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Principles for Constitutions and Institutions in Promoting the Rule of Law

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Mills: Principles for Constitutions and Institutions in Promoting the Ru
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APPROACHES TO THE RULE OF LAW AND
JUDICIAL INDEPENDENCE**

**PRINCIPLES FOR CONSTITUTIONS AND INSTITUTIONS IN
PROMOTING THE RULE OF LAW**

*Jon Mills**

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I. INTRODUCTION

Establishing societies that respect the rule of law is an almost universally shared, but elusive, aspiration. Such a society has a political, judicial, and cultural infrastructure that supports a stable economic structure and protects personal freedoms. Five common principles support this infrastructure: 1) Acknowledgment of private property; 2) Domestic (national) protection of human rights; 3) Maintenance of a system of justice that effectively protects personal and individual rights; 4) Establishment of a governance system that is transparent, accountable, and legitimate; and 5) The overall presentation of a system that is accepted by the global community as legitimate and reliable. These principles represent a point of departure in examining the status of the rule of law in the Americas.

A state may establish these principles in varied ways but there are common paths. First, establishing self-government based on fair elections that select representatives who actually govern. Second, adoption of a binding governmental obligation or constitution, which protects and establishes rights. As a structure, the constitutional democracy protects the minority, supports the majority’s political views, and creates a stable tension that allows the evolution of policies over time.

In support of this evolution, a written constitution should protect the private sphere from majoritarianism, respect and enforce rights, solve problems of collective self action, ensure that duly elected representatives follow the will of the people, and be perceived as a legitimate functional instrument of governance. But written constitutions widely vary in their actual impact. While some constitutions are functional, controlling, and the basis for private and public action, some are aspirational and observed in the breach. While the United States has a relatively short constitution with a strong interpretive and authoritative role for the judiciary, some South American constitutions are lengthy and establish lofty principles with uncertain procedures and mechanisms for enforcement.

Our challenge is to establish the underpinning for a “constitutional democracy” that supports the above-mentioned five principles. In sum, a written basis for private property, human rights, an independent justice system, and legitimate democratic governance is a prerequisite but not a guarantee. The social structure and civil society must support the written

commitment. The commentary below describes how each of the five principles may be achieved in the Americas.

To a great degree, a just society depends upon judicial institutions, and for this reason, both constitutional revision and reform of the judiciary in particular have been key factors in the evolution towards the rule of law. This is especially true both for Americans and for Floridians. We in Florida have undergone many significant reforms of judicial institutions since the adoption of our present state constitution in 1968, as our state struggled to reform legal institutions and processes to serve a fast-growing and increasingly diverse population.¹

Rule of law development is a process that many have fostered, either as members of judicial or governmental bodies. Likewise, those who work with funding organizations such as the U.S. Agency for International Development (USAID) or the Inter-American Development Bank (IDB) have provided both resources and technical assistance to rule of law and judicial reform programs throughout the Americas. Similarly, we are delighted to have with us the director of the OAS-established Justice Center of the Americas, an institution that has already become a clearinghouse of information and technical assistance in this field. Many participants come with years of legal, academic, or professional experience, often in several countries, and have made contributions both in their research and teaching capacities. The expansion of civil society has also brought concerned citizens and nongovernmental organizations into the process as advocates and exponents of reform.

We can learn from the past: the various initiatives throughout the Americas provide examples for our study. While at the White House, Buddy MacKay, who currently teaches as an adjunct Professor at the Levin College of Law, surveyed every country in the Americas detailing existing programs relating to the rule of law. The vast array of experiments, initiatives, studies, and programs will help serve as a foundation for future options.

The statement of principles is made with the understanding that common policies may be applied across different cultures. We are aware enough to understand that particular governmental and judicial systems that work in one culture may not work in another. However, some

1. Important Florida reforms include: 1) court-ordered mediation to speed the resolution of citizen disputes; 2) restricted jurisdiction of the Florida Supreme Court, making intermediate appellate courts the normal final courts of review, with the Florida Supreme Court limited to cases of great importance and conflicts among appeals courts; 3) reforms allowing local referenda to introduce merit selection and retention of trial judges; and 4) changes to court funding to provide a more equitable burden-sharing between local governments and the state.

agreement on principles and goals will allow the pursuit of various avenues to reach those goals.

II. RECOGNITION OF PRIVATE PROPERTY RIGHTS AND ABILITY TO TRANSFER THESE RIGHTS

This characteristic requires not only the availability of secure legal status for property, but also mechanisms to allow for its lawful sale and exchange.² Commentators such as Hernando de Soto and Richard Posner have written about the need for security of title to property as a fundamental basis for economic development.³ The recognition of these property rights by judicial organs is an accompanying necessity, if there is to be sustainable development.

In Eastern Europe the fall of the Iron Curtain allowed a return of transferable private property and created a challenge in establishing and promoting an effective system that created individual rights where few had existed. Potential transitions in places such as Cuba to private property principles would use those lessons.⁴

2. See, e.g., Universal Declaration of Human Rights, art. 17, GA Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration] (providing for protection of individual property rights). Both the U.S. and Florida Constitutions provide protection for property rights, especially from confiscation by the state or its agencies. See U.S. CONST. amend. V; FLA. CONST. art. I, § 2 (recognizing the right of natural persons "to acquire, possess and protect property").

3. See HERNANDO DE SOTO, *THE OTHER PATH* 160 (1986); Hernando de Soto, *Protection of Property Rights and Civil Society*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 73-82 (Edmundo Jarquin & Fernando Carrillo eds., 1998) (discussing property title reforms in Peru); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 2-3 (1998).

4. See Jon Mills & Kern Alexander, *Resolving Property Claims in Post Socialist Cuba*, 27 GEO. J.L. & POL'Y INT'L BUS. 137 (1995). In the United States, title problems often exist in so-called brownfields and other abandoned properties within formerly industrialized urban neighborhoods. See COMMUNITY LEGAL RESOURCE, *CLEARING CLOUDED TITLE FOR THE REDEVELOPMENT OF URBAN LAND: A GUIDE FOR NONPROFIT ORGANIZATIONS* 2 (2003). Because of outstanding liens on property or confusion as to who owns the property in question, it remains unused and blighted. See *id.* Legal tools, such as eminent domain, as well as creative financing, are necessary to return this land to productive use and rehabilitate these neighborhoods. See J. Terrence Farris, *The Barriers to Using Urban Infill Development to Achieve Smart Growth*, 12 HOUSING POL'Y DEBATE 1, 14 (2001), available at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1201_farris.pdf (last visited Oct. 27, 2003).

III. CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS, AND ACTUAL RESPECT FOR THESE RIGHTS

In addition to property rights,⁵ the essential bundle of rights includes freedom of speech, freedom of religion, and equal protection of all citizens under the law.⁶ The existence of fundamental rights under a constitution, or a basic contract between the state and the citizenry, is a prerequisite, but so is the actual protection of guaranteed rights. Where enumerated rights are not enforced, or are selectively enforced, or are so written as to be literally unenforceable, this undermines faith in the applicability of the constitution.

This is not to say that a constitution should not contain aspirational language. Indeed, some evidence exists that the highlighting of fundamental rights in the constitution in itself encourages government organs to pay more attention to those rights.⁷ However, care should be taken in constitutional drafting or revision processes to couple these aspirations with attainable benchmarks that will allow reviewing courts to measure the state's success or failure in upholding constitutional guarantees.

The infrastructure and culture of a justice system that supports human rights is, of course, central to the meaningful existence of this second principle.⁸ The system itself is discussed below in principle number three. Protection of individual human rights must be designed to achieve the following:

- protection of minority interests from abuse by the majority or by government;
- equal protection of individuals preventing discrimination based on identity, including ethnicity, race, language, religion, sex, social or political roots, to name a few;

5. See Berta Esperanza Hernández-Truyol, *Property, Wealth, Inequality and Human Rights: A Formula for Reform*, 34 IND. L. REV. 1213 (2001).

6. See, e.g., Universal Declaration, *supra* note 2, *passim*; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted* by the Ninth International Conference of American States (1948); American Convention on Human Rights, art. 1, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 (1978) (obligation of all American countries to protect enumerated rights).

7. See, e.g., Linda Camp Keith, *Writing Constitutions that Protect Against Human Rights Abuse — How Important are Provisions for Judicial Independence and Judicial Review?*, Paper prepared for the 1999 Conference on the Scientific Study of Judicial Politics, Texas A&M University (Oct. 21-23, 1999) (on file with the author).

8. See generally BERTA ESPERANZA HERNÁNDEZ-TRUYOL, *MORAL IMPERIALISM, A CRITICAL ANTHOLOGY: HUMAN RIGHTS, GLOBALIZATION AND CULTURE* 353-69 (2002).

- freedom to participate in government, both in selection of leadership, as with the right to vote, and in policymaking, as well as by running for election;
- freedom of speech and association;
- right to individual identity and privacy from government intervention; and
- access to the justice system.

“Bill of rights” types of principles should be expressly stated. The recognition of those rights is a prerequisite to developing legitimacy and a culture that protects the individual. Among the goals of articulating such principles are: to define the limits of democratic institutions and the operations of government, to state in enforceable terms broadly held values, and to take the debate of some issues off the agenda. The next step is to provide the context, mechanism, and system to enforce those rights.

IV. ACCESS TO A RELIABLE JUSTICE SYSTEM

A system of justice must, at the threshold, support the principles cited above: private property rights and individual rights. In other words, to establish a state that abides by the rule of law, the standards for individual protections must not only exist but also have a reliable, accessible, and timely enforcement of those rights. I include in a justice system alternative means of dispute resolution.

A. *Availability of Justice*

This characteristic focuses on the practical ability of citizens to make use of dispute resolution mechanisms. It includes the requirement that the system be accessible, and the subsidiary requirement that it allow for movement of cases within the systems.⁹ As the saying goes, “Justice

9. See, e.g., Universal Declaration, *supra* note 2, art. 8 (providing “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”); see also *id.* arts. 10 & 11 (providing for speedy access to courts for those accused of crimes). By way of comparison, the Florida Constitution provides that, “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” FLA. CONST. art. 1, § 21. In the Quebec City Summit Action Plan, OAS leaders pledged to help foster access to justice in the Americas, stating that the American states would “[s]upport public and private initiatives and programs to educate people about their rights relating to access to justice, and promote measures that ensure prompt, equal, and universal access to justice.” THIRD SUMMIT OF THE AMERICAS, PLAN OF ACTION (2001) [hereinafter THIRD SUMMIT], available at http://www.ftaa-alca.org/ministerials/Quebec/plan_e.asp (last visited Oct. 27, 2003).

delayed is justice denied.”¹⁰ Timeliness is a widespread problem given the backlogs in many court systems; regional surveys indicate that citizens accused of crimes can wait up to five years for trial, and between half and three-quarters of those held in prisons in many countries have not yet been formally sentenced.¹¹

The use of the term dispute resolution is an attempt to paint with the broadest brush, and of course includes both the traditional court systems as well as the justices of the peace used both in many Latin American countries and in many American states.¹² Today, any examination of dispute resolution would also look to the incorporation of alternative dispute models, and their increasing recognition as a useful tool to both increase legal efficiency and citizen satisfaction by allowing for quicker resolution of citizen conflicts.¹³ Throughout the Americas, nations have implemented a variety of reforms and programs, some successful, some less successful. Each can teach useful lessons.

1. Traditional Court System

The availability of timely access to courts to an average citizen may also be a factor contributing to popular confidence in the judiciary, and thus indicative of the success of judicial reforms. Where resolution of disputes in courts is delayed, citizen dissatisfaction with the judiciary is likely to be significant.

The importance of a sound, technologically advanced infrastructure within the court system is undisputed. Lack of improvements in this area can significantly hamper the success of other forms of reforms within the

10. *Gohman v. City of St. Bernard*, 111 Ohio St. 726, 737 (1924).

11. See LAURIE COLE, ACCESS TO JUSTICE AND INDEPENDENCE OF THE JUDICIARY IN THE AMERICAS (FOCAL, Summit of the Americas Follow-Up Series, No. 1, 2002), at 17, available at http://www.focal.ca/images/pdf/summit_justice.pdf (last visited Sept. 3, 2003). Surveys in Venezuela and Argentina show that citizens accused of crimes wait an average of 4.5 years before trial. *Id.* Similarly, the Andean Commission of Jurists reports that, for the Andean nations of Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela, 43-72% of people in prison have not yet been sentenced. *Id.*

12. See MARIA DAKOLIAS, THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM 39-40 (World Bank Technical Paper No. 319, 1996) (discussing the role of both lay and legally trained justices of the peace). Florida eliminated the justice of the peace position in its judicial reform of 1972, but the office continues in other states.

13. See *id.* at 37-41 (examining the incorporation of ADR into national practice, including both voluntary court-annexed mediation or ADR system and as a private, contract-based system of dispute resolution).

judiciary.¹⁴ Filing fees which are excessive can also be a barrier to access for poor citizens.¹⁵

Another barrier is geographical distance. Not all political subdivisions in a country (provinces, etc.) have their own local courts. In some instances, aggrieved parties have to travel tens or hundreds of miles to get to the nearest court. This discourages resort to the judicial system, especially for citizens of rural communities.¹⁶

In some countries, case backlogs exist at all levels of the judiciary. In one notable example, the Brazilian Federal Supreme Court in 1997 faced an enormous backlog of some 30,000 cases.¹⁷ This was the unexpected result of the expansion of the Court's jurisdiction under the 1988 Constitution to include disputes over social, political, and economic rights, all of which were expressly regulated in the Constitution.¹⁸ Most notably, the Supreme Court under the 1988 Brazilian Constitution has no ability to deny the writ of certiorari, even in trivial cases. Before long, the severity of the problem became apparent and the government undertook to remedy it by introducing the Superior Court of Justice, which alongside the Supreme Court served as a court of last appeal. The Superior Court took over some of the jurisdictional prerogatives of the Supreme Court, thus somewhat reducing the latter's backlog.¹⁹ Another remedy would be the

14. See WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* 90 (2000) (discussing lack of centralized, computerized filing system in Brazil, which prompted simultaneous filing of cases in multiple courts to improve chances for resolution in at least one court). Argentina noticed early the importance of improvements in this area, and sought to modernize court operations through a nationwide system of records computerization, intended to facilitate case tracking and management. *Id.* at 120.

15. *Id.* at 91-92 (showing in Brazil, the access to court for an average citizen was significantly improved through provisions requiring that a party pay only its own court costs and fees).

16. Edgardo Buscaglia, *Obstacles in Judicial Reform in Latin America*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 15, 24-25 (Edmundo Jarquin & Fernando Carrillo eds., 1998). For example, peasants from the most remote rural regions in Peru must travel an average 53.1 kilometers (about 35 miles) to reach the nearest court. *Id.* at 25.

17. PRILLAMAN, *supra* note 14, at 91-92.

18. See BRAZILIAN C.F. art. 102 (describing the broad jurisdiction of the Federal Supreme Court).

19. See PRILLAMAN, *supra* note 14, at 82. In Florida, similar case backlogs brought about a constitutional change in 1980, which was intended to restrict the jurisdiction of the Florida Supreme Court and left district courts of appeal as the normal final appellate courts. See Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151, 1225-37 (1994).

appointment of new judges, and the establishment of new courts to lighten the load on existing institutions.²⁰

2. Implementing and Developing Alternative Dispute Resolution

International institutions have played an important role in introducing alternative dispute resolution (ADR) mechanisms in Latin America. Significant contributions in this area came from the World Bank, the IDB, the U.N. Development Programme, and the USAID.²¹

In Florida, court-annexed mediation has been made mandatory for most civil cases, and has expanded successfully into the areas of family practice. Mediation in Florida is directed by the Office of the Courts Administrator, under the supervision of the Florida Supreme Court. Over the past twenty-five years it has gained increasing acceptance and support among judges, lawyers, and the general public.

B. *Reliability of Justice*

The reliability of any dispute resolution forum is, of course, central to its ultimate utility and legitimacy. In other words, the system must function and be seen to function by citizens. Inherent in this reliability is the

20. In Brazil, in addition to the introduction of the Superior Court of Justice, which assisted the Brazilian Federal Supreme Court as a court of last appeal, other reforms aimed at improving timely resolution of disputes. One major step was the decentralization of the appeals process through the adoption of a nationwide system of regional federal appeals courts, rather than a centralized appeals court sitting in Brasilia. See PRILLAMAN, *supra* note 14, at 82. Similarly, in Argentina, funds were secured to hire more than 200 new judges in order to address the problem of backlogs. *Id.* at 120.

21. See generally Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 24-28 (Pilar Domingo & Rachel Sieder eds., 2002). The lack of success of ADR reforms in some countries can be explained rather simply — local bar associations in some countries refuse to refer cases to ADR for fear of losing attorneys' fees, which are usually made contingent on the filing of formal pleas in court, or on the number of court appearances. *Id.* at 28. ADR reforms implemented in Chile in the 1990s created a model for other Latin American countries. Noteworthy was the attempt to expand the arbitration of commercial disputes, which was widely applauded by foreign investors and local chambers of commerce, although initially its practical effects were not very impressive: in 1997, only 27 commercial disputes were sent to arbitration. PRILLAMAN, *supra* note 14, at 159 n.74. Similar results appeared in the field of worker-employer relations, where the newly instituted national labor directorate successfully employed mediation to resolve out-of-court some 75% of 4,000 labor disputes. See generally *id.* at 144-51; see also Michael Samway, *Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile*, 6 DUKE J. COMP. & INT'L L. 347-69 (1996) (discussing Chilean reforms in detail, and noting that the Chilean access to justice reforms, including legal clinics for the poor, had succeeded in resolving some 100,000 cases out of court).

independence which is so essential to the proper functioning of the judicial branch. Many countries throughout the Americas have taken steps to secure the tenure of the judiciary from political manipulation.

1. Selection Process

In many instances, the selection process for judicial nominees in countries throughout the Americas results not only in a necessary independence of the bench, but also tends to more extreme consequences, such as lack of accountability.²²

In the United States, the selection process for federal judges has become increasingly politicized due both to the power and independence of federal judges, and to the requirement that these important executive appointments receive the advice and consent of the U.S. Senate. In Florida, there is an attempt to de-politicize judicial appointments through the establishment of special local judicial appointment commissions composed of lawyers and non-lawyers, not all of whom are nominated by the Governor.²³ These commissions submit a list of three nominees to the Governor for each judicial vacancy from which one may be appointed.

Currently, Florida has a mixed system of judicial appointments under which appellate judges are appointed through the judicial nomination process, while most trial court judges are elected in nonpartisan elections.²⁴ As part of the 1998 Constitution revision, there is now also a possibility for

22. PRILLAMAN, *supra* note 14, at 34 n.47. The institution of strict tenure and seniority systems for judges in some Latin American countries has resulted in nepotism. For example, according to World Bank Reports, in Ecuador internal investigation within the judiciary revealed 450 cases of nepotism. *Id.* (citing WORLD BANK, ECUADOR: JUDICIAL SECTOR ASSESSMENT 14 (1994)) Many judges and court personnel were selected for office irrespective of any professional criteria, and they held offices even though there was no record of their professional performance. *Id.* In Brazil, one report revealed that the head of a labor court employed 60 relatives, at an annual cost of \$2 million, even though none of them had any formal legal or technical training, and had not taken the legally mandated entrance exams. *Id.* (citing *Brazil Labor Court Head Accused of Hiring Family*, REUTERS NEWS DISPATCH (Nov. 10, 1995)).

23. See FLA. CONST. art. V, § 11(d) & § 20(c)(5) (showing judicial nominating commissions consist of nine members, of whom three are attorneys appointed by the Florida Bar, three are non-lawyer appointees of the Governor, and three are non-lawyers selected by the other six commission members).

24. See FLA. CONST. art. V, § 10. Florida Supreme Court justices and appellate court judges have been selected by merit selection since 1976. See generally Joseph W. Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 STETSON L. REV. 1, 35 (1989). Vacancies to trial courts are also filled by merit selection. See FLA. CONST. art. V, § 11.

local referenda to opt for merit selection and retention of trial court judges.²⁵

2. Independence

Judicial independence encompasses the ability of a judge to rule free of either fear or favor in any given case.²⁶ Independence of the judiciary is vital in any system which aspires to the rule of law and the impartial administration of justice. Two possible threats to judicial independence include: (1) those challenging the integrity of judicial institutions, and (2) those that affect individual judges in specific decisions.²⁷

This first type of threat is frequent in many parts of the hemisphere where court systems may be politicized and judicial decisions may be subject to external pressures or control. In modern society, the dependence on other branches of government is always a question of degree, and for a healthy judiciary to exist there must be a certain balance between independence and accountability.

A problem in Latin America has traditionally been an inability to strike a balance between the judiciary's independence and its accountability.²⁸ Recent history provides some methods used to reduce judicial independence: limiting tenure, packing courts, purging court personnel, and creating special tribunals under the control of the executive branch.

a. Limiting Tenure

In Latin America, limiting tenure of judges is a consequence of the traditionally strong position of the executive (president); typically, the incoming president will have the authority to shape and staff his

25. See FLA. CONST. art. V, § 10(b). To date, voters have not opted for merit retention in any trial court jurisdiction.

26. See ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 1, cmt. v (1990).

27. See PRILLAMAN, *supra* note 14, at 16. Commentators distinguish several types of independence necessary to a successful judiciary. See DAKOLIAS, *supra* note 12, at 9-11. These include functional independence, under which decisions are made subject only to the authority of the laws; personal independence, under which judges individually enjoy adequate security in office; collective independence, under which judges participate in judicial administration; and internal independence, under which judges are not subject to informal interference by other judicial bodies, such as the Supreme Court. *Id.* In Quebec City in 2001, OAS leaders pledged to improve the independence of the hemisphere's judiciary, stating that they would "[e]ncourage measures to strengthen the independence of the judiciary, including transparent judicial selection, secure tenure on the bench, [and] appropriate standards of conduct and systems of accountability." THIRD SUMMIT, *supra* note 9.

28. PRILLAMAN, *supra* note 14, at 19.

bureaucracy (often including court personnel and judges).²⁹ In other cases, judges may be subject to undue legislative interference, both in matters of funding and in matters of supervision and control of judicial matters.³⁰ In certain countries, the constitution may recognize judicial independence in some provisions, only to weaken it in others.³¹

In Florida, trial judges must stand in nonpartisan elections every six years. Supreme court judges and appeals court judges are subject to voter approval in retention elections every six years.³²

b. Court Packing

Both military and civilian governments have resorted to this measure in order to create more pliable courts.³³

29. *Id.*

30. For example, under Paraguay's 1954 Constitution, judges formally enjoy broad powers, but the Constitution also permits the legislature to review all judicial appointments every five years. *Id.* Such a sweeping provision may inhibit judges' independence. Likewise, under El Salvador's 1966 Constitution, the president was allowed to seek and secure removal of a judge by a simple majority vote in the unicameral legislature. *Id.* at 19.

31. For example, under the Mexican Constitution of 1917, judges are nominally protected from outside influences by a guarantee of life tenure and irreducibility of salaries. *See* MEXICAN CONST. art. 94(1) (irreducibility of remuneration); *id.* art. 96 (a duly appointed Supreme Court judge "shall continue in office permanently"); *id.* art. 94(2) (impeachment of Supreme Court judges for "bad conduct"). In practice, however, these guarantees have proven meaningless, because federal judges are often transferred from one region of the country to another (a practice expressly authorized under Article 97(2) of the Mexican Constitution, and limited only by what is "convenient for better public service"), and the government has the authority to unilaterally transfer cases from one docket to another. *Id.* art. 97(2). Also, political realities in Mexico have contributed to the decrease in judges' independence: judgeships are often viewed as a stepping stone to more financially lucrative political careers, and so in many cases judges are reluctant to rule against the dominant political party. *See* PRILLAMAN, *supra* note 14, at 31 n.22 (citing Leonel Pereznieta Castro, *La Reforma Judicial*, EXAMEN 13-19 (Jan. 1995)).

32. *See* FLA. CONST. art. V, § 10. In the retention election, electors are simply asked, "Shall Justice (or Judge) (name of justice or judge) of the (name of the court) be retained in office?" *Id.* Florida judges normally may serve until their 70th year. *See* FLA. CONST. art. V, § 8.

33. Court packing is not a phenomenon known only to Latin America. Many Americans remember Franklin Delano Roosevelt's plan to increase the number of U.S. Supreme Court justices, after he found his New Deal programs frustrated in the courts. *See, e.g.,* Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 *FORDHAM L. REV.* 105 (1992). Similarly, in Argentina during the 1990s, the executive attempted to exert control over the Supreme Court by increasing the number of justices from five to nine, justifying this as a means of increasing the court's efficiency. *See* PRILLAMAN, *supra* note 14, at 19.

c. Court Purging

Short terms and insecure positions can work to frustrate judicial independence and make the judiciary much less willing to take unpopular decisions or stand up to the executive.³⁴

d. Judicial Corruption

This problem implicates many issues (legitimacy, efficiency), but has probably the most significant effect on judicial independence. Corruption is a threat to judicial independence because it creates a suspect relationship between the litigant's court and the litigant, which results in final decisions based on considerations other than proper application of legal principles.³⁵ Thus, it undermines the rule of law and the confidence in both state and judiciary. The dispute resolution system must, thus, guard its integrity. All the more if it is independent, internal reviews and grievance structures must be established to guarantee a level of accountability for the judicial branch of government, as well as for the actions of personnel within the dispute resolution system.³⁶

On the other hand, as a more positive sign, changes to tenure status are being implemented in many states to balance security of tenure with accountability.³⁷

34. PRILLAMAN, *supra* note 14, at 20 (noting that, a survey of Bolivian judges in 1991 and 1992 found that only 40% of judges held their office for more than 4 years, and only 10% for more than 10 years).

35. *Id.* at 25.

36. In this regard, recent impeachments of judges in several countries in Latin America on charges of corruption have not only enjoyed widespread support, but have also made imperative a consequent strengthening of the institutions to prevent this from happening in the future. See Felipe Sáez García, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L L. REV. 1267, 1270 (discussing the effect of these impeachments in Bolivia and Chile). Chile provided an object lesson in judicial accountability in 1993. Allegations of past abuse of office prompted President Aylwin to seek the impeachment of three justices of the Supreme Court. *Id.* Only one justice was eventually convicted by the Senate, but the psychological effects of the impeachment process itself were profound: for the first time in 125 years a Chilean judge was removed from office because of unprofessional conduct. *Id.* This was a clear signal that the Pinochet regime was truly over and that impunity of the judiciary for past abuses was at an end. *Id.* Thus, the general public was assured that even those who are meant to enforce the "rule of law" are also subject to the rule's limitations. See PRILLAMAN, *supra* note 14, at 143-45.

37. See, e.g., Jorge Correa Sutil, *Judicial Reforms in Latin America: Good News for the Underprivileged?*, in THE (UN) RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 260 n.15 (Juan E. Méndez et al. eds., 1999) (noting mixed results for reforms introduced in Costa Rica,

C. Role of Ombudsmen and Other Investigators of the Judicial System

Citizens should have faith that some part of the system is designed so as to protect individuals from abuse by government authority. The recent addition of an ombudsman, or *Defensor del Pueblo*, in many nations as a popular advocate and investigator into governmental abuses is an important reform measure in bringing to light governmental misconduct.³⁸ Likewise, public defenders and even prosecutors have an important role in defending basic rights. In Brazil, the autonomy guaranteed the *Ministério Público* has offered this branch an increasing role in the supervision of acts by executive agencies, and encouraged judicial review of alleged law violations by government entities.

D. Legal and Continuing Education

To support access to justice, there must be a system for training and educating lawyers and other components of the judicial system. A legitimate culture that supports the cited principles of individual property and individual rights must be sustained with continuous renewal through legal education. The legal education system in the Americas has strengths, but the potential for shared experience and cooperation is much larger. The system of legal education should also encompass continuing legal education for practitioners, judges, and prosecutors to maintain some level of competence for those on the bench and in practice.

Another important aspect of education is directed toward the general public, that is, a direct and specific effort to educate the public as to the value of the rule of law and the legal system. Public support defines legitimacy, and an intelligent effort to explain the benefits of the system to the general populace is of fundamental importance to maintaining legitimacy.

Honduras, Panama, Guatemala, Peru, Chile, Columbia, Paraguay, and Argentina); COLE, *supra* note 11, at 10-12 (providing a comparative discussion of tenure in supreme courts for fifteen countries in the Americas).

38. See generally MARC UNGER, *DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA* 36-37 (2000) (detailing the expanded use of ombudsmen in the 1990s and their use in investigating allegations of misconduct in the judiciary).

V. EXISTENCE OF A TRANSPARENT, ACCOUNTABLE AND LEGITIMATE SYSTEM OF GOVERNANCE

Property rights, personal rights, and a fair justice system can only survive if the structure of governance surrounding them is designed to accept and protect those principles. The overall governmental system must be legitimized through real democratic participation. Of course, the system includes authentic public participation through democratic processes. Participation extends beyond voting to participation in policy decision-making through public input. Voting procedures must facilitate participation and foster honest outcomes. The State of Florida provides an example of how inadequate voting procedures can damage an election process even in an advanced democracy.³⁹

Participation is made possible by transparent systems that are accessible to public view and susceptible to public comment. Open meetings and records are a hallmark of democracies and provide a means of public accountability.⁴⁰ The access to information and transparency implies the ability to act on that information. This type of participation necessarily includes protection of speech, dissent, and public action. Such actions must be protected under human rights provisions and protections.

Accountability in governance will include some internal checks on government actions to assure that the state itself is adhering to the rule of law it has established. What have been termed checks and balances in the U.S. Constitution are a form of accountability. The separation of powers among the legislative, judicial, and executive branches is a means of legitimizing the overall government. Similar checks may be provided through broad rights of standing to allow court challenges to government action.⁴¹

The overall structure must be designed to support all of the previously enumerated principles. Such a structure will support private property,

39. See, e.g., Jon L. Mills, *Florida on Trial: Federalism in the 2000 Presidential Election*, 13 STAN. L. & POL'Y REV. 83 (2002) (discussing causes and effects of the 2000 Florida election controversy).

40. See FLA. CONST. art. I, § 24 (guaranteeing a right to open records and meetings).

41. In Brazil and other Latin American states, the public civil action has become a potentially powerful tool by citizens and nongovernmental organizations against government conduct which contravenes the law. By giving broad standing for those attacking such violations, the law encourages citizens to participate in and use the courts for enforcement of laws against the state. See generally Paulo Roberto Pereira de Souza, *Da Impossibilidade de Utilização da Denúnciação da Lide na Ação Civil Pública*, 1998 REVISTA DE CIÊNCIAS JURÍDICAS 43; JOSÉ LÁZARO ALFRÉDO GUIMARÃES, AS AÇÕES COLETIVAS E AS LIMINARES CONTRA ATOS DO PODER PÚBLICO 43-60 (2d ed. 1993).

human rights, and a judicial system that upholds them. The government, beyond the judicial system, should also reflect the above characteristics of openness and accountability to allow it to achieve legitimacy, subject to the culture and history of the state.

VI. GLOBAL LEGITIMACY

Global legitimacy facilitates economic and social participation in the community. It seems logical that if a structure under the rule of law has received legitimacy within its own country, the next step is acceptance of that legitimacy beyond its borders. Again, I emphasize that legitimacy does not, or should not, reflect or require conformity.⁴² There are multiple approaches to achieve the previously cited principles.

In the era of globalization, no state or country is an island to itself. For business to be conducted, third parties must have some modicum of faith in the domestic system of a given country. A functioning and impartial dispute resolution system is not in itself sufficient for development. However, a nation's courts and other legally accepted dispute resolution mechanisms will either encourage or hinder development.⁴³

There has been a widespread legal cross-fertilization, with many countries looking to other nations for model laws and practices. An example of this is the widespread adoption of laws based on the U.S. Commercial Code, or European equivalents. Likewise, the adoption by many Latin American countries of oral proceedings over the past ten years is an effort to integrate an important aspect of the North American adversarial model into the inquisitorial model.⁴⁴ This is not to say that identical legal structures are required in every country. Legal structures and practices need to reflect and respect the society and culture in which they are to function, or they will not continue to function over time.

Driven in part by funders of judicial assistance programs, there have been moves recently to develop indicators or checklists of judicial performance. Linn Hammergren, who has long worked in the area of judicial reform for both the World Bank and USAID, released a proposed

42. See generally Michael Gordon, *Legal Cultures of Latin America and the United States: Conflict or Merger*, 59 FLA. L. REV. 115 (2003).

43. See Posner, *supra* note 3, at 3-4 (noting that it is often easier and more efficient to begin with rule-based reforms of a procedural nature before beginning with the large-scale creation of new administrative models).

44. See COLE, *supra* note 11, at 21-22 (noting that ten Latin American nations introduced oral proceedings during the period from 1992-99).

checklist that synthesizes and expands on prior indicators.⁴⁵ Hambergren's proposed indicators measure such major categories as institutional integrity, independence, and transparency/accountability (each of which includes specific criteria addressing 1) judicial selection; 2) tenure and judicial careers; 3) internal administration of courts; 4) resources and funding; 5) judicial processes and case management; and 6) the legal profession).⁴⁶ The use of such indicators allows for more than mere internal monitoring; it also establishes performance standards by which each country's dispute resolution system may be measured and compared with others.

VII. CONCLUSION

Establishing and fostering lawful democratic societies in the Americas is a widely held goal. All in the Americas will benefit when there are stable and just societies in our neighborhood of the world.

45. See LINN HAMBERGREN, *DIAGNOSING JUDICIAL PERFORMANCE: TOWARD A TOOL TO HELP GUIDE JUDICIAL REFORM PROGRAMS* 1-91 (1999).

46. *Id.*

