

# ASSESSING JUDICIAL REFORM IN LATIN AMERICA

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*AIDING DEMOCRACY ABROAD: THE LEARNING CURVE.* By Thomas Carothers. (Washington, D.C.: Carnegie Endowment for International Peace, 1999. Pp. 412. \$39.95 cloth, \$19.95 paper.)

*THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW.* By William C. Prillaman. (Westport, Conn.: Praeger, 2000. Pp. 198. \$64.50 cloth, \$22.50 paper.)

*LAS DECISIONES JUDICIALES EN GUATEMALA: UN ANALISIS DE SENTENCIAS EMITIDAS POR LOS TRIBUNALES.* By Luis Pásara. (Guatemala City: Misión de Verificación de las Naciones Unidas en Guatemala, 2000. Pp. 195.)

*PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR.* By Margaret Popkin. (University Park: Pennsylvania State University Press, 2000. Pp. 287. \$18.95 paper.)

*THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE.* By Linn A. Hammergren. (Boulder, Colo.: Westview, 1998. Pp. 342. \$75.00 cloth.)

*THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA.* Edited by Juan E. Méndez, Guillermo O'Donnell, and Paulo Sérgio Pinheiro. (Notre Dame, Ind.: University of Notre Dame Press, 1999. Pp. 357. \$48.00 cloth, \$28.00 paper.)

"A learned and uncorrupt judge  
is much worth in time of peace."  
Thomas Hobbes, *Leviathan*

Hobbes's admonition, offered long before democracy gained wide acceptance in the modern world, has lately come to be deeply appreciated by those interested in furthering the process of democratic consolidation in "third-wave democracies" (Becker 1999; Diamond 1999; Shedler, Diamond, and Plattner 1999). Human rights advocates, reform-minded politicians, international donor agencies, and academic researchers have all found common ground on this issue. An enduring consolidation of democracy will

require strengthening the rule of law (and public confidence in the rule of law), and the rule of law requires a greatly strengthened judicial system. Given the centrality of this issue in the current literature, it is remarkable how little attention scholars of Latin America paid to it in the past (Ratliff and Buscaglia 1997). Given the dearth of older literature on the topic, the books to be reviewed here represent pioneering efforts to explore a neglected arena of Latin American political life. As such, they should be widely welcomed and read. The authors of these six books bring an exceptional mix of practical hands-on experience and academic research to the task of evaluating judicial reform in Latin America.

As a preface to analyzing justice reform in Latin America, two points should be made. First, concern for stabilizing third-wave democracies has led an array of international financial institutions to invest generously in projects to foster "institutional strengthening." During the past decade, the World Bank, the Inter-American Development Bank (IDB), the European Union, the United Nations Development Program (UNDP), and the United States Agency for International Development (USAID) have invested tens of millions of dollars in projects seeking to modernize and strengthen justice systems (Rowat, Malik, and Dakolias 1995; Biebesheimer and Mejía 2000; Hammergren 1998). At the end of the 1990s, the IDB alone was starting or preparing to implement programs to facilitate judicial reform in seventeen Latin American countries (Jarquín and Carrillo 1998, vii). Consequently, unprecedented financial and technical resources are now available to support judicial and legal reform. Indeed, if money and knowledge alone were sufficient to remedy the historic weakness of the Latin American judiciary, one might reasonably expect the countries in the region to be making good headway on this front. Recent research reveals disappointing results thus far, however, which point to a key problem that will be discussed in this essay. The challenge of judicial and legal reform may be more political or cultural than technical. To the extent that is true, international donor beneficence can be stymied by the absence of a political will to reform in the recipient countries. The books reviewed here offer abundant but discouraging evidence on this theme.

The second issue concerns the enormous gap separating the ideal of a democratically institutionalized judicial system and the reality of judicial practice in Latin America. One prominent theorist has suggested that democratic consolidation must presuppose the existence of "a judicial system that has the constitutional and political autonomy to ensure a genuine rule of law." The measures of autonomy that Larry Diamond has outlined demonstrate the enormity of the challenge confronting Latin America. In his view, the independence and professionalism of the judiciary are only the beginning. Better judges must also be "served and petitioned by an infrastructure of institutions that compose an effective legal system: prosecutors, public defenders, police, investigators, legal aid programs, bar associations, law

schools." Better judges also require better laws to adjudicate, and they need to function in a societal context in which "citizens commit themselves to the rule of law . . ." (Diamond 1999, 111–12). In sum, good judging can only be expected when all elements of the justice system are reformed, when civil society actively supports reform, and when the political culture places a high value on a reformed judiciary. Diamond is no doubt portraying the long-term ideal rather than the optimal conditions that might be achieved in the near term. Nevertheless, he underscores the magnitude of the task, especially when political will is weak. If everything must be reformed, then democratizing justice will be a long-term project indeed. A crucial question is whether sufficient and sustainable support exists for such an endeavor among either the elites or the broader citizenries of Latin America.

### *Judicial Reform in Central America*

Five of the six books under review here give ample attention to El Salvador and Guatemala, countries whose experience vividly illustrates two themes. First, they demonstrate how profoundly difficult it is to achieve meaningful justice reform under wartime conditions, when civilian authority is weakened by the militarization of politics. Second, they show the inherent limitations of reform efforts that depend more heavily on the resources and enthusiasm of external actors than on domestic proponents of reform. Margaret Popkin's *Peace without Justice: Obstacles to Building the Rule of Law in El Salvador* is narrower in scope than some of the other works but can serve as a useful reference point for comparison. She pursues the two themes of human rights and judicial reform, which she weaves together in a compelling analysis of two decades of efforts at reform in El Salvador. Her analysis is divided between the experience of the 1980s before the Peace Accords, when reform was carried out under U.S. auspices, and the experience after the accords in which the United Nations played a vital role.

A lawyer with years of experience in human rights work in El Salvador, Popkin points out that the Salvadoran civil war, complicated by heavy U.S. involvement, brought an unwelcome but illuminating spotlight to bear on the failures of the national justice system. As state violence ran rampant from the late 1970s to the late 1980s, judicial authorities proved utterly incapable of defending even the most basic human rights. Nor did direct pressure from the United States succeed in kick-starting meaningful reform.

Why was the Salvadoran justice system unable to defend human rights? Three points made in Popkin's complex answer can be cited. First, during much of this period, states of emergency suspended the right of habeas corpus and defined political crimes so broadly that the government had open-ended authority to arrest citizens (Human Rights Watch 1991). El Salvador's highly politicized and subservient Supreme Court approved these

laws, which made a mockery of due process of law (pp. 36–39). Second, the Constitution of 1983 authorized the armed forces, through “auxiliary bodies for the administration of justice,” to carry out criminal investigations (p. 18). Salvadoran military authorities assumed control over not only criminal investigations but also the operations of courts more generally. Such control rendered the judiciary a passive instrument of state repression instead of a guardian of the rule of law and guaranteed the impunity of those who violated human rights. Third, military control of judicial functions, which served the interest of state repression, was reinforced by the absence of judicial independence, that is, by the politicization of the judiciary. Supreme Court justices were elected for short terms by the legislature from lists submitted by the president. The Constitution of 1983 made these terms coincide with that of the president who nominated the justices. The political vulnerability of the Supreme Court was then transmitted throughout the entire judiciary by a highly vertical system of authority through which the Supreme Court controlled the careers of all judges in lower courts (p. 19).

Under these conditions, human rights were violated in El Salvador on an appalling scale during the 1980s with near complete impunity, much as they were in Guatemala (Jonas 1991). As Popkin points out in *Peace without Justice*, the “only politically motivated killings investigated and prosecuted during the 1980s were those in which U.S. citizens were victims” (p. 47). Even these cases, despite intense U.S. pressure to secure convictions, demonstrated the depth of military impunity and the weakness of the justice system. In the face of such impotence, the United States undertook nonetheless to promote judicial reform in El Salvador. Between 1984 and 1989, USAID spent 5 million dollars on four separate projects aimed at reforming criminal law and improving judicial performance. These efforts in El Salvador actually launched a new generation of Administration of Justice (AOJ) programs, which “emerged as the largest set of democracy assistance projects in Latin America during the 1980s . . .” (p. 59). In El Salvador, however, these programs were systematically undermined by the Salvadoran partners on whom USAID relied, revealing the absence of domestic political will and the futility of assuming that the problems were technical rather than political. Popkin’s conclusion is harsh but accurate: “Ignorant of the workings of the legal system and stubborn in their refusal to admit that their chosen counterparts might have greater reason to maintain the status quo than to change it, U.S. officials repeatedly allied themselves with sectors indifferent or opposed to reform” (p. 71). The unfortunate consequence was that when the peace process opened the possibility of more effective reform efforts in the early 1990s, mutual suspicions between U.S. officials and Salvadorans interested in reform prevented a prompt collaboration, to which USAID’s earlier experience might have contributed useful lessons (p. 77).

When UN-brokered peace negotiations ended El Salvador’s civil war, no change of government occurred like those in the Southern Cone

countries. Hence support within the government for institutional reform was less evident than in Argentina or Chile in the early stages of democratic transition. Although negotiators for the Frente Farabundo Martí de Liberación Nacional (FMLN) gave rhetorical support for judicial reform, it was neither their highest priority nor an area in which they had expertise. The Salvadoran government exhibited little interest in punishing human rights violators or in pursuing judicial reforms that might alter the balance of power in the country. Thus an accounting of the human rights violations of the 1980s was left to the Truth Commission (composed of non-Salvadorans), and the challenge of promoting judicial and other reforms of the justice system fell to the United Nations (Kritz 1995).

Popkin makes a convincing argument that the unique opportunity afforded to the Misión de Observadores de las Naciones Unidas en El Salvador (ONUSAL) to push the reform effort forward was largely lost. The Salvadoran government showed little interest in the UN programs, embracing instead the so-called Judicial Reform II (JR II) program, signed with USAID in September 1992. JR II allocated 15 million dollars toward an ambitious reform agenda that focused on improving judicial administration and achieving greater respect for due process of law in the criminal justice system (p. 199). These programs produced disappointing results, however, due to stiff resistance within the judicial sector and among Salvadoran lawmakers, and not enough attention was paid to building domestic political support for the process. The Supreme Court appointed before the Peace Accords bitterly resisted reform efforts. When a new court was elected in June 1994, prospects for the reform effort improved.

For most of the 1990s, El Salvador witnessed concerted efforts to achieve, under the imprimatur of the Peace Accords, an effective and far-reaching judicial reform. The peace process, spurred greatly by the reports of the Truth Commission and the Ad Hoc Commission, led to a notable diminution of military influence over civilian institutions, including the courts. What remained was the glaring need to foster professionalism within the judiciary and strengthen its autonomy, while attending to the extensive reforms needed in the criminal justice system. Popkin's thorough review in *Peace without Justice* of El Salvador's meager success in regard to these goals is essential reading for anyone seriously interested in the difficulties that confront building a rule of law in Latin American countries.

Reformers in El Salvador emphasized the importance of promoting judicial independence by diminishing the centralized authority that existed within the judicial branch. The favored method was to transfer much of the authority of the Supreme Court to govern the judiciary to the Consejo Nacional de la Judicatura (CNJ), an ineffective body subordinated to the Supreme Court since its creation in 1983. But despite support from prominent members of the Salvadoran legal community and ONUSAL's emphasis on its importance, two consecutive legislatures failed to pass measures that would autho-

size it (p. 206). Instead, the Assembly tinkered with the structure and functions of the CNJ, passing three different CNJ laws over a ten-year period and making little effort to draw on the experience of other countries. Although the legislature raised the salaries of judges, the CNJ was slow to take over the task of training judges or to coordinate with law schools. Popkin points out that at this critical juncture (1993 to 1997), no new training programs were initiated in Salvadoran law schools, despite the fact that ONUSAL experts “were appalled by the professional level of judges” and “found many judges unable to analyze cases and apply relevant law, unfamiliar with human rights norms and, to their dismay, provisions of the Salvadoran constitution” (p. 214).

Given El Salvador’s abysmal record on human rights during the war, reform of the criminal justice system was a top priority of institution building after the Peace Accords. USAID assisted the Justice Ministry in developing new legislation, which was finally passed by the Assembly in late 1996 and early 1997, going into effect in April 1998 (p. 223). According to Popkin, the “new codes provided the framework for a modern criminal system designed to ensure that criminal justice would be independent, speedy, transparent, and respectful of due process guarantees . . .” (p. 237). On paper, they were excellent laws. They restricted pretrial detention, reformed the use of extrajudicial confessions, substituted oral for written procedures, and separated the instruction and sentencing phases of the judicial process. In practice, however, the effectiveness of the new laws was undercut from the outset. The response in Salvadoran political circles reflected the divergent priorities that separated Salvadoran lawmakers from international experts. The Assembly took years to pass these laws without giving them careful scrutiny to anticipate problems of implementation, especially the need to support such laws with improved criminal investigation. Meanwhile, the same Assembly also passed emergency anti-crime legislation in 1995 that “flatly contradicted the *garantista* precepts of the Proposed Criminal Procedure Code” (p. 236). Moreover, key actors like the Policia Nacional Civil (PNC) and the Ministerio de Seguridad Pública took no interest in the reform legislation until it was passed. At that point, these actors criticized the new laws vehemently and blamed them for the country’s spiraling crime wave (pp. 236–27).

*Peace without Justice* emphasizes the prominent role that judicial reform has come to play in the agendas of negotiated transitions as well as the impressive financial investment made in the judicial sector. Popkin acknowledges the success of some essential elements of reform, including a guaranteed budget for the judiciary, an enhanced role for the Consejo Nacional de la Judicatura in the tasks of judicial governance, and improved training of judges. But a critical weakness of the reform effort was the failure to develop “a broad national consensus” (p. 251) or to win the support of members of the judiciary. As a result, deeply entrenched attitudes and



practices persisted, and at the turn of the century, the troubling question was how sustainable the reform effort would be if international support began to lag.

That question has long preoccupied Thomas Carothers. His new book, *Aiding Democracy Abroad: The Learning Curve*, analyzes U.S. efforts to assist democracies during the third wave. Carothers combines insights gained from direct experience with promoting democracy and careful academic analysis. His study provides a superb overview of what he calls the “core strategy” of U.S. democracy assistance. It consists of three complementary elements: elections, state institutions, and civil society. *Aiding Democracy Abroad* is anchored in case studies of Guatemala, Nepal, Zambia, and Romania. My review will highlight Carothers’s discussion of promoting the rule of law in Guatemala.

Notwithstanding the often overblown rhetoric and inconsistent application of U.S. assistance for democracies throughout the twentieth century, Carothers believes that the democracy aid of the 1990s “is not simply old-style U.S. political interventionism revisited.” Although the U.S. model of democracy has continued to be “America-specific” and “idealized” (p. 97), Carothers is persuaded that “democracy promotion efforts . . . do affect the political evolution of other countries” (p. 64). How much and what kind of effect have such efforts had in promoting the rule of law in Guatemala? To answer this question, one must again consider the context in which reform is being attempted. The parallels with El Salvador are striking. In the early 1980s, the United States sought to strengthen and democratize elections in Guatemala while assisting the military in fighting a counterinsurgency war. At that time, Carothers concludes, the Guatemalan military was “the worst violator of human rights in the Western Hemisphere” (p. 67). As long as the war continued, even the return of formal civilian rule in 1985 did not alter the balance of power in a political system in which the armed forces were an autonomous and preeminent institution: “Civilians would be allowed to rule the government; the military would continue to run the country” (p. 71). Although this situation prevailed throughout the 1980s, a gradual but important shift began to occur in the 1990s (Jonas 2000). A crucial turning point emerged in 1993, when the so-called Serranazo failed. President Jorge Serrano was prevented by concerted opposition in civil society, the restraint of the armed forces, and U.S. pressure from carrying out an “*autogolpe*” like that of Alberto Fujimori in Peru. This turn of events galvanized the peace process, which then opened the way for institution building, including judicial reform.

Carothers makes a useful distinction in *Aiding Democracy Abroad* between strengthening the administration of justice and promoting the rule of law. A characteristic weakness of U.S. democracy assistance has been the facile assumption that strengthening the administration of justice will necessarily lead to the rule of law. What is crucial to establishing the rule of law,

Carothers argues, is to subordinate political power (including the political power exercised by the armed forces) to law (pp. 101, 164). Application of the U.S. model of democracy assistance has failed to take sufficient account of the actual distribution of power in a country. The failure of Guatemala's justice system was approached as if it were a function of inefficiency. Reform focused on court administration, training of judges, equipment for courtrooms, and similar features designed to facilitate case management. Carothers refers to this agenda as "the standard menu" of democracy assistance (p. 168). The strategy "disconnected" reform initiatives from the social milieu, the "structures of power," and the "loyalties and traditions" that characterized the recipient country. This strategy also led aid providers not to ask "why the judiciary is in a lamentable state, whose interests its weakness serves, and whose interests would be threatened or bolstered by reforms. . . . [As a result,] the assistance may temporarily alleviate some of the symptoms, but the underlying systemic pathologies remain" (p. 101).

Carothers found the Guatemalan experience similar to that of the other countries he studied. It is also comparable with the experience of El Salvador. The first wave of judicial reform in the 1980s, although amply supported by USAID funding, "came to grief over the lack of local support for reform and the powerful resistance to reform within the targeted institutions" (p. 172). As in El Salvador, although the government yielded to USAID pressure and adopted a new code of criminal procedure, it made "few preparations to persuade resistant prosecutors and judges to implement its new requirements for defendants' rights" (p. 172). Yet the Guatemalan Peace Accords, which made democratizing and strengthening state institutions a central task, yielded some positive developments in the second half of the 1990s. The U.S. approach was reconfigured to synthesize top-down and bottom-up strategies by placing greater emphasis on cultivating and strengthening stakeholders in civil society. The sustainability of reform may well depend on the success of this strategy, although it is too early to judge the effects. Carothers concludes, "Aid for judicial reform is finally starting, after almost fifteen years, to gain some traction," as in small improvements in the structures of criminal justice, passage of a new judicial career law, and new judicial training programs (p. 315). But his larger conclusions on Guatemala are pessimistic. By and large, the judiciary and other state institutions have "remained citadels of corruption, incompetence and inefficiency throughout the [reform] process" (p. 81). Thus "the troubled state of the judiciary has not substantially improved and the rule-of-law climate in the country is considered one of the weakest links in the transition" (p. 316).

Corroboration of Carothers's pessimistic assessment of judicial reform in Guatemala is provided by Luis Pásara in *Las decisiones judiciales en Guatemala: Un análisis de sentencias emitidas por los tribunales*. A scholar of judicial institutions and an international expert working with the Misión de



Verificación de las Naciones Unidas en Guatemala (MINUGUA), Pásara directed a UN-funded study carried out through Guatemala's Escuela de Estudios Judiciales (EEJ). The new book follows up on an earlier study in which an EEJ research team surveyed personnel in the justice system in an attempt to develop a profile of Guatemalan judges (p. 15). That profile revealed poor legal training, appointments based on nepotism and political favoritism, subordination throughout the judicial hierarchy, formalistic decision making, and a propensity to delegate responsibility. *Las decisiones judiciales* addresses the quality of judicial reasoning used by Guatemalan judges. Pásara looked at how judges used evidence to reach decisions and how they interpreted relevant law (p. 19). His study is based on a sample of almost five hundred cases, 55 percent of them criminal cases and the rest civil cases. Pásara's analysis of judicial decision making in criminal cases complements intriguingly the discussions presented in *The (Un)Rule of Law and the Underprivileged in Latin America*, which focus on the ways that the justice system affects the poor.

Guatemalan law specifies that decisions and sentences handed down from the bench must identify "the facts that have been subject to proof" and also record "which of the facts under discussion are judged to be proven" (p. 165). Pásara found that in criminal cases, the use of evidence was arbitrary and inconsistent at best. Inadequate use of evidence tended to undermine the quality of judicial reasoning. Such deficiencies afflicted cases in which the accused was convicted as well as those in which the accused was absolved. Pásara reviews a number of murder cases in which the accused was found guilty on the basis of witness testimony, but without any use of forensic evidence (a murder weapon, for example) and without establishing any motive for the crime (p. 91). In other cases, a guilty verdict was rendered solely on the basis of a police report that made no specific reference to any evidence gathered. In one such case, two men stood accused of homicide. The police report asserted the guilt of one on the basis that he had been arrested on suspicion of murder on prior occasions, and the innocence of the other on the grounds that he had never been detained before. The trial judge rendered a verdict based on the police report but with no mention of the specific evidentiary findings by police that may have justified the verdict (pp. 94–95).

Criminal cases ending in not guilty verdicts may have been even more common. A typical feature of such cases was conflicting testimony. Rather than pursue an investigation of the facts to determine which testimony was the more credible, the judge would conclude that, in essence, conflicting testimonies canceled one another out. The case would be dismissed for "lack of proof." Pásara discovered a consistent pattern in which "there is no doubt that a criminal act has been committed; nevertheless, due to lack of investigation no proof is found against the defendant. The resulting acquittal is synonymous with impunity" (pp. 97–98). Pásara found this

problem of “judicial passivity” to be widespread in Guatemala at all levels of the judiciary (p. 117). Once more, the gap between law and practice is revealed. The new Código Proceso Penal, a key achievement of Guatemalan reformers, gives judges ample authority to seek corroborating evidence in criminal cases, but many seem disinclined to use it.

Because cases are often disposed on the basis of incomplete evidence, the legal reasoning is also weak. One disturbing pattern that Pásara discerned in *Las decisiones judiciales en Guatemala* was the tendency of judges to discount testimony from the victim or any relatives or co-workers of the victim in criminal cases. One man accused of aggravated robbery was arrested in possession of the stolen goods. But the testimony of three store employees who witnessed the robbery and identified the thief was thrown out because the judge ruled that the employees had a conflict of interest as employees. Thus their testimony was discounted, and the accused was released for lack of evidence (p. 103). Numerous other examples are presented in which judges dismissed a victim’s testimony because the victim was presumed to have “a direct interest” in the outcome of the trial (pp. 104–8). Absent from all these decisions is any clear legal basis for ruling out the testimony of victims and persons related to them.<sup>1</sup> Pásara concludes that to dismiss testimony on the presumption that being victimized makes one an unreliable witness “not only lacks a basis in law but also is illogical” (p. 109). This pattern of judicial behavior shows that in criminal cases, Guatemalan judges tend to put the burden of proof on the victims of crime and then raise serious obstacles to meeting that burden of proof. It is hardly surprising, therefore, that when Donald Jackson and I surveyed public opinion in Guatemala and El Salvador, we found exceedingly low levels of trust and deep cynicism toward the institutions of the justice system.<sup>2</sup>

Although certain patterns, such as the strong tendency “to deny the value of the testimony offered by the victim, his family, friends or co-workers” (p. 168), were especially pronounced in criminal cases, other patterns of “interpretive error” transcended categories of law. Judges generally were prone to treat each piece of evidence involved in a case discretely, rather than to pull the various pieces of evidence together to form a complete picture of the case. The common result was a conclusion that insufficient proof existed

1. The one question that might be raised is how representative such cases are in Pásara’s sample, which is based on 152 criminal cases. His methodology is put to imaginative use to examine a hitherto unexplored area. One hopes that other researchers will replicate these efforts and apply them to broader samples of cases to determine that Pásara’s findings are not idiosyncratic but indeed reflect a general pattern.

2. Jackson and I carried out national surveys of public opinion in El Salvador in August 1996 and in Guatemala in September 1997. Those surveys were followed up with Focus Group surveys in El Salvador in September 1999 and Guatemala in June 1999. The results for Guatemala will be published in a forthcoming article. For the Salvadoran results, see Jackson, Dodson, and O’Shaughnessy (1999).

to reach a verdict. Consequently, such decisions also lacked “legal analysis that establishes the probative capacity of the totality of proofs available.” Pásara found that while this pattern was “extremely grave” among justices of the peace, it was serious at all levels in family and criminal law (p. 170). Meanwhile, when probative errors occurred at the level of the justice of the peace, they almost always involved ignoring evidence that a crime had been committed (leading to dismissals) or, in the case of convictions, giving decisive weight to police testimony. In either case, the pattern of judicial decision making seems to reflect the strong persistence of the authoritarianism that historically typified state institutions in Guatemala. Pásara’s final conclusion will discourage those who wish to see the judiciary become a more relevant institution in a democratic state. In his opinion, the Guatemalan “judge does not seem to understand his function to be that of seeking the best solution possible to each conflict within the existing legal order, but rather that of finding the legal recourse that will excuse him from providing that solution” (p. 178).

The most recent report of the UN Secretary-General illustrates how difficult it is for international reformers to overcome such deficiencies in the absence of cooperation from the national elite. The July 2000 report noted that a five-year plan for strengthening the justice system in Guatemala had been adopted with broad participation from the judiciary and civil society. A new Career Judicial Service Council had been elected, “getting the process of creating a career judicial service off to a good start.”<sup>3</sup> But the implementing regulations of the Career Judicial Service Act limit judicial independence by making it a misdemeanor for judges to render opinions that alter precedents they have already set! Such enabling provisions of the law seem designed to perpetuate rather than remedy judicial passivity.

### *A South American Example: Justice Reform in Peru*

Pásara’s painstaking examination of inadequate and arbitrary judicial decision making in Guatemala brings into sharp relief a single facet of the broad picture. Linn Hammergren’s *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* casts the analytical net much wider. Based on her years of experience working on USAID administration of justice projects in Latin America, Hammergren looks critically at repeated efforts to reform the justice sector in Peru.

The centerpiece of *The Politics of Justice and Justice Reform* is her analysis of justice reform under the authoritarian regime of Alberto Fujimori, who has been widely criticized for politicizing the reform process and pursuing radical innovations. Hammergren, however, views Fujimori’s drive to change

3. “United Nations Verification Mission in Guatemala: Report of the Secretary-General,” A/55/175, 26 July 2000, in-house report, Secretary-General, New York, p. 12.

the justice sector not as a break with the past but rather as a sign of continuity with some thirty years of largely frustrated efforts to reform the sector. Furthermore, she insists that the crisis of the justice system, which the Fujimori regime tried to address, was symptomatic of a broader “devaluation of institutional legitimacy” throughout the Peruvian political system. Explanations focusing on the impact of guerrilla insurgency or drug trafficking underestimated the public’s growing rejection of institutions that “survived for centuries on an inegalitarian, exclusionary logic that protected the privileges of an elite few and either ignored, patronized or exploited the dispossessed masses” (p. 44).

The radically reformist military government that seized power in Peru in 1968 sought to restructure the judicial system to prevent the judiciary from blocking its programs of economic and agrarian transformation. The government of General Juan Velasco moved swiftly. It replaced the entire Supreme Court, created the Consejo Nacional de Justicia (CNJ) to select trial judges, and introduced a separate agrarian court system. These actions were justified on the grounds that the Peruvian courts were corrupt and lacked independence (p. 143). But what the regime actually sought was not a real reform of the justice system but an ideologically sympathetic judiciary. By 1975 they had replaced 504 out of 643 lower-level judges (p. 144). The executive branch, by working through the CNJ (which it controlled), broke with tradition and bypassed the judicial career ladder in making many appointments. In short, the military government overtly politicized judicial appointments, a practice to be repeated by succeeding governments. Hammergren concludes, “The military’s policies escalated and aggravated trends that had begun decades earlier, leaving in their wake a justice system bereft of leadership [and] discredited in the eyes of the wider public and of its own members” (p. 147).

When democratic rule returned to Peru in the 1980s, neither political leaders nor the judiciary acted to strengthen the judiciary or increase its independence. A new constitution in 1979 replaced the CNJ with a new body called the Consejo Nacional de la Magistratura (CNM). Early in the administration of Fernando Belaúnde Terry, the CNM presided over a “ratification” of judges, a review and purge driven by the partisan interests of the dominant political parties. According to Hammergren, “Thus, despite complaints that the new constitution was too strict in its limitations on the political activity of the judiciary, partisan identification emerged in the 1980s as a primary factor in naming and promoting judges. To an extent never seen before, judges were identified as sympathizers with one or another party” (p. 149). This tendency became even more pronounced in the government of Alan García. In power for the first time, his party (the Alianza Popular Revolucionaria Americana, or APRA) carried out a “partisan colonization of the judiciary” that “only served to increase the divisions and overall demoralization within the institution, and further discredit it in the

eyes of the public" (p. 150). At the same time, the García administration neglected reforms that might have strengthened the administration of justice or improved access for the poor. Thus on the eve of Alberto Fujimori's autogolpe of 5 April 1992, Peru's justice system was "riddled with corruption, constrained by archaic procedures designed for an epoch long past . . . [and] disdained by public opinion . . . , the worst of the public institutions in a country where the entire public sector was in crisis" (p. 152).

Hammergren makes the rather surprising argument in *The Politics of Justice* that the new constitution adopted in 1993 laid "the basis for a truly independent judiciary." It is one thing to install formal rules that encourage a workable separation of powers and quite another to make institutions actually work in practice (p. 70). The Constitution of 1993 restored and strengthened the CNJ and created a Constitutional Tribunal to be elected by the Congress. Its members were elected in April 1996. In the meantime, the Fujimori government set up an executive commission to oversee "reform" of the entire justice sector. Its executive secretary, a former admiral with close ties to President Fujimori, was eager to reorganize the judiciary and improve its performance at a technical and functional level. His stated aim was "to place highly qualified apolitical appointees" in the judiciary "who would do an excellent technical job and restrain any impulses to political activism" (p. 187).

While this constitution was being written and before the reforms mentioned were implemented, the executive branch conducted a far-reaching purge of the judiciary. In concert with exceptional measures adopted to confront the terrorism of Sendero Luminoso, the government summarily dismissed judges and prosecutors throughout Peru, including members of the Supreme Court and the CNJ. After Fujimori appointed a new chief justice and court majority, the court itself continued the purge, ultimately dismissing more than half of the remaining judges. By the end of 1993, over 60 percent of Peru's judges held provisional appointments. This purge, the "largest mass firing of judges and support personnel in Peru's history," occurred in the context of a decree law that defined terrorism very broadly, empowered military courts to hear cases involving treason, and established the system of "faceless judges" (p. 177).<sup>4</sup>

In June 1996, the Consejo Judicial Coordinadora was established under the authority of the Comisión Ejecutiva to oversee a new "reform" of the judiciary in Peru. Although chaired by the chief justice, the commission was imposed on the judiciary by the executive branch. The legal community was largely excluded from the process, and the government invested the Executive Commission with extremely broad powers to do as it saw fit. For in-

4. Those interested in this aspect of the Fujimori initiatives and their impact on human rights should consult the *UN Special Rapporteur*, "Report on the Mission to Peru," E/CN.4/1998/39/Add.1, 19 Feb. 1998.

stance, the commission bypassed the CNJ and placed the power to discipline all provisional judges (the overwhelming majority) in the hands of the Executive Commission. Hammergren stresses that this path to reform “weakens governmental accountability and strengthens the authoritarian thrust of the new institutional arrangements,” thereby undercutting the new constitution’s promise to establish greater separation of powers (p. 176). Although the Fujimori government infused the judicial sector with new resources and sought to rationalize court administration, it also controlled the overall effort and brooked no opposition from the judiciary. Shortly after the Tribunal Constitucional declared some aspects of the Fujimori reforms unconstitutional in late October 1996, unknown assailants physically assaulted the president of the tribunal. Several months later, the Fujimori-controlled Congress impeached and dismissed three members of the tribunal who had ruled that the president was ineligible to run for a third term. The justices were not replaced, leaving the Tribunal Constitucional impotent. Through such measures as these, the Fujimori government made Peru an extreme example of how technical “reform” of the judiciary could be carried out while undermining any pretense of judicial independence.

Hammergren concludes in *The Politics of Justice* that the Executive Commission sought judicial modernization because the government viewed judges and courts as providers of a public service, which should be delivered efficiently. But the government did not accept the judiciary as an independent power exercising a legitimate political function in promoting checks and balances, or what Guillermo O’Donnell has called “horizontal accountability” (O’Donnell 1994, 1999). Under such conditions, it is easy to imagine how the administration of justice could be improved but without enhancing the rule of law.

### *Toward a Theory of Judicial Reform*

In *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, William Prillaman criticizes the work of Hammergren and other researchers on two counts. He finds that they have not developed a sufficient theoretical explanation of judicial reform and have failed to show what part judicial reform played, if any, in democratic consolidation (p. 4). To be fair, Hammergren’s stated objective was to chronicle the history of reform efforts and identify factors that might account for failure or success. Her comparison of the Peruvian experience with that of El Salvador, Costa Rica, and Colombia is very useful in showing that successful reform is most likely when two conditions are met: support must come from leaders within the judicial sector, and ongoing financial support must be available from providers of international aid (pp. 250–51). These considerations return readers’ attention to the important role played by external donors in justice reform. Prillaman joins Carothers in criticizing such donors, including the



multilateral lenders, for assuming that progress is incremental and unilinear and that the problems are more technical than political (p. 6).

Prillaman seeks to develop a more theoretical approach to justice reform by focusing on “three critical and interrelated variables: independence, efficiency, and access.” He also draws on traditional systems theory, contending that analysts should look at both “inputs” (reformed laws, new institutions, and judicial training) and “outputs” (rulings against the government, speedier trials, and public perceptions of the efficacy and fairness of the justice system). *The Judiciary and Democratic Decay in Latin America* is organized around four case studies in which Prillaman attempts to apply this conceptual framework to the reform experiences of El Salvador, Brazil, Argentina, and Chile. As he recognizes, his challenge is to identify valid measures of independence, efficiency, and access and then marshal the empirical evidence. To illustrate this argument, I will focus on judicial independence.

Prillaman makes the valid point that judicial independence is a relative concept rather than an absolute one. Judges need to be independent in the three senses first articulated by Owen Fiss (1994),<sup>5</sup> but they also need to be accountable to civil society (p. 17). Clearly, Latin American governments have a long history of undermining judicial independence by limiting tenure, packing courts, and purging the judiciary. Threats of violence and militarization of the judicial function have compounded the problem. How is judicial independence to be measured in a given country? One approach would be to look at new institutional design inputs, such as judicial councils, expanded courts to cover juvenile justice and the like, new career laws, budgetary autonomy, and longer tenure. These are the reform elements that Popkin and Hammergren researched so thoroughly. But Prillaman rightly insists that unless outputs are also measured, one cannot know how a reformed system works in practice or whether reform makes any difference in relation to past experience. For instance, is the reformed judiciary more willing to rule against the government when the law warrants it or the constitution is threatened by government actions? Also, does the public perceive that the courts are more independent but without being marginal to the exercise of power? Prillaman regards this last point as critical and stresses opinion surveys as an important tool of measurement (see also Lagos 1997): “Because democratic consolidation rests so heavily on public confidence, polling also provides an indication of whether confidence in the rule of law is growing—an extremely useful indicator for tracking democratic consolidation and decay” (p. 29).

5. Fiss (1994) identified three principles of judicial independence. “Party detachment” means judges should not be subject to undue influence by the parties before the court. “Individual autonomy” implies that a judge should not be subject to undue influence from other judges. “Political insularity” says that a judge will not be subject to inappropriate control by other branches of government.

In assessing El Salvador, Prillaman covers the same ground as Popkin, although in far less detail. He does not mention the degree to which reformers within the justice sector were important in pushing for reform, a point both Hammergren and Popkin stress. But Prillaman's conclusions are much the same as theirs. During the 1980s, efforts to promote greater judicial independence in high-profile cases failed totally "because reformers did not address the broader forms of politicization that compromised judicial independence" (p. 47). The second phase of reform, which was carried out in conjunction with the Peace Accords, achieved greater success in some inputs, such as strengthening the CNJ to play a greater role in judicial governance, revamping judicial selection procedures, and enhancing the budget. But other important reforms, such as decentralizing power within the judiciary to increase the autonomy of rank-and-file judges, failed because reform was resisted from within the judiciary. Prillaman's broader criticism that reform failed because of "negative synergy" (failure to address all aspects of the justice system in a simultaneous and coordinated effort) probably applies more to the experience before the Peace Accords rather than after them. Moreover, Popkin's study shows that even broadly gauged reform efforts can fall short when faced with political resistance or disinterest on the part of the judiciary and the political elite.

Whereas Prillaman thinks that efforts in El Salvador to promote judicial independence were too narrowly drawn, he believes that the reform effort in Brazil tried to do too much. The Brazilian Constitution of 1988 granted Supreme Court justices tenure for life, while increasing the autonomy of lower-court judges and guaranteeing their salaries. In their zeal to insulate judges from political manipulation, authors of the new constitution gave courts "near total control over their administrative, personnel, and disciplinary affairs." They also gave the Supreme Court control over the budget of the judiciary (p. 81). In Prillaman's judgment, the ironic result of these innovations so far has been a total loss of accountability in the Brazilian judicial system. The sweeping increases in the autonomy of the judiciary led to rampant nepotism and other opportunities for corruption. Again, the problem was compounded by the unintended effect of sharply raised standards for entrance into the judiciary. Prillaman reports that 80 percent of nominees fail to qualify for judicial appointments, leaving chronic shortages on the bench (p. 95). Thus the Brazilian judiciary has come to be seen as a privileged enclave, and public dissatisfaction has reached an all-time high. Meanwhile, Brazilian judges express great satisfaction with a justice system that the public almost uniformly scorns (p. 97).

Prillaman thinks that Chile has come closest to developing a coherent approach to judicial reform because there reformers have self-consciously and purposely attacked all three variables simultaneously, but without raising expectations too high. The military regime of General Augusto Pinochet had actually encouraged the administrative autonomy of the courts be-

cause the judiciary stood aloof from the political conflicts that divided Chilean society. The democratic administrations of the 1990s really needed to scale back the autonomy of the judiciary while strengthening the institution. They sought to foster a show of independence, in the sense of horizontal accountability, by introducing into the courts important human rights cases that were not exempted by the military's 1978 amnesty law. They also reduced the jurisdiction of military courts and created a judicial academy to train judges, determine promotions, and impose discipline (p. 143). While taking these measures to enhance independence, the democratic administrations also addressed the issues of efficiency and access. They created a public prosecutor's office to conduct criminal investigations and sought to encourage cooperation between the office and the courts. These measures were complemented by the introduction of oral argument and better methods of case management that are typical of administration of justice programs elsewhere in Latin America. Finally, in addition to increasing the number of judges, Chilean reformers developed a highly successful "access to justice" program that operates at the local level. Working through the Ministry of Justice, the government set up legal clinics and staffed them with law students and recent law graduates who travel to low-income communities to offer legal services. Prillaman assesses the output of these programs by pointing to two factors that set Chile apart from her neighbors. First, public approval of the judiciary was actually rising in Chile in the 1990s, from 10 percent levels in 1990 to 37 percent in 1997. At the same time, a broad range of political and civil society actors were involved in the reform process (pp. 151–52).

Prillaman reaches conclusions that are generally shared by the other authors. The typical judicial reform package has tended to focus on technical aspects of "judicial modernization" and tried to move sequentially from one technical aspect to the next. In his view, the disparate elements of the justice system are too interdependent for this approach to succeed, and the political element is too crucial to be ignored: "Judicial reform, like virtually all bureaucratic reform, is deeply political. It involves altering power relationships between various branches of government and between levels of the judiciary itself . . ." (pp. 166–67).

### *Justice Reform and the Poor*

If resistance to justice reform often characterizes entrenched interests in the judicial establishment, it is equally typical of those charged with policing society. When an unreformed judicial system is combined with an unreformed police system and an archaic prison system, the result can be what Paulo Sérgio Pinheiro has called "democracies without citizenship" (p. 2). Pinheiro coedited *The (Un)Rule of Law and the Underprivileged in Latin America* with Juan E. Méndez and Guillermo O'Donnell. Although the transition to

electoral democracy may be consolidated in Latin America, the weak link in the new polyarchies is what the editors call “the (un)rule of law.” Formal legal equality is far from achieved because judges and police fail to interpret and enforce the law “without taking into consideration the class, status, or power differentials of the participants . . .” (p. 307). To the contrary, as Guillermo O’Donnell stresses in his essay entitled “Polyarchies and the (Un)Rule of Law,” these countries are notable for the way in which the “exactly severe . . . application of the law upon the vulnerable can be a very efficient means of oppression,” while the privileged readily “exempt themselves from following the law” (p. 312). This fine collection of essays compellingly explores two harsh polarities that characterize the rule of law in Latin America. The first involves the near complete impunity enjoyed by individuals of high status from the reach of the criminal justice system, as opposed to the arbitrary way in which the system operates for the poor. The second polarity concerns access. The elite of Latin America can often ignore the judicial system, but if they need adjudication, they can get it.<sup>6</sup> The poor suffer from systematic exclusion. As Pinheiro explains, “the way the courts function is intimately linked to the hierarchical and discriminatory practices that mark social relationships” (p. 11).

The first part of *The (Un)Rule of Law* demonstrates that law enforcement in Latin America is steeped in lawlessness. Although security forces were used to repress political opponents under military rule, today law enforcement bodies practice violence in the more routine activities of police work. Juan Méndez worries about the degree to which law enforcers resist “all attempts to bring them under democratic controls. The result is that police and security bodies are . . . unaccountable to civilian authority . . .” (p. 22). Spiraling crime fosters a public mind-set that tolerates police brutality and gives short shrift to calls for due process or prison reform. Ligia Bolívar points out that a decade of structural adjustment has only compounded the problem because “such programs tend not only to increase but also to criminalize poverty. As a consequence, crime rates increase and tougher measures against crime are demanded by the public” (p. 47). Contributor Jorge Correa Sutil comments on the importance of growing reliance on markets to solve social problems from another angle. Government’s role in providing social services is declining. Power formerly wielded by government is being transferred to the private sector. According to Sutil, “The market is now the main forum where groups advance their interests and resolve their conflicts. This is bad news for the poor . . . [because] it is in the marketplace that their weakness is most eloquently displayed” (p. 269).

6. Enthusiasm for market reform in Latin America has led the elite sector to appreciate the need for greater judicial efficiency and competence. Elites increasingly realize that a passive and corrupt judiciary is not conducive to a dynamic commercial environment in a market economy. Thus even though the elites have access to judicial remedy, they now see the need to “modernize” that remedy.

Returning to the issue of police violence, Ligia Bolívar asserts that in a context where police lack investigative skills and “judicial systems encourage confession as the key evidence, police and security forces will continue detaining in order to investigate, instead of investigating in order to detain . . .” (p. 45). To complete the deadly cycle, excessive reliance on confessions leads readily to corruption of the police and the broader justice system. Paul Chevigny reports that in Brazil, police use torture to extort money from those in custody rather than to solve crimes. One study in Rio de Janeiro showed that 90 percent of homicide investigations failed to produce enough evidence for trial. Chevigny points out, “Thus torture creates a situation in which, in addition to the violation of human rights, guilty people remain at large and crimes are not investigated adequately” (p. 61).

*The (Un)Rule of Law* features excellent essays on groups that are discriminated against in Latin America, including blacks, indigenous peoples, and women. The plight of indigenous peoples in relation to the justice system is indicative of the problems all these groups face. Jorge Dandler describes the gulf that separated the provisions of Guatemala’s Constitution of 1985, which affords numerous special protections to groups with Mayan ancestry, and the reality of “gross human rights violations, discriminatory practices, and violence” that afflicted Guatemala’s Maya Indians in the 1980s (p. 128). Only with the advent of the peace process, which facilitated greater Mayan political participation, and the intervention of the United Nations in the 1990s was it possible to begin to close this gulf. The *Acuerdo sobre Derechos e Identidad de los Pueblos Indígenas* (1996) is an extremely progressive document. It recognizes the validity of customary law and acknowledges the historic exclusion of Mayan peoples from the national judicial system. To remedy that discrimination, the Guatemalan government committed to providing a broad range of legal and judicial services and accepted UN verification of its compliance. Thus the reports of the Secretary-General provide compelling evidence of the progress being made.

Unfortunately, the Secretary-General’s report is a litany of weak follow-through on the many commitments made to the Mayan people. A major UN concern is the failure of the government to establish consultation mechanisms that will allow indigenous persons to participate in public policy decisions that affect them. Nor has the government created a body to oversee efforts to make indigenous languages official languages of Guatemala. The current legislature has not addressed a bill that makes discrimination against the Maya a crime. In an area of particular relevance to the Maya, police reform has bogged down in critical areas. According to the report, “The number of indigenous people who apply and are selected, trained and deployed remains low.”<sup>7</sup> Finally, the Support for the Civil Security Forces Act of 2000

7. “United Nations Verification Mission in Guatemala: Report of the Secretary-General,” A/55/175, 26 July 2000, p. 13.

permitted armed forces participation in public security and intelligence gathering to a degree that the UN regarded as “a major setback for the process of demilitarizing public security pursuant to the peace agreements.”<sup>8</sup> Such initiatives on the part of Guatemalan lawmakers could hardly be reassuring to indigenous groups whose rights had been grievously violated in the past by the armed forces and militarized security forces. Leonardo Franco, another contributor to *The (Un)Rule of Law* who comments at length on the Guatemalan case, holds out hope that the presence of an actor such as MINUGUA can enhance the long-term possibilities for reform. He credits MINUGUA and the verification process for much of the progress made to date. But based on the MINUGUA reports, I am inclined to agree most with Franco’s conclusion that in Guatemala, “as in other countries, the long-term nature of the judicial reform process cannot be overemphasized, given the inherent complexity of the sector and powerful vested interests against reform” (p. 249).

### *Conclusion*

Few would challenge the thesis of Sérgio Pinheiro and his colleagues that most Latin Americans live their lives subjected to the unruly rule of law. Latin America’s negotiated transitions have achieved the democratization of elections but have perpetuated “an authoritarian legality.”<sup>9</sup> Some analysts contend that the key to overcoming this democratic deficiency is to attack judicial incompetence and corruption, a top-down solution (Ratliff and Buscaglia 1997). Others like Prillaman and especially Miguel Schor stress the importance of “pressure from below” and urge a kind of “legal mobilization” through which the public can hold the judiciary accountable.<sup>10</sup>

The excellent books reviewed in this essay make clear what an enormous challenge either strategy confronts in Latin America today. Top-down strategies are seriously hampered by the ambiguous commitments of the domestic partners enlisted by foreign donors, not to mention the indifference or even outright opposition of the national political elite. Bottom-up strategies are undermined by low public confidence in state institutions, pervasive lack of trust throughout the political culture, and the general political exclusion resulting from extreme inequality. Finally, as the Peruvian experience amply demonstrates, the rule of law entails more than an efficient administration of justice. The rule of law requires the subordination of political power to law, a point on which analysts like Carothers, Hammergren, and Prillaman agree. All too often, however, the aim of national politicians is precisely the opposite—to subject the judiciary to political control.

8. *Ibid.*, p. 16.

9. Miguel Schor, “The Rule of Law and Democratic Consolidation in Latin America,” 1–26. Schor’s unpublished paper is available at: <http://darkwing.uoregon.edu/caguirre/schor.html>

10. *Ibid.*, p. 15.



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