ability of law and legal institutions to restrain powerful executives, police the separation of powers, curb state violence, and limit corruption have led to a loss of confidence and legitimacy. The problem arises both in controlling current power holders and in imposing accountability for the violations of previous regimes. Arguably, the weakness of courts and other legal institutions in this regard has contributed to the brand of hyper-presidentialist and diminished democracy O'Donnell labeled "delegative

democracy” (O’Donnell 1994, 1993; Larkins 1998). In summary, the democratic rule of law, in this conception, includes effective restraints on both the ruler and fellow citizens, ultimately leading to interactions in society that may or may not be law-ordered in a direct way, but that in any event are consistent with democratic citizenship.

It is important to keep in mind, especially when designing possible solutions to the failure of the rule of law, that in no society are all social interactions directly regulated by formal laws, nor is this a necessary or even desirable condition for the existence of a democratic rule of law. Indeed, in democratic societies – and in plural, multicultural societies in particular – we may wish to open multiple spaces for interactions that are free of direct government regulation, even if that regulation has impeccable legal and democratic credentials. A democratic rule of law creates and protects these spaces, and prevents their occupation by alternative orders that are incompatible with a democratic regime and with the exercise of legally recognized rights. Thus, the law may preserve a great deal of freedom for individuals to order their intimate relations as they see fit, as in marriage or other domestic arrangements, while preventing that space from becoming a place for oppression and domination. It may preserve a great deal of contractual freedom, while still proscribing contracts and agreements that are inconsistent with the effective exercise of democratic citizenship.² A democratic rule of law will leave many relationships unregulated by formal law, but must remain sensitive to the consequences of leaving those

² I have avoided so far the discussion of what is “congruent” or “consistent” with a democratic regime. That is, at bottom, a question for democratic theory to answer, and, within bounds, we may come up with a different answer for different societies. Beyond certain core commitments that are necessary for a regime to be a democracy, what substantive commitments a democratic rule of law requires is a matter for debate and definition through the democratic process itself, given what is achievable for any given country. As the theoretical framework for this project puts it, the scope of each country’s “ciudadanía exigible” is partly a function of its own historical moment.

relationships unregulated and open up avenues for asserting rights that are denied in the context of those relationships.

This implies that the rule of law goes beyond the purely negative function one could derive from the earlier formulation – protection against the sovereign, protection from each other. The goal of a complete and effective democratic rule of law is to create a context in which citizens acquire what we might label full legal agency: a low probability of being denied one’s rights, a high probability of securing redress when those rights are violated, and the capacity to make effective and proactive use of law and legal processes when and as desired in the pursuit of all legitimate life objectives.³ Its institutional embodiment provides the means by which, as Weber (1978: 666-67) noted, rights become a source of power even for the formerly powerless. Thus the role of the institutions that enforce a democratic rule of law cannot be conceived in purely reactive, passive terms, as a barrier against, or mechanism of redress for, violations of an active nature. Courts and other legal institutions must be accessible, efficient and effective vehicles for the assertion of rights and the resolution of disputes, either against the state or against fellow citizens.

Finally, the challenge of establishing the rule of law over a certain territory or for a certain class of social interactions is complicated by the fact that doing so typically entails displacing an alternative order. The prolonged, enduring absence of the rule of law does not most often imply anomie or chaos – the absence of order – but rather the presence of alternative normative orders (Brinks 2006; Helmke and Levitsky 2006). Moreover, these alternative orders are very often sustained and backed by their own set of coercive,

³ See O’Donnell (2001a) for a discussion of the connection between agency *tout court* (of which what I have called “legal agency” is but one component) and democracy.

normative and ideological resources, and are, in all likelihood, deeply congruent with the power relations in which they are embedded. The more the rule of law seeks to shift the center of power from its status quo position (or conversely, the more an emerging alternative order reflects emerging power disparities), the more coercive and pervasive the law's enforcement structure must be.

The consequences of this should be clear: a new normative order creates new winners and new losers; it upsets normative expectations; it produces conflict. In the final analysis, therefore, if its own legal order is to prevail, the state must offer sufficient persuasive or coercive backing to persuade those who are likely to lose power that they must acquiesce in the new order (see, Brinks 2008a for a more extended discussion of this issue). And so, as noted, the rule of law ultimately depends on backing legitimate legal claims with the threat of (legitimate use of) force, even in the context of such apparently benign conflicts as contractual disputes, and even when the law implicitly or explicitly allows for unregulated relationships. But coercion is costly and inefficient, and especially when the state is weak, the opposition strong, and non-compliance is widespread, coercion is unlikely to succeed. The rule of law depends, to a large extent, on voluntary compliance.

Whether through coercion or persuasion, then, a state that seeks to replace the rule of alternative orders with the rule of state-based law must succeed in two tasks. First it must provide an effective institutional framework for asserting the rights and enforcing the duties prescribed by law, and for protecting the spaces of intentional non-regulation. Over the long run, it must also prevent this framework from being co-opted by and made to serve the alternative order (see, e.g., Brinks 2003 for a description of how the legal system may be placed in the service of alternative rules). I will address the characteristics of this

institutional framework in the section on administration of justice reform. Secondly, it must somehow make this institutional framework the preferred one for settling disputes.⁴ Ideally this will happen when the legal order becomes more attractive to all parties to the dispute (Stone Sweet 1999, 2000) either because it is more efficient, leads to normatively preferred outcomes, or otherwise has positive attributes superior to the alternative. The more the affected community has a role in its creation and participates in its implementation, the more likely it is that the system will secure voluntary compliance. Coercive enforcement should be a last resort: a permanent credible threat, but one rarely exercised.

In summary, the goal of rule of law reforms is to promote legal agency, by creating and strengthening the various structures that empower citizens to exercise their rights vis-à-vis each other and the state. Many of these structures will be state-based agencies – courts, prosecutors, police, ombudsmen organizations. Perhaps the most important challenge to the rule of law in Latin America today – violent crime – requires at least in part effective state-based mechanisms to control it. Other structures will be outside the state altogether and may well exist in a certain tension with the state. On the one hand, lawyers and the legal profession are an essential component of any rule of law regime, and civil society organizations that mobilize and aggregate demands allow rights claims to be made more effectively in any venue. But occasionally the preferred mechanism for dispute resolution will be a more informal one – perhaps an informal justice system, or a mediation

⁴ See Shapiro (1981: ch.2) for an extended account of how the crown successfully offered the English common law as an alternative to preexisting, customary legal orders.

service. So long as these informal mechanisms are “complementary”⁵ to a democratic legal order, no violence is done to the rule of law, and the entire system is more likely to garner voluntary compliance. I return to these implications of the theory, after cataloguing and diagnosing the problems at hand, when I discuss the possible solutions. In the following pages I discuss first the failures on the Hobbesian dimension and then the shortcomings in meeting the Madisonian function.

The observed failures:

Violent crime: The most visible and most pressing violation of the Hobbesian task is the increasing failure to control crime and violent crime in particular (Mainwaring and Scully forthcoming: ch.2). In the 2006 LAPOP survey of 23 Latin American countries, when asked, “What is your country’s most important problem?” respondents most frequently (26% of the time) answered crime (19% of respondents named unemployment) (LAPOP 2006). The Latinobarómetro results invert the order of these responses, with the largest number (24%) identifying unemployment and the second largest (16%) crime as the most important challenge (Corporación Latinobarómetro 2006: 39-40). In either case, it seems clear that crime is perceived by the citizenry as the most crucial challenge for the governments of the region in establishing an effective rule of law.

Moreover, concerns about crime are justified. The region has the second highest reported per capita murder rate of any region in the world (after Southern Africa) with between 20.36 and 24.59 homicides per capita.⁶ Only South Africa has a homicide rate

⁵ Helmke and Levitsky (2006: 13-14) describe as “complementary” those informal institutions that coexist with effective formal institutions, and produce results that are convergent with those of the formal rules.

⁶ Source: United Nations Office on Drugs and Crime, available at <http://www.unodc.org/unodc/index.html> (last visited Jan. 13, 2009). The UNODC report includes “high” and “low” values when multiple data sources are available. Here I use a population weighted mean to give the regional average. While many claim that

(39.5) that approaches that of El Salvador (56.4) and Colombia (45.5), the two worst countries in the Americas. Table 1 reports the homicide rates for Latin American countries.

Table 1: Homicide rates for all countries in Latin America⁷

Country	Homicide Rate per 100,000 (low)	Homicide rate per 100,000 (high)
El Salvador	56.4	57.5
Colombia	45.5	61.1
Venezuela	32.5	37
Guatemala	26.3	36.4
Brazil	26.2	30.8
Belize	21.9	30.1
Guyana	17.7	19.2
Ecuador	16.8	18.5
Paraguay	15.3	17.8
Honduras	13.8	32.2
Nicaragua	12	17.4
Panama	11.5	13.4
Mexico	10.9	11.3
Suriname	10.2	11.8
Costa Rica	6.2	7.3
Argentina	5.3	5.5
Uruguay	4.7	6
Bolivia	3.7	5.3
Peru	3	5.7
Chile	2.9	5.5

Although the data are murky, the consensus seems to be that, with limited exceptions such as Colombia and particular cities here and there, violent crime rates have generally worsened over the last two decades. Reports of the increase in kidnappings in Mexico, murders and violent robberies in Central America, carjackings in the large cities of Brazil, and violent confrontations between rival gangs in Honduras, Mexico, Brazil and

Latin America has the highest homicide rates of any region, if we take a population adjusted mean, rather than simply averaging across countries, we find that South Africa, a country with high murder rates that comprise a large percentage of its region's population drives the homicide rate for Southern Africa to between 24.7 and 41.95, higher than that of Latin America. If we average all of Sub-Saharan Africa, however, Latin America recovers first place.

⁷ The data is taken from the International Homicide Statistics report by the United Nations Office on Drugs and Crime, available at <http://www.unodc.org/unodc/en/data-and-analysis/ihs.html> (last visited March 17, 2009).

elsewhere dominate headlines in the region. Cocaine flows freely across national borders, generating huge sums of money, violence and social and political dislocation. Law enforcement agencies are, when not captured and complicit, at least overwhelmed and ineffectual. There cannot be an effective rule of law in Latin America without an effective response to violent crime.

Judicial insecurity: In addition to crime, for the ordinary citizens who do not expect either to make high sounding constitutional claims or to be brought up on criminal charges, perhaps the most important aspect of the rule of law is simply the ability to enforce private contractual arrangements, employment protections or garden-variety property rights against other ordinary citizens. While surely it was a mistake to focus legal reform purely on contractual enforcement mechanisms and debt collection, in the hope of promoting economic development (Salas 2001), it is nonetheless true that ordinary people desire the assurance that the legal system will respond when they need to enforce a contract or recover for an injury. Contracts, residential plot boundaries, and, perhaps most importantly, family disputes relating to child support and alimony are the bread and butter of Latin American legal systems. If courts fail to respond in these ordinary, unglamorous cases, they deprive many vulnerable people of legal agency, not to mention basic subsistence needs. This in part explains the popularity of the Brazilian Public Prosecutors' work on consumer protection rights (Sadek 2000), and the many advances in consumer protection legislation, alternative dispute resolution, family law reform, and the like.

In terms of the universality of the rule of law, historically subordinate groups continue to struggle for the full exercise of their rights. This is translated not only into violence against such groups but in a broader denial of rights. Here I will identify and

discuss three such groups of particular significance – women, the indigenous and afro-descendants – but to some extent every country has its own reality and will be able to identify the relevant group.

Women: Latin American law has traditionally placed women in a subordinate position. In many countries, the civil code historically incorporated and explicitly protected the gender bias that was dominant at the time of its drafting, denying women certain property rights, or discriminating against them in family matters; in other instances, the codes fail to include measures that would protect the interests of women (Oquendo 2006: ch. IX; Htun 2003). But many of these deficiencies have been addressed, with a great deal of variation across countries to be sure, either through the adoption of international agreements, such as the Convention on the Elimination of All Forms of Violence Against Women, or through legal reform and judicial review (Htun 2003; Macaulay 2005).

The basic problem, however, remains: even when the laws are adequate, women very often find that the entire machinery of the law, including police, prosecutors and judges, is hostile to their claims, thus exposing them to violence and discrimination (see, e.g., Acosta 1999). Beltrán and Freeman (2007) argue that “Victims of gender-based violence are often re-victimized by police and judicial personnel who harass them, treat them dismissively, or blame them for their fates based on their clothing or their lifestyles. Such gender biases frequently impede these cases from being investigated and prosecuted seriously, and can consequently put a woman’s life in even more danger”. The results are most visible in the high rates of violence against women, as in the “feminicidio” that has made headlines in Guatemala (where 2,500 women have been violently killed since 2001) or Ciudad Juárez (over 400 women have been murdered in this one border town since

1993) (Beltrán and Freeman 2007). This *de facto* discrimination also affects women's participation in the labor market, their ability to care for their children after a divorce or separation, and their exercise of reproductive freedoms (Acosta 1999; Htun 2003). Latin American justice remains strongly "gendered" (Macaulay 2005), and a critical task in most countries is finding a way to make the recently conquered formal rights a reality in the lives of ordinary women.

Indigenous and afro-descendant groups: The indigenous and afro-descendants have similarly made great strides in transforming formal legal regimes to incorporate their demands, only to find even their constitutionally recognized rights unrealized. Over the last two or three decades, Latin American countries have formally recognized the rights of the indigenous and afro-descendant groups in constitutions and laws, through adoption of ILO Convention No.169, through modification of land tenure regimes and more (Sieder 2002). Indigenous groups have fared better than afro-descendants in this regard (Rapoport Center for Human Rights and Justice 2007) as afro-descendants struggle with smaller population sizes and less political organization and mobilization around collective rights (Hooker 2005). Nevertheless, these groups continue to experience the *de facto* denial of rights, even longstanding ones like the right to land (Davis 1999; Rapoport Center for Human Rights and Justice 2007, 2008).

The poor: The residents of rural areas and the urban poor experience the same legal marginalization, the same experience of having formal rights but finding them unrealized in practice. O'Donnell once described this as the "brown areas" of Latin American democracy, areas defined either geographically or in class terms, in which the state fails to impose its own legal order, leaving citizens at the mercy of alternative,

unequal and oppressive power relations (O'Donnell 1993). These groups experience “legal poverty” or “low intensity citizenship” along with their socio-economic marginalization (O'Donnell 2001b). The areas they inhabit – whether remote rural areas or densely populated urban peripheries – are characterized either by the sheer absence of state legal institutions, or by what can be worse, overwhelmed and malfunctioning courts and poorly trained, violent and unaccountable police forces. In particular, poor urban youth, especially the males, are frequently subject to violence and abuse by the police. The rate of police homicides among shantytown residents in São Paulo, Córdoba or Buenos Aires, for example, is six times higher than the overall average for each of those cities (Brinks 2008b: 54, Figure 2.3). The challenges for a democratic state thus include both a lack of access to justice (Méndez et al. 1999) and the presence of state actors who themselves violate rights (Holston and Caldeira 1998; Brinks 2008b).

Human rights violations (and impunity): As one human rights network emphasized, human rights violations are endemic to Latin America, and while they vary from place to place, they are everywhere marked by impunity:

The Human Rights situation in Latin America varies considerably country to country. In some, such as Colombia, disappearances, extra-judicial executions and torture have reached epidemic proportions. In others, such as Perú, hundreds of innocent people continue to be in jail, falsely accused of "subversive activities". Yet in others, the main human rights violations concern police brutality, inhuman prison conditions, and violations to economic and cultural rights. If there is one violation that is common to most of the continent, it's impunity, the lack of punishment – and often even of investigation – to those who are responsible for committing the most dire human rights abuses (<http://www.derechos.org/nizkor/la/eng.html>).

One of the crucial tasks in regard to human rights violations, therefore, is to fix the mechanisms of accountability for these violations. When the courts exonerate or otherwise

fail to punish notorious human rights violators, they simply legitimize the violation. This not only further deprives the victim of justice, it directly contradicts the rule of law.

Indeed, for many of the legally poor the problem is not too little state but a state that itself violates basic rights. Indigenous groups in particular often experience the state's legal apparatus as the source of rights violations and state law as a means for denying fundamental rights. I have already mentioned police violence and the mistreatment of women by police and judiciaries. But state actors violate the rule of law in other respects as well, including, importantly, within the criminal justice system. Police investigations continue to rely too much on confessions, often using coercion and torture to secure them. The accused wait years for their trial, and they typically do so in detention, often being imprisoned at least as long as they would have been if convicted at the very outset (Bhansali and Biebesheimer 2006). Prison conditions across the region are appalling, with overcrowding, inadequate food and medical care, rampant guard-on-inmate violence and inmate-on-inmate violence (Ungar 2003). In many countries, more than half the prison population living in these Dantesque conditions has never been convicted of a crime (Bhansali and Biebesheimer 2006). Criminal justice institutions thus not only fail to solve crimes, they fail to respect basic principles of due process, the bedrock on which rests the rule of law.

Lynching: Somewhere between human rights violations by state agents and ordinary violent crime, is a deeply troubling and increasingly important phenomenon: the lynching of people suspected of a crime. The number of lynchings has grown in recent years, especially in Guatemala, Peru and Mexico, but it has long been a problem in Brazil and other countries. In Guatemala, for example, lynchings were not popular during the

country's civil war but began in earnest with the first democratic elections in the early 1990s. Between 1996 and 2002, 480 lynchings were recorded, more than 5 per month on average (Mendoza 2007). The lynchings themselves, like virtually no other problem we have discussed, flag the weakness of the state and the marginalization of the affected populations. Carlos Mendoza (2007) highlights the weakness of the state in the most heavily affected areas of Guatemala. But Angelina Snodgrass Godoy (2006) properly notes that the communities that lash out in this way are those that are threatened by social and economic dislocation, and marginalization. Communities lynch, then, when they (rightly) perceive that the state does not provide an effective response to crime; but they lynch to re-assert their agency and to send a message to the state that they can no longer be ignored. The response, then, is to give these local communities more control over their circumstances, while monitoring to ensure that locally based responses are respectful of basic human rights.

Corruption: Finally, in many countries across the region, official corruption is widespread. While measures of corruption are notoriously poor, both perception measures and victimization surveys suggest that corruption continues to be endemic in Latin America, although lower there than in Africa, the Asia-Pacific region or Southeastern Europe (Transparency International 2008: 305). There is, however, a great deal of variation across countries in levels of corruption. A person in Uruguay has a 7% chance of being asked for a bribe in a given year, while one of every two people in Haiti reported being asked for a bribe in the previous year (Seligson and Zéphyr 2008: 313). As Table 2 shows, legal actors like the police and the courts are in many countries among the most likely to demand a bribe – it is difficult to imagine controlling corruption when the

mechanisms of control are themselves awash in it. While according to regional opinion polls corruption typically ranks below economic issues and crime in the list of a country's most important problems, it feeds cynicism about government, political leaders, and democracy more generally, eroding confidence in democratic representatives (Mainwaring 2006).

Table 2: Percentage of respondents in Latin America who report being asked to pay a bribe by actors in different sectors⁸

	Police bribery	Public Employee bribery	Municipal bribery	Court bribery	Health service	School bribery
Bolivia	20.5	14.5	24.1	19	10.2	10.2
Chile	2.3	1.7	5.6	5.3	3	3.5
Colombia	4.5	2.6	4.4	3.3	3.7	1.8
Costa Rica	8.7	6.1	5.9	3	4.5	4.4
Dom. Rep.	10.7	6.3	19.5	12.5	5.1	3.6
Ecuador	11.6	15.1	14.8	22.9	8.7	13.2
El Salvador	6.6	2.5	6	2.8	6.7	3.5
Guatemala	11	4.6	6.4	6.3	7.6	7.4
Guyana	11.8	6.4	13.4	10.1	13.6	n/d
Haiti	10.2	10.8	61.9	50.2	57.7	59.6
Honduras	11	3.9	10.4	7.8	3.7	3.9
Jamaica	7	2.3	16	16.8	35.7	30.1
Mexico	22.8	13.7	24	25	13.7	12.7
Nicaragua	7.3	4.1	12.5	22.7	10.2	9.3
Panama	6.6	3.7	16.2	14.3	3.9	4.1
Paraguay	11.6	13.1	13	17	3.9	3.1
Peru	18.8	10.7	14.9	11.6	3.9	8.2
Uruguay	2.3	1.9	1.8	0	1.4	1.6

The general diagnosis:

What are the general patterns we can discern from this litany of complaints? Does this profusion of social ills respond to a limited set of common dynamics and mechanisms, or does each call for its own diagnosis and thus its own treatment plan? Clearly, we should be wary of attempts to discern the one silver bullet solution to all that ails the rule of law in all the countries of Latin America – especially if that solution is imported from abroad.

⁸ The data is taken from Table 7, Seligson and Zéphyr 2008, Global Corruption Report 2008, p.314.

Attempts to fix everything by blindly importing laws and best practices from abroad were long ago rejected as abysmal failures (Trubek and Galanter 1974). The countries of the region have widely differing histories, political dynamics, legal traditions, and economic structures, among other things. Precisely for that reason, more recent scholarship emphasizes the importance of contextualizing and individualizing solutions, principally by being sensitive to the need to adapt legal frameworks to local conditions (Carothers 2006; Berkowitz et al. 2003; Brinks 2008b). Still, there are some commonalities to the various problems listed above, and we can infer some general guidelines for devising successful strategies to address them. I turn to these next.

Recall that the democratic rule of law is a characteristic of a socio-political system in which rules congruent with a democratic political regime are consistently applied regardless of social position, and in which core democratic rights are protected against incursion by state or social actors. A democratic rule of law creates legal agency so that even the spaces that are, intentionally or not, unregulated become the locus for the exercise of effective democratic citizenship. If this is so, then a failure of the democratic rule of law could be attributable either to the presence of laws that fail to meet democratic standards, or to the failure to effectively implement sound, existing, formal laws, or both.

Over the last two or three decades, much effort and thought has gone into legal reform. But if we have learned anything at all from the law and development movement it is that drafting new and improved laws is the merest beginning of the solution (see, e.g., Carothers 2006: 11). This point is brought home yet again by the contrast marked above, between the dramatic improvement in the formal legal structures governing indigenous rights, the rights of women, civil and political rights, rights against torture and other forms

of state violence on the one hand, and the generally dismal record of compliance on the other. Although there is certainly much to be done to rid the law of authoritarian remnants and to improve formal protections, the preceding list of specific failures suggests that a crucial problem now is the failure to make existing laws effective (Méndez et al. 1999; Brinks 2008a). One implication of this is that “rule of law” efforts should focus as much or more energy on the implementation of laws and on empowering rights-bearers to exercise their rights as on producing “better” substantive laws and more formal rights. It is beyond time to consolidate the gains made in formal terms, by focusing on failures of implementation.

The second general point is that, as the previous discussion illustrates, these failures of implementation, with limited exceptions I will discuss in a moment, disproportionately affect groups that are socially, economically and politically marginalized. The failures affect women, the indigenous, poor urban youth, rural populations, afro-descendants, and the poor more generally. Violent crime in particular appears to disproportionately target the poor, at least in the cities (Cardia et al. 2003). The poor are more likely to populate prisons (Adorno 1994; Adorno 1995), to experience police abuses (Brinks 2008b), to lack access to courts (Bergoglio 1997; Lista and Begala 2000; Vanderscheuren and Oviedo 1995), and on and on. Violations cluster, so that the same people are exposed to multiple exclusions from the rule of law that build on each other in mutually reinforcing ways. O’Donnell’s descriptive term “legal poverty,” then, captures the essential reality of the manifold failures of the rule of law: the common thread running through these failures is the broader social, economic and political marginalization of the affected population.

The solution, then, must take as its starting point the need to address this multi-faceted legal poverty. The solution is always a whole-person solution and rarely a matter of tweaking one institution or amending one law. Ensuring that formal laws and the spaces for a democratic social order that they create extend to the underprivileged, extending legal agency across socio-economic and geographic boundaries, requires a holistic, interdisciplinary approach. Again, this is not news to anyone with a passing knowledge of Latin America's legal texture. The question is exactly how to empower the disadvantaged in order to promote a more universalistic rule of law.

Not all the shortcomings affect the poor and marginalized exclusively, however. For example, there is evidence to suggest that, although poorer countries tend to have more corruption overall, within any given country moderately wealthier people experience higher rates of corruption (Seligson and Zéphyr 2008: 314 ["even though the poor may pay a higher percentage of their incomes in bribes, it is the wealthier who have the 'deep pockets' and are more likely to be seen as good targets"]) and property crime (Gaviria and Pagés 1999: 13 ["property crimes ... are much more prevalent among richer households, [but] violent crimes are much more prevalent among poor households"]). Property crime represents the majority of total offenses and greatly affects wealthier households because criminals actively seek out lucrative victims whose property will provide a high return. For wealthy households, effective protection is costly and is subject to diminishing returns (the more the wealthy have to spend to deter criminals, the less comprehensive protection they put in place). In comparison, violent crimes are much more prevalent than property crimes in poor households, as poorer properties are less enticing to criminals.

Clearly, expensive, slow, unpredictable courts are a liability for the middle class as well. The failure to protect consumer rights affects everyone, as does disregard for environmental and safety laws. Corruption's drag on development and good governance affects people regardless of class. But if we can create a context in which legal institutions respond well to the poor, *a fortiori* we will have at least begun to address the more middle class demands for a predictable, efficient, and accessible legal system. The same system will be useful for enforcing ordinary civil disputes and producing a more effective response to crime and corruption.

The solutions promoted by international aid agencies and other donors have tended to focus precisely here: on improvements to judicial institutions, with the primary goal of advancing economic development (Domingo and Sieder 2001; Santos 2006). While the decades of involvement and the billions of dollars invested in rule of law reform in the region (Trebilcock and Daniels 2008: 2) can no longer be criticized as an absolute failure, it is clear that they have failed to produce results commensurate to the effort (Carothers 2006; Hammergren 2006).

Moreover, rights violations and denials of citizenship can continue, for marginalized populations, even in the presence of relatively high functioning judicial institutions. In Córdoba, for example, the moderately better off can access a relatively high functioning judiciary while the poor remain excluded, thus accentuating legal inequality, while in cities with less functional justice systems results are poor for everyone (Brinks 2008b; see in particular the discussion of Córdoba and São Paulo). Without the resources needed to engage with the justice system, justice will remain out of reach, even if nominally

accessible; the poor often lack the knowledge of rights, access to lawyers, money, time and other forms of social capital to make effective use of the courts.

As this suggests, and we will see below, it is clear that the root of the problem is more often outside judicial institutions themselves. More resources and better institutions are not irrelevant, to be sure. But if the common underlying problem is a more multifaceted condition of the subjects we might call “legal poverty,” then the solution must in some way centrally address the capabilities of the legal subjects themselves, not merely the capacity of legal actors and judicial institutions. To solve the problem, in other words, we must transform legal poverty into legal agency, the capacity to make effective and proactive use of law when and as needed in the pursuit of all legitimate life objectives.

Any institutional development must therefore be designed with an eye to supplying the resources these legal subjects lack in their interactions with the law and the legal system. The traditional reactive approach – interpreters for indigenous defendants, free lawyers for indigent defendants – is inadequate to the task. The point is to enhance citizens’ capacity to experience and assert the full range of their legal endowment in their everyday lives. To promote legal agency is to give citizens more control over the construction and assertion of their rights, when and as they deem necessary. The state’s task is not necessarily to take over from citizens or offer paternalistic, top-down solutions⁹ but to provide the structures that enable citizens to claim and exercise rights for themselves, given their existing capabilities. The task is to bring law and legal institutions to the citizens, not citizens to the law.

⁹ One frequent criticism of the otherwise very successful Brazilian Ministério Público, for example, is that it takes initiative away from individuals and civil society groups, filtering and recasting their demands.

A closer look at the social and institutional foundations of the rule of law shows why this is so, and provides some additional guidance as to where to focus efforts. Recall the earlier theoretical discussion: establishing the rule of law implies displacing an alternative order, creating new winners and losers. Whether the claims are novel or not, we should always expect the process of claiming rights to be a contested one, pitting rights bearers against duty bearers. But the problem is exacerbated when a new order upsets longstanding arrangements, making losers of erstwhile winners, predictably generating considerably more resistance. This process of claiming rights *against* a duty bearer always entails the expenditure of legal resources commensurate to the expected resistance. The likely outcome is as much dependent on conditions outside the legal system as on conditions within it. If the claimant is in a significantly unequal relationship regarding the duty bearer, we should not expect the claim to succeed. An employee's capacity to assert labor rights, for example, depends as much on conditions in the labor market, alternative sources of employment and the like, as on legal structures. Enhancing that capacity means, in addition to crafting new legal tools, explicitly addressing the market conditions that will otherwise induce workers to forego asserting rights.

The relevant legal resources are defined by the enforcement structure for the particular rights in question and the nature of the disputing dyad. In formal legal systems the requisite legal resources include lawyers, of course, but also transportation, time, money, knowledge of rights, and the ability to articulate a claim in legal terms. Implicitly – and for many marginal communities of Latin America this is a non-trivial issue – they also include the capacity to resist violence and coercion. The police, for example, often use violence and threats to silence complainants (Brinks 2008b), as do landowners in Brazil

(Piovesan et al. 2001), husbands charged with domestic abuse (Macaulay 2005), employers in Guatemala, El Salvador, Colombia and elsewhere,¹⁰ people who want to use the communal land of Afro-descendent groups in Colombia (Rapoport Center for Human Rights and Justice 2007) and so on. Any institutional reforms, therefore, must be designed with an eye to resolving the particular resource disparities existing between the members of the contesting dyad – the rights bearer and the duty bearer – in light of the specific enforcement structure that is in place.

Given this focus, one might conclude that the only possible solution is the elimination of social and economic inequalities. But we need not wait that long to offer some palliative arrangements. We may begin by recognizing that any new or under-realized right requires the development of a network of ancillary, sometimes completely extra-judicial, supporting institutions. What is needed is what I label elsewhere the development of a network of lateral support institutions tailored to the social reality of the rights bearers and those who owe them a correlative duty (Brinks 2008a). The particular solutions will be specific to the dyad in question, to the socio-economic context in which the rights are being contested, and to the institutional strengths and weaknesses already in place. But the general rule is straightforward: build a network of lateral support for the rights and rights bearers in question; invest in institutions and arrangements that enhance the rights bearer's ability to assert rights, in light of the expected source and degree of resistance to that claim. In the following section I apply this insight to suggest possible concrete solutions to the various concrete problems identified above.

¹⁰ On this last point, see reports regarding violence against union organizers, such as, e.g., the WOLA report on Trade and Labor Rights, at https://www.wola.org/index.php?option=com_content&task=view&id=197&Itemid=6).

Concrete solutions, short and long term, derived from this general statement:

While the judiciary is obviously a crucial institution in the effort to improve all the problems identified so far, and has figured prominently in most “rule of law” reform efforts to date, courts should ideally be a last resort, and many of the most necessary changes do not necessarily affect the courts directly. I will therefore begin by discussing a series of possible extra-judicial means of improving legal agency, in the context of the various problems identified earlier. I will discuss the judiciary in the following section.

Crime: Of all the challenges listed above, one of the most intractable must surely be crime. It often seems to have a dynamic of its own, driven by macro-economic and social structures, unrelated and impervious to state policies. Indeed, the variable most consistently associated with high levels of violent crime is inequality (Fajnzyłber et al. 2002a, 2002b), and Latin America has this in abundance. Unfortunately, the data also suggest that there is a considerable inertia effect (Fajnzyłber et al. 2002b), so that a quick turnaround in crime rates is unlikely. But there are important and recent success stories, which at least anecdotally suggest that policy solutions, short of eliminating inequality altogether, are available. And, as the previous discussion predicts, many of these policy solutions depend integrally on enhancing legal agency, not only on the part of communities victimized by crime, but also on the part of those who do or might commit crimes.

In Medellín, for example, official statistics suggest a 94% reduction in homicide rates over 16 years (this reduction is measured against the historical high point for violence in that city). Bogotá has also experienced and sustained dramatic reductions in violent crime from its peak in the 1980s. Journalistic accounts, including one entitled

“Medellín attacks violence with inclusion,”¹¹ attribute this success to a program that addresses directly the social causes of crime, attempts to restore confidence in the police and relies on community relations. Colombian experts on citizen security make similar arguments. It is true that episodes of high violence in Colombia and elsewhere often ebb and flow in large part as a function of relationships among competing crime syndicates. But there is also evidence that crime rates respond to increasing confidence in the police, improving community dispute resolution procedures, reclaiming public spaces, incorporating organized civil society in the process of design and implementation of public safety policies, and improving the accountability of local government and police to the community.¹² As the earlier headline suggests, the more effective means of combating crime is often not repression but inclusion, although it always includes an element of strengthening the police while simultaneously making it more accountable.¹³

São Paulo also experienced a dramatic reduction in homicide rates over the last seven years or so.¹⁴ São Paulo’s approach, under a social democratic local government, shows that consistent public safety policies can have a positive effect when they are not purely repressive, but marry improvements in the investigative capacity and capabilities of the police, to programs that address the social roots of violence. Significantly, São Paulo’s

¹¹ Source: La Nación, Jan.4, 2009, “Medellín Ataca la Violencia con Inclusión.”

¹² Source: La Nación, Jan. 3, 2009, “La Opinión de dos expertos en seguridad de Colombia” (interview with Alfredo Rangel Suárez and Hugo Acero Fernández).

¹³ Arias (2008) suggests that in Medellín this inclusion may have been achieved in part through a rather troubling *modus vivendi* reached between municipal authorities and paramilitary groups who ejected drug gangs from the most violent neighborhoods, but there are obviously better ways to do this, including community policing, as discussed in the text, below.

¹⁴ See Veja, Dec.19, 2007, *Sexta-Feira Santa: pela primeira vez, desde a década de 50, São Paulo tem un dia sem assassinatos*, discussing the reduction in violent crime in São Paulo since 2001, including homicides (down by 79% in the capital city), armed robberies, robberies and car theft. Even some of the most dangerous neighborhoods saw a 75% drop in the homicide rate.

experience demonstrates that one consequence of improving policing in this way is to reduce crime and police violence at the same time, two goals that are, in the minds of many publics and policy makers, in direct contradiction.

In all these cases, from Medellín to São Paulo, the key to sustaining a more peaceful society is the incorporation of the community into the policing effort and the inclusion of marginalized groups into the polity, rather than the violent repression of groups or individuals. Enhancing the community's agency through community policing has been one of the few repeatedly if not universally successful reforms to address crime. While a variety of programs can be described as "community policing," the key elements of such a program are fairly consensual: developing contacts and communication between police officers and the community by locating officers, often on foot, in a particular neighborhood; decentralizing control of the police and giving the community more influence over the policies and priorities of law enforcement; and focusing on prevention and problem solving (Eijkman 2007; Davis et al. 2003). These measures seek to ensure a more preventive, more inclusive, more responsive and less repressive form of policing.

Many of these programs have been successful. Hugo Frühling, for example, recently edited a report for the Interamerican Development Bank, in which he argues that community policing has reduced police abuses and improved public confidence in the police while at the same time helping to reduce crime in Villa Nueva (Guatemala), Bogotá (Colombia), and Belo Horizonte and São Paulo (Brazil) (Frühling 2004). In fact, community policing efforts in Brazil and Honduras have been shown to be most effective when they most promote community participation (Arias and Ungar forthcoming). Moreover, all these efforts have relied on community outreach programs more generally, to enhance the

attractiveness of the formal legal order. When community policing fails, it is often as a result of a lack of support by police hierarchies, the failure to involve the police and a lack of community involvement (Davis et al. 2003).

Over the long term, of course, the least costly, most socially beneficial way to reduce the crime rate is to reduce socio-economic marginalization: countries that are successfully growing GDP and reducing inequality have significantly lower crime rates (Fajnzylber et al. 2002a: 7). Adorno and Cardia further show that poverty alone is not the cause of high homicide rates, but that it works in combination with other markers of social exclusion. Poverty and a growing population with high numbers of young people combine with overcrowding and limited educational and employment opportunities to generate high murder rates, while neighborhoods that are poor but have higher levels of education, better health facilities and other public services produce lower levels of violence (Cardia et al. 2003). But reducing poverty and marginalization is a long-term goal. In the meantime, successful crime control policies rely on improving the quality and trustworthiness of law enforcement by including the community, and, crucially, on including at risk populations in the economic and social life of the community by providing alternative opportunities.

More systematic, quantitative evidence suggests that even high level organized crime responds to policy initiatives with similar characteristics:

The most effective policy measures against organized crime linked to high level public sector corruption ... are mainly founded on four pillars: (i) the introduction of more effective judicial decision-making control systems causing reductions in the frequencies of abuses of procedural and substantive discretion; (ii) higher frequencies of successful judicial convictions ...; (iii) the attack against high level public sector corruption; and (iv) *the operational presence of government and/or non-governmental preventive programs addressing technical assistance to the private sector, educational opportunities, job training programs and/or rehabilitation (health and/or behavioral) of youth linked to organized crime in high-risk areas (with*

high crime, high unemployment and high poverty).... (Buscaglia 2008: 314)(emphasis mine)

In other words, once again, success in reducing crime depends not on more draconian repressive activities, more punitive sentencing or giving the police and courts more discretion and latitude for arbitrary action. The current approach, which all too often relies solely on *mano dura*, increasing the discretion of the police, and more punitive penal policies, has not been as effective. Indeed, in a weak institutional environment, emphasizing draconian punishments and law enforcement discretion is more likely to lead to an increase in corruption than to a decrease in crime, as criminals buy their way out of a more severe enforcement regime (Buscaglia 2008: 293). Success relies, rather, on strengthening the capacity of law enforcement institutions while increasing their accountability and reducing their discretion, and, crucially, on incorporating both at risk populations and the community at large into the process. One important concrete way to incorporate the community, which has shown positive results when properly executed, is community policing.

Corruption: What of corruption? In what way does increasing legal agency lower rates of corruption? If we think of citizens as the victims of corruption, empowering them both individually and collectively to respond is one of the principal ways to curb corruption. Many studies have found that, in general, “more democracy – specifically, a longer experience with competitive, multi-party elections – fosters lower levels of corruption” (Gerring and Thacker 2004: 298). The same authors argue that the higher degree of accountability implicit in parliamentary regimes reduces levels of corruption. Rose-Ackerman notes further that it is the higher quality democracies that consistently reduce corruption (Rose-Ackerman 2006: 11). To reduce corruption, then, improve

democracy: create more mechanisms for accountability and transparency, improve electoral rules and party systems.

Short of transforming the entire political regime, however, measures that empower citizens can lower corruption. Transparency International, for example, highlights the role of access to information reforms in enabling citizens to hold public officials accountable.¹⁵ Clearly, the literature on the causes of and cures for corruption is too vast and varied to discuss in full detail here. But we may summarize by saying that greater transparency, coupled with better enforcement mechanisms allowing citizens to hold public officials accountable are among the best mechanisms to address corruption. Here one of the most successful institutions in Latin America is the Brazilian Ministério Público, which has found the capacity and independence to pursue corruption, especially at the local and state levels (Sadek and Cavalcanti 2003; Bastos Arantes 2000). The key to its success seems to be that it has sufficient independence from the local and state-level officials on which it has primarily focused; that it is well funded and supported by a career structure that encourages the very best lawyers to join; and that it has broad ranging powers of investigation and prosecution. Its most important weakness is the lack of independent investigative capacity, which forces it to rely on existing police forces for its eyes and ears.

Universalizing the rule of law, across social barriers: How to extend the rule of law to the traditionally marginalized communities identified above has also been a vexing problem. The typical response, when there is one at all, has a reactive, band-aid feel, trying to redress specific disadvantages by working within the existing legal structure, under the

¹⁵ See the discussion of this issue at http://www.transparency.org/global_priorities/other_thematic_issues/access_information (last visited 1/16/09).

rubric of access to justice – free lawyers and waiver of litigation fees for the poor, interpreters for the non-Spanish speakers, etc. (Garro 1997). What is needed is a more proactive approach that, rather than adding crutches and patches to a system that assumes a certain type of litigant and dispute, actually creates new legal structures that are designed to work with the resources and types of disputes that are likely to be present in these communities. Thus small claims courts with less formal procedures, which do not require legal assistance, or neighborhood mediation and dispute resolution services, both reduce congestion in the formal courts and make dispute resolution more accessible.

Similarly, bringing legal services into the locations where these groups live is much more effective than building gleaming new buildings in business districts (both Bergoglio 1997 and Lista and Begala 2000 show that the urban poor in the periphery of large cities demand neighborhood-based services). One successful example is the Balcão de Direitos initiative, which sent teams of lawyers, public prosecutors, social workers and other advocates into various *favelas* in Brazil. These outposts of legality are an example of holistic approaches to bringing the legal system to the affected community, rather than simply opening the doors a little wider and waiting for the community to come to the courts. Community policing similarly brings control over public safety closer to the community. Improving the efficiency of the judicial system will also help, and I will return to this in the discussion of judicial reforms, below.

Surprisingly, the creation of strong, independent constitutional courts with low barriers to access, such as the Colombian Constitutional Court, or the Costa Rican Sala IV (Wilson 2007, n.d.) has done much to address the concerns of many marginalized groups. These more formal mechanisms benefit especially those groups with some access to

lawyers, some organization and funding from foundations, and knowledge of rights (Gauri and Brinks 2008). But when the barriers to access are truly low, they can be an important part of a strategy to extend protection to many groups that are legally protected but marginalized in practice. In Colombia, for example, the Constitutional Court has acted on behalf of the internally displaced and the indigenous; in Costa Rica it has defended the rights of HIV positive people as well as of the homosexual community.

But for many communities that live far from the formal justice system, the best alternative will be to recognize informal legal systems and dispute resolution mechanisms, whether based on indigenous and customary laws or not. Either way, these must be systems that grant the local communities a great deal of control, that respond to their immediate needs and do not demand resources that are beyond their capabilities, and that resonate with widely held normative commitments. These systems raise thorny but not insuperable issues of coordination and congruence with the formal elements of a democratic rule of law. They have also produced mixed results in many instances. But in principle, they appear to solve many of the problems that are inherent in attempting to extend the rule of law to populations that are unprepared, unused and often unwilling to engage with formal, state-based legal institutions.

Again very briefly, given space constraints, I will review the challenges and advantages of informal legal arrangements. Several countries including Peru, Bolivia, Ecuador and Colombia have adopted informal justice systems in one form or another (Muñoz and Acevedo 2007; Faundez 2005; Van Cott 2002, 2006). The first, and possibly greatest, advantage is that locally governed legal systems are more likely to be perceived as impartial arbiters. Shapiro (1981) makes the acute observation that courts, as part of the

state, inevitably reflect and protect state interests.¹⁶ This is generally unproblematic to the extent that a community feels represented within that state so that the state's interests in some sense reflect the community's. But those who view the state as hostile to their interests, as many indigenous, afro-descendant and other marginalized groups do, have little reason to view the courts as anything but hostile as well. A local, informal, community-controlled dispute resolution mechanism is far more likely to be viewed as neutral, and thus to garner a greater degree of legitimacy. Without this, the legal system is unlikely to sustain the level of voluntary compliance needed to function at all, let alone without investing heavily in coercive resources.

Locally controlled informal legal systems have additional advantages. Compared to formal systems they are far less likely to demand resources that are simply not present in the community, such as knowledge of esoteric legal rules, professional lawyers and the cash to pay them, language proficiency and the ability to travel and invest time. They are more likely to adjust rights and remedies to local realities, valuing what the local community values and employing penalties that do not impose undue costs on the community. The tendency of many informal systems to use restitution and community service as punishments, for example, disciplines without removing an offender who may have to support a family. Such systems are accessible, not only physically, but because they are very low cost, do not require the intermediation of a lawyer, and conduct proceedings in the vernacular. Litigants can argue their own cases, in their own language, on their own terms. They are many times faster and more efficient than most courts. In short, they are

¹⁶ "State interests," here, are broadly conceived: the extension of state law across the national territory, the imposition of criminal law, the enforcement of those contracts that are sanctioned but not others, and so on. This does not mean, of course, that courts can never rule against the current government.

more likely to be trusted, accessible, efficient, and perceived as impartial than the state-based judiciary. As a result, they have the potential to be not merely a second-best solution to the absence or weakness of the state, but the optimal, agency-enhancing solution to resolve disputes that have very local characteristics.

Of course, they also raise concerns. They may exclude some members of the community both from their constitution and in their operation, they may simply reproduce local inequalities, they may apply rules that violate the constitution or discriminate against women, they may use forms of punishment that approach torture, they may create legal uncertainty and apply different rules in different locations (Faundez 2005). All of these are legitimate, indeed grave, concerns. But, first, we must recognize that the formal legal mechanisms have been just as often guilty of all these things, and continue to be guilty of many of them, and yet no one is suggesting we should do away with the formal legal system altogether. The solution, in both cases, is to improve their functioning so that it is consistent with a democratic legal order.

Moreover, second, there are possible solutions to all these problems. One solution has been to subject these parallel legal systems to formal oversight by the ordinary courts (Yrigoyen Fajardo 2002; Van Cott 2002, 2006). This has its own drawbacks. One is that the operators of the formal system tend to be hostile, often arresting the leaders of community justice systems on charges of kidnapping and the like, or at minimum disregarding their jurisdiction and decisions (see, e.g., Muñoz and Acevedo 2007; Yrigoyen Fajardo 2002). Yet another is that, for the communities in question, the state has been more often the source of neglect or outright violence than of benevolent and enlightened oversight. To subject

them once again to state oversight through the ordinary courts may not be the way to enhance their legal agency (Faundez 2005).

If the goal is to promote legal agency even within spaces of local and community autonomy, there are alternatives, two of which I will very briefly discuss here. One possibility is to keep customary law regimes fully local and autonomous, but to allow defendants, especially in criminal matters, to opt out of the informal system in favor of the formal legal system. Surveys suggest that many local people strongly prefer the customary system in any event, for its greater efficiency and because the penalties often do not require people to be removed from the community, or to lose their ability to support their families (Faundez 2005; Yrigoyen Fajardo 2002; Van Cott 2006). This does not remove all the problems, but at least for minor issues, it may suffice.

Note, however, that standard notions of due process and international agreements require at least one appellate instance. If the ordinary justice system seems suboptimal for this purpose, one could establish a parallel appellate body composed entirely of representatives of the informal legal system, or at least staffed with representatives from both systems, to serve as a sort of bridge to the constitution. An appellate instance with national jurisdiction could begin to generate some uniformity across the country. Some extraordinary recourse could further be taken, perhaps as a discretionary appeal or using a mechanism similar to the *recurso de amparo* or *tutela* (Oquendo 2006: ch.V), from that second instance to the constitutional court or other apex court, to police possible human rights violations and guard consistency with constitutional principles.¹⁷ The one caveat, of

¹⁷ The Constitutional Court of Colombia has some experience with this, has been broadly supportive of customary law (Van Cott 2006) and is a potential role model for other efforts in the area.

course, is that the more formal and layered the customary law arrangement becomes, the more it loses the advantages of informality. In addition, the operators of informal systems should receive some constitutional and human rights training. There is evidence to suggest that many would welcome this form of training (Faundez 2005: 204-05). When properly shaped, community based, informal justice arrangements can considerably enhance legal agency, extending the rule of law to underserved communities without requiring extensive and expensive expansions of state structures.

In summary, to promote the universality of the rule of law, we must bring the rule of law to the communities in question, not expect the communities to come to the law. Ways of doing this within the formal legal system include strengthening civil society organizations, lowering barriers to access to courts, creating strong and accessible constitutional courts with the power to enforce constitutional rights, changing procedural rules to benefit the poor (e.g., legalizing contingency fee agreements, permitting class actions, empowering NGOs to bring claims on behalf of disadvantaged groups, creating small claims courts with minimal formalities). But another way to do this might be to legalize, in the appropriate circumstances and with appropriate regulation, informal legal systems that are more community based.

Impunity for human rights violations: Of course, most often, human rights violations pit individuals against state agents, and in many instances these state agents have a distinct advantage within the formal legal system, leaving the victims without redress (Brinks 2008b). A host of institutional arrangements inside and outside the courts will be required if the courts are to respond effectively to these violations (*id*, pp. 247-58). Clearly, impunity for human rights violations rests in large part on the deficiencies of

formal legal structures. A solution will require improving the investigate capacity of courts and prosecutors, isolating them from pressures brought to bear by the police or other targets of investigation, and generating stronger incentives for a more effective response. Concrete proposals in this regard include creating special purpose prosecutors with independent investigative capacity, witness protection programs, civilian oversight institutions like the *Ouvidorias da Polícia* that exist in a number of Brazilian states, and the like.

But once again, not all the solutions require state agents. One of the ways to enhance claimants' power and control is to grant them the formal right to accompany the prosecution of a rights violation, as a "*querellante*," "*particular damnificado*," or "*asistente do promotor*" as in Argentina, Brazil and elsewhere (Brinks 2008b: 68-69). The principal drawback here is that the more a system relies on the private resources of the rights bearers, the more the results are likely to mirror socio-economic inequalities. Simply opening the door, therefore, is not enough. In addition, the state must step in to support claimants in their function as *querellantes* by funding legal representation and litigation, or by fostering the growth of a legal profession that can fulfill this function free of charge. In this regard, one of the most useful and inexpensive devices has been to legalize the contingency fee, allowing private lawyers with an affinity for these cases to earn a living representing even the very poor. Once again, this mechanism gives the claimant more control over his or her own claim, enhancing legal agency on the way to producing higher conviction rates.

Reforming the justice system

These last points bring us to the discussion of judicial reform. I discuss this separately because, to a greater or lesser extent, each of the previous recommendations rests on a well-functioning justice system. Sometimes courts intervene directly, but more often they provide the ultimate backstop, the implicit threat of intervention, that allows citizens to mobilize on behalf of rights, operating “in the shadow of the law” (Mnookin and Kornhauser 1979; Cooter et al. 1982; McCann 1994). For courts to effectively provide this function they must be, as Prillaman (2000) argues, impartial, efficient and accessible.¹⁸ Reform efforts must target these three areas.

Latin America is no stranger to judicial reform efforts, and while we have learned a great deal from previous attempts we are still far from having a clear-cut prescription for change. There is not enough space in this brief essay to catalogue, let alone review and critique, all the specific institutional changes that have been proposed, from oral proceedings and judicial training, to computerization, judicial restructuring, administrative reforms under ISO norms, access to justice proposals and procedural reforms. Instead, here I will briefly present what I take to be the ultimate goals of judicial reform, discuss some general lessons from successful and unsuccessful attempts to date, and identify some specific institutional arrangements that seem to have produced positive results. Any institutional suggestions must necessarily be tentative and partial, as similar institutions produce different outcomes depending on their social and political context, and different institutional solutions can lead to the same outcome.

¹⁸ Prillaman speaks of independence, rather than impartiality. While I prefer to speak of impartiality, as discussed below, I think his list captures much of what is needed in the judicial systems of Latin America.

As to the goals of justice reform, the first thing to note is that Latin American judicial reformers seem to be caught on the horns of a dilemma. On the one hand, there is a strong demand for something generally labeled “judicial independence.” There is a great deal of conceptual confusion regarding this term (Brinks 2005; Burbank and Friedman 2002), but it captures a very basic requirement for judicial institutions: the need for a neutral, impartial third party to resolve disputes (Shapiro 1981; Stone Sweet 1999). On the other hand, there is an equally strong demand for higher quality, more efficient, more accountable judicial institutions. It is hard to see how this second demand might be satisfied without increasing oversight of judicial decision-making and administration, a process that judges typically resist, arguing it erodes judicial independence. Judicial reformers must resolve this apparent tension between judicial accountability and judicial independence (see, Trebilcock and Daniels 2008: 59 [“in some obvious respects, the two ideals sit in direct tension”]).

One way to do so is to re-cast our understanding of judicial independence in terms of impartiality, not uncontrolled discretion (see Brinks 2005 for a more extended presentation of this argument). Unless we have unlimited trust in their wisdom, what we generally want from third party dispute resolvers is neutrality as to the parties in the dispute, not complete freedom to decide however they see fit. Indeed, every arrangement for triadic dispute resolution includes mechanisms of oversight, from clear and specific rules, to appellate structures, to disciplinary mechanisms for misconduct. The solution to the tension, then, is to seek mechanisms of control and oversight that do not impair the neutrality and impartiality of judges. What institutional design needs to avoid, if we accept this formulation, is the capture of those mechanisms of control by what I will for

convenience call a “faction:” an identifiable factional interest, whether it be a political party, a narrow social group, or a particular stratum of society. The principal way to accomplish this goal of neutrality is to increase and diversify participation in the mechanisms of control: “the balance of many partialities is the closest we can come to impartiality” (Holmes 2003: 50)

There are two principal ways in which political systems may control the courts: they can control judicial *preferences* through the appointment process, or judicial *decision making*, post-appointment.¹⁹ Many systems, prominently including that of the United States, closely control appointments to the bench, thus ensuring that only judges whose preferences are more or less in tune with dominant majority coalitions will make these important decisions (see, e.g., Dahl 1957). Other systems (examples are the electoral systems for judicial retention in American states, or the civil service models common in Latin America and continental Europe) use promotion, retention and discipline mechanisms to monitor judicial decision-making itself, post-appointment. In combination, this control over judicial preferences and judicial decision-making ensures that judges remain more or less “faithful servants of the regime” (Shapiro 1981: 32; see also Brinks 2005). The problem in Latin America, of course, has been the capture of these levers of control by strong executives and partisan interests (Bill Chavez 2004a; Larkins 1998).

¹⁹ A third way to control judicial decision making is to simply limit courts to matters that do not touch on important interests. But in a democracy today, at least, it is generally not acceptable to have important areas of public life set beyond all judicial and constitutional control.

The answer is not to eliminate these mechanisms of preferential and decisional control but to ensure that they are broadly representative.²⁰ This leads to some specific recommendations. The most promising efforts are those that are more, rather than less, inclusive in staffing these mechanisms of control. Greater civil society and multi-partisan participation in the appointment process and more inclusive bodies for promotion and discipline make it more difficult for any one party to control the courts. More transparency throughout and opportunities for public notice and comment expose politicians to public scrutiny and accountability. Requiring higher majorities for legislative approval of nominees prompts the appointment of more mainstream candidates. In general, opening up the process to multiple, competing interests will ensure that judicial candidates are not overtly partisan or unduly beholden to any one faction. The consequent tendency to deadlock can be addressed by providing some way to break an impasse (such as the Uruguayan system's default to a seniority-based Supreme Court appointment in the event of a deadlock in the legislature).

One of the principal mechanisms used in Latin America recently to increase both quality and independence is the judicial council, a mechanism with great potential that has frequently failed to live up to its promise. A majority of Latin American countries adopted this measure over the last several decades, with a dizzying diversity of designs and functions (Hammergren 2002). Probably the most immediate, and most predictable, effect of these efforts was simply to transfer much of the politics of judicial appointments from their original locus to the council itself. Still they have had some success, notably in freeing

²⁰ Many systems have attempted to maintain neutrality by isolating the judiciary from politics altogether, with poor results (Hilbink 2007; Hilbink 2003). A strict posture of apoliticism leads to courts that often defer unduly to executives, abdicating their responsibility to exercise constitutional control.

individual judges from political pressures (p. 20). As long as they remain inclusive and representative, and when properly staffed and supported, judicial councils can be valuable tools for improving judicial impartiality.

Councils have been less effective in improving the quality of the judiciary or of judicial administration (pp. 20-25). This is not necessarily a shortcoming inherent in the council itself, but rather a function of the lack of clear consensual criteria for judicial quality and performance (id.). But these criteria are difficult if not impossible to set in the abstract. The meaning of judicial quality is itself a political question, as witnessed by ongoing debates in the region between judges who wish to be technical operators of the law and those who call for more judicial engagement with social questions and social reality. Different political communities may well have very different conceptions of the ideal judge. For this reason, the original prescription stands: the goal should be more transparency and more broad-based participation, both in setting and enforcing standards of conduct for the judiciary, rather than trying to establish a norm that will hold across countries. Clearly, as Hamnergren concludes, judicial councils are not a panacea. But if designed with an eye to balanced and broad inclusion they can be one of a larger set of solutions that can contribute to improving judicial impartiality without sacrificing quality through accountability (see Hamnergren 2002; 2006 for additional suggestions for improvement).

The success of judicial reform, whatever its specific incarnation, rests critically on getting the politics right. In fact, the rule of law as a whole, at least in the way that I have defined it – as enhancing individual legal agency without regard for social privilege or political influence – necessarily devolves power away from central political actors. For this reason the first and most essential obstacle to overcome is the political one. This is true

whether the problem is the initial design of judicial institutions (Ginsburg 2003), their reform (Finkel 2004, 2005), or their staffing (Larkins 1998; Epstein et al. 2002) and eventual operation (Bill Chavez 2004b); or whether the goal is broader rule of law reforms (Trebilcock and Daniels 2008: 336).

Much of the literature suggests that a vibrant, competitive, democratic environment is an almost universal requirement for the effective reform and operation of judiciaries and attendant legal institutions. Although there are notable exceptions, it is not clear how sustainable those exceptions are over the long term. That is not something that is typically within the control of judicial reformers. But Trebilcock and Daniels usefully suggest that a focus on the politics of reform can help identify the places where pressure must be applied, groups that are more supportive of reform and thus must be strengthened, and ways to approach seemingly intractable opposition to effective reform. If political elites are unlikely to be supportive because none of the usual incentives are present, for example, then perhaps working to strengthen civil society organizations will be more fruitful than working directly with the government.

These same authors repeat and emphasize a point that others (Prillaman 2000; Brinks 2008b: ch. 9) have made before: the many parts of the justice system are intricately related and interdependent. Reform has little hope of actually improving the rule of law if it is narrowly targeted to a single institution out of the web of institutions that constitute the entire justice system. As Prillaman notes, the failure to focus, say, on independence and efficiency while improving access becomes self-defeating, as people's increasing experience with the courts simply exposes them to arbitrary, unfair and grossly inefficient judicial services (Prillaman 2000). Similarly, an extensive reform of criminal procedures that fails

to address, say, police investigative capacity and training becomes self-defeating, as better judicial processes are devoted to examining poorly prepared cases, coerced confessions, and unsolved mysteries (see Brinks 2008b for a discussion of how police misconduct can frustrate even relatively strong judicial institutions).

Trebilcock and Daniels catalogue the various elements that comprehensive rule of law reform should target. They include the judiciary, of course, but also the police, prosecutors, correctional institutions, legal education, the legal profession, and more. In their book they offer an extensive treatment of various reform initiatives targeting each of these components, the general experience and various lessons to be derived. It is neither necessary nor possible to repeat all that here. Suffice it to say that many observers agree that, in general, rule of law reform cannot be successful if it adopts a narrowly targeted, one-thing-at-a-time approach. In the worst case, attempting to strengthen the rights of a group in a narrowly targeted way can simply expose them to violence and retaliation (Brinks 2008b: 240-41, 252-53). Any reform must be attuned to the way in which other institutions feed into the one at issue, and into the effects this reform will have on other dynamics elsewhere.

But this can be a daunting task for governments struggling with many problems and limited resources – “just do everything at once” may not be feasible advice. Better than segmenting the legal system into its various constituent institutions, then, may be separating the legal landscape into its subnational units and addressing each unit, one at a time, in a vertically integrated way. Despite some criticisms (Trebilcock and Daniels 2008: 157-58) one of the most successful recent experiences with reform is that of Chile’s adoption of an entirely new criminal procedure regime (Bhansali and Biebesheimer 2006).

Chile's criminal procedure reform was integral in that it was top to bottom, including not only judges but also prosecutors, the police, public defenders, alternative sentencing options, alternative dispute resolution opportunities and more (Blanco et al. 2004). It was, however, gradual in that it was rolled out one judicial district at a time, using the experience gained in one district to introduce the reforms to other jurisdictions, and to train and strengthen personnel in each place (id.). The result has been a reduction in delays and the number of people being held pending trial (Bhansali and Biebesheimer 2006), more transparency, judges who are more directly in touch with the parties, and an improvement in due process guarantees (Blanco et al. 2004). In sum, perhaps the advice should be, "Do everything at once, but if necessary do it in a limited geographic and jurisdictional context."

Conclusion:

In summary, Latin American democracies continue to suffer from a host of often-interrelated deficiencies in the rule of law. Cataloguing them singly obscures the more profound observation that, for many people and many countries, the problem is better described as legal poverty and a consequent loss of legal agency. Even the problem of crime very often pits someone who has been denied legal agency in a host of ways against a victim who is in turn denied agency. Solving these deficiencies will require holistic, integrated approaches, expressly designed to address the resource disparities between the bearers of rights and those who owe them a duty. The ultimate goal is to grant all citizens full legal agency – the relatively infrequent denial of rights, prompt redress in the face of a violation, and the ability to effectively use legal means in the pursuit of all legitimate life objectives.

There are institutional solutions to the deficiencies, although not all the solutions need be state-based. State-based solutions include addressing the investigative and administrative capacity of legal actors, strengthening police forces and instituting community policing efforts, improving transparency in government and the monitoring capacity of the population as a whole, and creating a variety of legal channels for social groups to press claims through judicial or quasi-judicial (e.g., ombudsmen) avenues. Non-state efforts could include strengthening civil society groups, empowering local communities to run their own informal dispute resolution processes, creating economic and cultural opportunities for at risk youth, and broadening access to legal education. All the institutional reforms should be designed to address specific realities, to draw on the strengths and address the weaknesses of the institutional and social context.

But the problem with designing and implementing successful rule of law reform is more often a political one than a technical or resource one (Davis and Trebilcock 2001; Trebilcock and Daniels 2008). For this reason, one of the very first steps in any reform project will be to identify the likely willing supporters, and to evaluate how to create the political support necessary for successful and sustainable rule of law reform. The most successful legal reform efforts are built on the self-interest of those in power (Finkel 2004, 2005; Ginsburg 2003), with broad public participation and debate (Fundación para el Debido Proceso Legal 2002). There is a great deal of demand in the region for an effective response to crime and corruption, often at the expense of due process; there is perhaps less broad-based demand for extending the rule of law to the underprivileged. A comprehensive effort that meets the needs of diverse constituencies will enjoy more support than one that is narrowly tailored to a specific group's demands.

Moving from legal poverty to legal agency is no small task. More than a billion dollars have been poured into the effort, with limited, though noticeable, success. The region is littered with the bones of programs that were begun only to be abandoned, instituted only to be reversed by powerful interests, and stymied by their partial and overly narrow approach to the problem. A successful program will persuade those in power that it is in their best interests to strengthen the rule of law, it will address the specific circumstances of those the program is trying to reach, it will be comprehensive, and it will require long-term, sustained and consistent effort.

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