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The Reform of the Latin American Judiciary

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When we discuss constitutions and the rule of law and the independence of the judiciary, I must begin by saying that I come from a country where constitutions and the judiciary have been systematically manipulated by government and, in fact, the real exercise of constitutional rights and the independence of the judiciary is something that we are still fighting for. For an audience which is basically schooled in the common law, I would like to refer to the changes in the constitutions of Latin America. In general, since the 1980s and 1990s, all Latin American constitutions have changed. In general the model that we have used on the continent for these changes is the Spanish constitution of 1978. I am sure that in Brazil they also used the constitution of Portugal, but in the other countries, the Spanish constitution is conceived as the most democratic and the most advanced, because it has a clear system of protection of human rights, the civil liberties or fundamental rights, and also an interesting system for the judiciary and institutions concerning the judiciary. Certainly the Spanish constitution adopted the amparo, created in Mexico and developed in Colombia as tutela, and in general these Spanish constitutions had a lot of influence in our continent.

First of all, in all of our countries, we have the constitutional tribunal apart from the supreme court. The constitutional tribunal is a European creation by which a specific tribunal decides on the constitutionality of the laws. So the constitutional tribunal is capable of repealing a law passed by Congress when it is against the constitution. We have it in almost all of our countries in addition to the supreme court. In some cases the constitutional tribunal has also the power to decide on constitutional matters in individual cases and with regards to certiorari, there are constitutions which allocate this power to take up cases to the common tribunals to decide for the constitutional tribunal.

Second, the ombudsman. The ombudsman is not truly a new creation, it is an adaptation by the Spaniards of the Scandinavian institution. It is conceived in Spain not only as supervising the administration in order to redress the injustice produced by maladministration, but the ombudsman

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has also been given the task of protecting human rights. In general in Latin America, with different names, we have adopted the institution of the ombudsman or something similar.

As far as the judiciary is concerned, the Spaniards took up all the new institutions in Europe to provide for independence in the judiciary. Basically, the judiciary councils are independent organs with the task of selecting the judges and electing or nominating them. The system that you have in the United States in which the Justices of the Supreme Court are appointed by the executive and ratified by Congress has been abandoned in the modern European constitutions and is not generally in force in Latin America. The reason is that such a system leads to the politicization of the nominations of judges. Therefore, these judiciary councils are in place, which are normally composed of representatives from the judiciary, legislative, and executive, but which are totally independent. In some cases, like in Peru, they also represent civil society, and some members are elected by bar associations and universities. These judicial councils are entrusted with the task of guaranteeing an independent judiciary by systems of neutral selection. In addition to that are the judicial academies, which are the bodies which exist to give special education to judges.

All of this has occurred in Latin America since the 1980s and 1990s, together with the introduction of free market economy and the greater flexibility that this new economy requires. In all Latin American countries in general, judicial reforms have been promoted to adapt the judiciary to the challenges of a new market economy, to make the judiciary work efficiently and certainly to assure that the local population has access to the judiciary. All financial institutions, like the World Bank, the International Development Bank, UNDP, AID, even the German technical corporation, have been promoting modernization, judicial reforms, real codes with the goal of introducing a modern proceeding either in the civil or in the criminal area.

Together with these reforms, whose results are not necessarily as spectacular as they apparently are in Brazil, we are beginning something like a new era of reforms. We are rethinking the reforms and we are trying to see what things we are supposed to do. Most of the reforms of the judiciary have not necessarily led to a better judicial system and certainly the Center for Judicial Studies in Chile will have much more to say about this. In addition to judicial reforms, we have introduced alternative systems of dispute resolution – arbitration, and also mediation or conciliation. In some cases, like in Argentina or Peru, mediation in civil cases is mandatory but has very little success. In other cases, arbitration has developed quite significantly, particularly when dealing with foreign investment. I would say in Peru, my country, arbitration is working

relatively well. We have gone so far as to include in the legislation that every contract with the state and every purchase of goods and services in the state goes to arbitration. This is a modern jurisdictional function, but one which is now mandated by law.

Regarding big business and corporations and foreign investment, these investments are generally protected under multilateral treaties or bilateral treaties. We have abandoned the Calvo clause in Latin America, which is this diplomatic protection to the investors that we had. During the twentieth century, it was largely abandoned because under these multilateral treaties and bilateral treaties, countries are supposed to be taken to court directly by the investor. These cases are to be brought before a local court, or to the International Arbitration Tribunals, in particular the ICSID — International Center for the Settlement of Disputes — which is promoted by the World Bank. ICSID has been working for quite some time and it is very impressive. They have already decided 111 cases in which the arbitrators have, in many cases, given the reason for their decision to the investor. In other cases, fewer cases, they have given the reason to the state which was taken to court.

Another new development in Latin America, particularly in Peru, is the growing existence of the quasi-judiciary systems or, as we call them, administrative courts. Courts from the administration within the agencies actually perform a quite high judiciary role and I would say that if we look at various countries in the region, the most important litigation is taking place in these administrative courts and not necessarily in the judicial system. Although exceptional cases may go to the judicial system through amparo or through the constitutional remedies, these remedies are to remedy the wrongdoings of the administrative court and not to decide again or do not constitute an appeal to those cases.

Now the basic reforms that we are undertaking in Latin America are in the area of criminal procedures. Under the influence of the Germans who have the best criminal procedure, or at least have sold it to Latin America, we are introducing the accusatory system to supercede the inquisitive system that we inherited from the Spaniards. We are introducing the *ministerio publico*, which is the public prosecutor, together with the public defenders, and an oral proceeding in criminal cases. Almost all countries in Latin America have adopted this new procedure, significantly Guatemala, Venezuela, Ecuador, Bolivia, and Chile. The results have varied, however, because it is difficult to just change the code and the system and not change the culture. I am particularly impressed by the experience of Chile. They decided to create the national prosecutor, the *ministerio publico*, to introduce the new system, but did so progressively. They have organized the implementation of the code according to the

regions and incorporated it little by little. They are implementing this new system which actually calls for a new culture, rather than simply a new code.

On the different problems of judicial organization, and taking into account the experience in Latin America that we've had with these institutions developed from the constitution of Spain, there are some conclusions that are based on the work of the judicial center in Chile that one has to underline in a meeting like this. First of all, we are trying new codes and new constitutions – in Peru we are redrafting the constitution again, and soon we are going to have the thirteenth constitution in the history of our country. New constitutions, new codes, new models. We can have whatever we import, but if the political will is not present, then we are going to make little progress, just as we have made little progress with the reforms that were promoted by international organizations over the last 10 or 15 years. Certainly the way to make the political will real and tangible is not through speeches or discourses or nice intentions but budget. Our judiciaries need money, larger budgets. It was very clear from Brazil and from Guatemala and from Mexico how the courts need more money and that the most clear way of making sure that a political will exists is the way in which the judiciary is given not only enough money, but enough independence to handle their budgets.

Second, we may change codes and constitutions, but certainly we need a new culture in Latin America vis-a-vis the judiciary. The basic problem is the lack of trust that the judiciary has in vis-a-vis the local population. Ambassador Jett, who has been in my country for many years and who has played a significant role in the fight against dictatorship in Peru, mentioned how poorly the courts and the judiciary perform in the polls. I am afraid this is true in many countries of Latin America, with the fortunate exception of Brazil. But this is only part of the problem. We need to do something because it is not only a question of codes or of legal education, but a question of promoting greater trust in the judiciary. Certainly new systems like oral systems or perhaps alternative systems of dispute resolution are going to help. A new trend which is interesting in my country and in others in Latin America is the new role that the judges themselves and the prosecutors are playing in judicial reform. They are getting properly organized in associations or unions, not for their labor problems or dispute but to play a role in the reform of the judiciary. In taking the importance of these judges, in particular the new judges, I think that these reforms will be carried out and the independence of the judiciary is going to be significantly strengthened.

We have said very many things about the judiciary in our countries but let us make clear, it is not only the judiciary. Almost all branches of

government can be depicted as wrong and as awful as the judiciary. In general we are not witnessing only a crisis in the judiciary but probably a crisis of the state as it is conceived due to the many differences in terms of income distribution.

Finally, the main thing in judicial reform is the role of civil society. Certainly we say that we need more than codes and constitutions and a proper education for the judges and budgets. We also need a role for civil society and there is an ongoing discussion about how civil society is supposed to participate in judicial reform, in the contribution to strengthen the independence of the judiciary, and there are questions still to be asked. First of all, what is civil society for this purpose? In general, in many countries, civil societies are the human rights NGOs. I do not agree with that because I basically think that in addition to the human rights NGOs, civil society means the universities. The role of universities in judicial reform seems to be most important; therefore, this university in this bridging role with Latin America has a particular contribution to make in terms of catalyzing the participation of universities in judicial reform. In addition to that, bar associations in Latin America in general are more an association to promote benefits for the lawyers and not the guardians of the ethics in the profession, therefore, a new role for the bar associations would be significantly important for the strengthening of the judiciary as much as the growing participation of the judges and prosecutors themselves in their own associations, the free press, the investors, the entrepreneurs, and the private sector. In general the private sector are supposed to be the best users, the greatest users of the judiciary, but at least in my country, they pay very little attention to the independence and the functioning of the system. Therefore, I think that there are different avenues in terms of civil society and there are different roles that should be perceived for this second wave of reforms that is taking place in Latin America. I hope it is not going to be followed by a third wave in which we will keep on discussing how many failures have taken place.

