

ESCOLA DE GOVERNO

**Seminário Internacional
Segurança Pública:
Antigos Desafios, Novos Modelos**

Síntese das Palestras

PLANEJAMENTO



FUNDAÇÃO JOÃO PINHEIRO
GOVERNO DE MINAS GERAIS

**The School of Government of the João Pinheiro Foundation in
association with the Konrad Adenauer Foundation's Seminar on**

“Public Security: Old Challenges, New Models”

**LATIN AMERICAN CRIMINAL JUSTICE REFORMS AND
CHALLENGES**

Presented by Luis Salas
Full Professor, College of Urban and Public Affairs and
Director of the Center for the Administration of Justice
Florida International University

September 2 and 3, 1998
Belo Horizonte, Brazil

SUMMARY

INTRODUCTION	01
FIGURE – 1	02
THE LEGAL SYSTEM AND CRIMINAL PROCEDURE	05
LEGAL AND JUDICIAL IMPEDIMENTS SUCCESSFUL CRIMINAL INVESTIGATIONS	10
POLICE	20
NEW TRENDS IN POLICING	24
PROSECUTION	30
CONCLUSION	37
CRIMINAL JUSTICE: THE NORTH AMERICAN EXPERIENCE	39
ORGANIZATION	40
WHY CRIME DECLINED	41
POLICE INTEGRITY	45
CIVIL RIGHTS AND DOUBLE JEOPARDY	47
CAPITAL PUNISHMENT	51
WAR OR CRIME AND DRUGS	52
SEMINARIO INTERNACIONAL SEGURIDAD PÚBLICA: ANTIGUOS, NUEVOS MODELOS	54
EL CONSENSO EXPERTO EXPLICACIONES/LEGITIMACIONES Y DIAGNÓSTICOS	58
NUEVOS Y VIEJOS DESAFIOS	60
BIBLIOGRAFIA CITADA	65

I. Introduction

Latin America has undergone a revolutionary political transformation during the last decades as many countries moved from military to democratic governments. Governments have abandoned the economic model that made the State the primary employer and have shifted to a massive program of privatization leading to the adoption of traditional capitalistic economic models. This is accompanied by a trend to decentralize government services and delegate greater authority to local governments. All of these trends have affected all sectors of Latin American society including the justice sector.

As the region moves into the next millennium, people are genuinely afraid but his time the cause is not civil war but crime. All opinion polls in Latin America reveal that public safety and corruption are ranked among the top five social problems facing the country. Polls also reveal growing distrust in the capacity of the justice system to combat crime and even raise questions as to its complicity in criminality. For example, in a recent UNICEF poll of young people in Argentina, about 73% mistrusted the judicial system and 75% the police¹. Venezuelan adults showed even less confidence in the justice sector with 80% of respondents having no confidence in the police and 74% in the courts. The armed forces, on the other hand, had 31.5% support, exceeded only by the church (70%) and the media (53%). When Mexican citizens were asked in a recent poll "how safe do you feel when walking alone at night in your neighborhood?" 49% felt insecure while 62% of residents of Mexico City felt insecure. A similar question asked of U.S. citizens revealed a 29% level of insecurity².

Latin America now averages 30 homicides per 100,000 inhabitants, six times the world average, four times the rate in the United States, and twice that of Africa and the Middle East. While most news reports from the region focus on large criminal organizations or macroeconomic trends, most Latin Americans are more immediately affected by the fear of common crime.

Crime in Mexico, for example, has multiplied faster in the past four years than in the previous 60, according to the Mexican Institute for the Study of Organized Crime. Colombia, on top of its drug violence, has become the world leader in kidnapping, with more than 2,000 reported last year (and many more unreported). Moreover, El Salvador has surpassed Colombia as the most murderous country in the world, with more homicides per year (around 9,000) than during the height of its bloody civil war. The murder rate in

¹ Marcela Valente, "Politics - Argentina: Youths Cover Political Anger with Indifference". Inter Press Service, August 18, 1998.

² Quoted in Fundación Mexicana para la Salud, Centro de Economía y Salud, *Análisis de la magnitud y costos de la violencia en la Ciudad de México*, Inter-American Development Bank. Working Paper R-331. 1998, p. 6.

Caracas has risen five-fold in ten years while doubling in the rest of the country³. Even in Chile, where crime is low (but increasingly violent), fear is rampant: a UN survey published last month reports that 78 percent of Chileans expect to be robbed -- and 47 percent of Chilean women expect to be sexually assaulted.

FIGURE 1⁴

IMPORTANCE OF THE PROBLEMS OF CRIME AND CORRUPTION
(Percentage who think it is the number 1 problem)

Unemployment					
Education					
Low wages					
Crime					
Corruption					
Poverty					
Inflation					
Political violence					
Health					
Drugs					
Youth opportunities					
Housing					
Environment					
Other					

³ Estrella Gutiérrez, "Latin-American Politics: Cocktail of Violence Plagues Region", Inter-Press Service, February 4, 1998.

⁴ Source: *Latinobarómetro* 1997, See: Eduardo Lora and Gustavo Márquez, *The Employment Problem in Latin America: Perceptions and Stylized Facts*, Inter-American Development Bank, Office of the Chief Economist, Working Paper 371, 1988, p. 3.

0% 5% 10% 15% 20% 25%

The rising tide of criminality has widespread consequences. Recently, the Inter-American Development Bank called violent crime "the principal barrier to regional economic development." The IADB estimated that its annual cost is \$168 billion, or 14% of the region's GNP. The social and political costs may be even greater. Latin American cities are now a mass of large walls and bars surround almost every home, no-one leaves their home unattended for fear that even their toilets will be stolen, neighborhood watch committees are springing up everywhere, lynching is becoming common and private security is one of the region's fastest growing industries.

Meanwhile, politicians are now taking up an anticrime banner and there is a growing popular call for the return of the security "enjoyed" during military rule. Public safety and corruption have become such major political issues that they were used to justify several coup attempts: two in Venezuela, President Fujimori's autoup in Peru, and an attempt at a similar autoup in Guatemala. Former military officers are rapidly entering the political arena and winning. Bolivia, recently elected ex-Bolivian Dictator Gen. Hugo Banzer to the Presidency of his country. Gen. Lino Oviedo (Paraguay) was imprisoned for his part in an attempted coup against the former government. His party's nominee, President Cubas, was elected and quickly pardoned Oviedo causing a major constitutional crisis in that country. Meanwhile Col. Hugo Chavez (Venezuela) who spearheaded one of the military coup attempts in Venezuela is leading all public opinion polls in his run for the presidency.

As the size of military forces have decreased, following peace treaties and general downsizing of the armed forces, this demilitarization has been attributed as a cause of the rise in crime. A dangerous trend is the remilitarization of internal order functions that had seemed to end after the end of civil wars. In Guatemala, for example, the government has ordered the army to patrol alongside the police and about 11,000 soldiers are now involved in security operations in urban and rural areas⁵. In addition, the army is reopening military outposts in places where it had withdrawn, while constructing new bases in some rural zones. In Caracas, the National Guard and the secret police openly patrol the capitals' streets alongside the municipal police force. In Honduras, chambers of commerce have petitioned the government to bring out the army to patrol the streets of San Pedro Sula. The army, meanwhile, has declared that it is ready to do its part and deploy troops in the streets.

Legislators have also felt public demands to get tougher on crime and have turned back the clock on criminal law reforms. The death penalty, abolished in almost all

⁵ The rise in crime has led some commentators to argue that this, rather than government noncompliance, is the primary obstacle to the peace process. The army's reduction and withdrawal from many areas, combined with the dissolution of the civil defense patrols that cooperated with the military during the war, led to an unprecedented breakdown in public security.

countries of the hemisphere (with the exception of national security cases) is now being reconsidered in some countries. Criminal penalties have been raised and procedural safeguards have been curtailed for violent criminals.

The rise in crime has come about in a time of economic growth and peace. One noted Colombian scholar, Francisco Thoumi, is quoted as saying "(t)he real message is that good macroeconomics is not enough. What's happening now is that the deep problems of Latin American societies are coming to the fore." Like Eastern Europe after the fall of communism, Latin America is seeing a partial meltdown in law and order. "Democratic capitalism is not a wildflower that flourishes without a state, If it lands in a predatory society, then opportunities for crime are wide open."⁶

While criminologists and legal experts argue about the causes for this rise in criminality, the one thing they all agree on is that "impunity" characterizes Latin American criminal justice systems. People throughout the hemisphere are afraid to call on the police for help because they fear that the police may be involved or that the courts will not act. Unfortunately, these perceptions are oftentimes correct. In the Mexican state of Morelos, for example, the chief of an anti-kidnapping elite task force was arrested for being himself involved in the kidnappings⁷. Fifteen policemen were arrested in Mexico City for the kidnapping and gang rape of three teenage girls. Popular outrage brought tremendous public pressure on Mayor Cuauhtemoc Cardenas to crack down on rampant corruption and crime in the capital. Recently, Buenos Aires' authorities purged 261 police officers of different ranks in a crackdown on inefficiency and corruption. This purge followed charges that Buenos Aires police had been involved in the attack on the Argentine-Israeli Mutual Association (AMIA) and the murder of photographer José Luis Cabezas.⁸

The perceived complicity and/or inefficiency of police have led to a radical change in the way of life of Latin Americans. Gun purchases have risen so that there are more weapons in private hands today than there ever were during the civil wars, wealthy Latin Americans travel to Miami regularly and purchase the latest electronic surveillance and alarm equipment while they bullet proof their cars. Security guards routinely patrol the sidewalks of Latin neighborhoods. Neighborhood-watch committees have also sprouted in the wealthier areas.

Citizen self-help has sometimes turned violent as vigilantism is on the rise. Raul Cubas, head of the human rights organization Provea, said lynching began with two in 1994, but this Spring, Caracas was averaging one per week⁹. A report released late last month by the UN Verification Mission in Guatemala (MINUGUA), meanwhile, condemned a wave of lynching described as "social cleansing," and underscored the high level of criminal violence as one of the main factors against human rights in Guatemala. Since March 1996, 120 lynchings have taken place, primarily in rural areas. The

⁶ "Living in Fear", *Newsweek*, April 20, 1998, p. 17.

⁷ Linda Diebel. "In Mexico, Calling the Cops is a Last Resort", *The Toronto Star*, July 19, 1998.

⁸ *La Nación*. "Massive" purge of Buenos Aires provincial police reported", May 29, 1998.

⁹ "Lynching on the Rise in Caracas", ABC-CLIO, Inc., May 31, 1995.

prosecutorial agency only opened investigations in 24 cases and in only two instances did the investigation result in a criminal trial. The report blamed the government's inability to deal with crime as the cause¹⁰. "In some cases, entire communities have taken the law into their own hands in frustration at the lack of justice in their areas. The government is under enormous pressure to provide security. In responding, it has made serious mistakes, too easily incorporating members of the old and corrupt police into a new civilian force."¹¹

A factor closely related to the public's concern over public safety is public corruption. Corruption, a staple of Latin American democracies has become one of the main issues of popular debate and generally occupies one of the first places in opinion polls measuring public concern over social problems.¹²

Standing to prevent the rise of crime and to curb public corruption is a cadre of passive judicial functionaries subservient to executive authority and more at home with formalism than judicial activism. Prosecutors primarily file papers and seldom initiate investigations on their own. Assisting these justice officials are law enforcement personnel who are underpaid, unappreciated and oftentimes subservient to the military. While this may present a grim picture, there are signs of hope. The justice system has historically been unimportant to the political life of Latin American states. Growing fear of crime and popular discontent with the efficacy of the justice sector has driven this system to the forefront of national politics. No longer can problems of public safety, judicial inefficiency, systemic unresponsiveness, and human rights be routinely ignored. The manner in which governments address these issues may well determine the course of Latin democracies.

II. The Legal System and Criminal Procedure

Most commentators agree that Latin American justice systems are in crisis. Judges face gigantic backlogs, the public holds them in low regard, they enjoy little independence, are generally politicized, and, because of their continued reliance on an antiquated legal system based on written pleadings, are unable to deal effectively with sophisticated forms of criminality. Nevertheless, Latin America, and especially Central America, is undergoing a radical transformation of its legal systems as it moves away from the Napoleonic inquisitorial tradition¹³ and adopts an accusatorial model of criminal procedure.

¹⁰ Silvio Hernández, "Rights-Central America: Activists Fear Return to Bloody Past", Inter Press Service, July 2, 1998.

¹¹ Hugh Byrne, "Guatemala's Difficult Healing: Fear, inequality, injustice linger from years of civil warfare", *The Boston Globe*, March 15, 1988.

¹² In Venezuela, for example, a majority of the population ranked this as the number one social problem while in a similar Brazilian poll, 78% concluded that their country had become a "corruption paradise." Andres Oppenheimer, "Latin Americans Growing Sick of Scandal," *The Miami Herald*, April 13, 1993, p. A 15.

¹³ The inquisitorial system has its roots in the Catholic Church's attempt to root out heresy in the Middle Ages. Following the Reformation, the ecclesiastical model was adopted by governments as an efficient

One of the central and most misunderstood features of the civil law system, especially as it relates to the administration of criminal justice, is its "inquisitorial" characteristic. Normally a "civil law" criminal proceeding consists of two parts: the investigative stage ("instrucción or sumario") and the trial ("plenario"). During the investigative stage the judge leads the investigation of the crime, orders the detention of the suspects, gathers the relevant evidence, and formulates charges against the accused. This phase is usually secret, although its results are reduced to writing to which the defense counsel has access. The defendant may be requested to testify. While he/she may refuse, this refusal may be taken into account as evidence of guilt. Theoretically, the police are under the command of the judge during this stage and he/she may order them to cooperate in the investigation, however, in reality, this seldom takes place. Throughout the proceedings, the prosecutor lacks the power to supervise investigations, file charges, or exercise discretion. The trial, most often, consists of a review of the evidence gathered during the investigative stage, making the preceding phase the most critical stage of the criminal proceeding.

In this system, criminal proceedings are so technical that the writs and pleadings take on greater importance than the outcome of the dispute. The system's success depends on a cadre of poorly trained and overworked instructional judges who are unable to oversee police investigations as required by the respective code of criminal procedure. Prosecutors are assigned few tasks under the old system and are largely passive figures in the process while the right to an efficient legal defense is largely ignored. Meanwhile, more than 80% of prison inmates are pretrial detainees who have to wait an average of two years prior to sentencing.

It was against this background that the first reforms were implemented. Italy became one of the first European nations to reject the model and adopt a "mixed" system with many of the characteristics of the accusatorial system¹⁴. The enactment of the Italian legislation had a tremendous impact on Latin American reformers.

The priority of the national and regional legal reform initiatives was transformation of the codes of criminal procedure due to the negative impact that these antiquated codes had on human rights and a growing popular demand to combat rising crime rates. National reformers argued against prevailing criminal policies that relied on abstract legal theory

tool to combat crime and eliminate political opposition. The model was institutionalized by Napoleon in the 1808 code d'instruction criminelle and it rapidly became the model in Europe and its colonies.

¹⁴ For a discussion of the Italian reforms see: Ennio Amodio and Eugenio Selvaggi, "An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure", *Temple Law Review*, vol. 62, 1211, 1989; Lawrence J. Fassler, "The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe", *Columbia Journal of Transnational Law*, vol. 29, 245, 1991; Jeffrey Miller, "Plea Bargaining under the new Italian Criminal Procedure Code and the United States: Towards a New Understanding of Comparative Criminal Procedure", *New York University Journal of International Law and Politics*, vol. 22, 215, 1990; William T. Pizzi and Luca Marafioti, "The New Italian Code of criminal Procedure: the Difficulties of Building an Adversarial System on a Civil Law Foundation", *Yale Journal of International Law*, vol. 17, 1, 1992.

and ignored national realities. They turned to the accusatorial system so prevalent in the common law countries. The system formed the basis for the Model Code of Criminal Procedure ("Código Procesal Penal Modelo") drafted in 1988.

Guatemala was one of the first countries to adopt the accusatorial model. The reform encountered numerous obstacles as proponents underestimated the level of opposition of stakeholders and did not devote sufficient resources to adequately plan for the implementation of the reform. Uruguay, on the other hand, adopted oral proceedings for its civil and criminal processes with greater ease as it implemented a massive training program, developed a gradual implementation plan and its Judiciary received adequate financial support from the other branches of government for implementation of the reform.

Reform is now the rule rather than the exception in Central America. El Salvador has recently adopted the accusatorial model in its new code of criminal procedure and has also modified its procedure for juvenile courts; Costa Rica, a short while ago, enacted a new accusatorial code of criminal procedure; Guatemala's initial obstacles have been partially overcome and its code is in operation; Honduras' Congress is reviewing a new code of criminal procedure and created one of the most autonomous and powerful Public Ministry's (prosecutorial body) in the region. Elsewhere, Venezuela also enacted a new code of criminal procedure while Colombia also embraced the accusatorial model and strengthened its procedural system by establishing a very powerful Public Ministry.

Colombia's experience is especially illustrative because the reform of the criminal code of procedure was accompanied by substantive institutional reforms leading to the creation of one of the most powerful Public Ministries in Latin America.¹⁵ The significance of the Colombian change lies in its acceptance of an accusatorial model in which the prosecutor investigates crimes and files charges against defendants, with the exception of police and military suspects. The office's investigative capability was strengthened by the addition of the Technical Corps of the Judicial Police (a forensic unit). Finally, the prosecutor is given authority to order arrests and to determine measures for the protection of witnesses.

All of these reforms are premised on the belief that the old system is ineffective in ensuring that the Rule of Law becomes a reality in Latin American criminal courtrooms. Some of the major weaknesses of the system, are:

- The inabilities of instructional judges, without any police training, to adequately supervise police investigations. This formative deficiency, when combined with a lack of technical resources, makes it especially difficult to deal with modern criminal investigation techniques.

¹⁵ For a brief overview of the changes see: Alejandro David Aponte, "Constitución de 1991: la Administración de Justicia," *Boletín: Comisión Andina de Juristas*, vol. 30, pp. 43-52, 1992. See also: Andrés Franco, "Colombia's Justice System: Modernizing for Viability," *North South*, June-July 1992, pp. 29-33; Michael R. Pahl, "Wanted: Criminal Justice- Colombia's Adoption of a Prosecutorial System of Criminal Procedure," *Fordham International Law Journal*, vol. 16, 1992-1993, pp. 608-634.

- Instructional judges primarily see themselves as judges and tend to reject the view of prosecutors who view their role as obtaining convictions. As a result, these judges often lean over backwards to comply with the letter of the law and are seldom zealous in pursuing investigations. Police, on the other hand, often become frustrated with the judge and pursue the investigation independently.
- Since instructional judges are often at the bottom of the judicial hierarchy, this function is often assigned to the least experienced or skilled judges.
- The job of the instructional judge is often impeded by the legal myth that they, in reality, oversee the work of a diverse group of police agencies each responding to a different agency in the Executive Branch. Additionally, since these judges are often limited in their jurisdiction and cannot offer protection to witnesses or bargain with defendants, public cooperation is the exception rather than the norm.
- Instructional judges have no discretion in the cases they will investigate and usually manage large caseloads with many of the files being simply complaints in which no perpetrator is ever going to be arrested. This contributes to lengthy proceedings during which the defendant is usually imprisoned.
- Since the proceedings are held behind closed doors, the public has little confidence in the outcome of cases and is often ill informed as to the reasons for decisions taken.

A response to these criticisms of the inquisitorial model was the publication of the Model Code of Criminal Procedure drafted by Latin American reformers. Some of the most important reforms being proposed for the region are:

- transfer of the supervision of the instructional stage from a judge to a prosecutor whose actions could be reviewed by a judge charged with safeguarding basic guarantees (civil rights)¹⁶;
- institutionalization of summary proceedings which could, upon the agreement of the parties, rely on mediation and arbitration without a need to resort to the criminal process;
- decriminalization of innumerable conduct whose repression is either antiquated and/or is best left up to other institutions¹⁷;

¹⁶ Germany (1974) and Italy (1989) have abolished the traditional figure of the instructional magistrate; Spain and France are also reviewing this choice (cf. Jean PRADEL, *L'instruction préparatoire*, Paris, Cujas, 1990, p. 45-46).

- redefinition of the role of the prosecutor, converting him/her in a more active participant in the process whose main function would be to act as the State's representative in pursuing the accusations against the accused;
- establishment of an efficient and well financed public legal defense service;
- more active participation of the victim in the process;
- acceleration of the process;
- alternatives to pretrial incarceration.

It is still too early to judge the success of the new codes. The trend towards adoption of the accusatorial model appears to be unstoppable as more and more countries consider the change. As with many prior reforms, however, the proponents of the change may be placing too much faith on this model and we are already seeing some of the difficulties in implementing it. Some of the primary obstacles to successful implementation have been:

- Legal reform is a lengthy reform strategy since it seeks to transform institutions and processes whose history can be traced back to colonial times.
- Law reform is the most complex justice reform strategy since it involves highly delicate and complex political relations that affect all public institutions. Reform cannot be approached solely from a technical point of view. Successful change requires the adoption of a clear and gradual political strategy aimed at creating or backing reform constituencies who may exercise political power in favor of the reform.
- National reformers have sometimes overlooked the vested interests that might be negatively affected by modernization of the legal system. For example, political parties will resist attempts to enact Judicial Career laws that reduce their patronage pool. Lawyers, on the other hand, should theoretically constitute the major constituency for change. In reality, however, practicing lawyers and bar associations have tended to be among the staunchest opponents to legal reforms. For many, the justification is as simple as not wanting to learn new codes while for others this is seen as a interference in the operation of a system which they have learned to manipulate and from which they derive benefits

¹⁷ José Ma. RICO, *Las sanciones penales y la política criminológica contemporánea*, 4a edición, Mexico, Siglo XXI, 1987, p. 128-153. With respect to Colombia, see: Jaime GIRALDO et al., *Reforma de la justicia en Colombia*, Bogota, Instituto SER de Investigación, 1987, p. 129-130 and Eduardo VELEZ et al., *Jueces y justicia en Colombia*, Bogota, Instituto SER de Investigación, 1987, p. 114-117.

- A critical component of any law reform strategy is to devise a sound implementation plan that estimates the costs of the reform, the potential effects on existing processes and institutions, and takes into account local idiosyncrasies.
- Reform of the procedure code is only a preliminary step in the road towards real reform and must be accompanied by considerable institutional and organizational reform. For example, the new code will demand the strengthening of the Public Ministry since it will have to assume a totally different role. Likewise, without an effective public legal defense, defendants will stand helpless as prosecutors zealously seek their conviction.
- Finally, this type of reform dictates a change in the manner in which law is taught at the Law Schools since the skills necessary to practice in an inquisitorial system are radically different from those required for lawyers questioning witnesses and making oral arguments before judges.

In addition to these impediments, reformers will also find that there are other serious barriers to speedy and successful prosecution of crimes, especially complex cases. These are presented in the following section.

III. Legal and Judicial Impediments to Successful Criminal Investigations

Even though major strides are being made in reforming the codes of criminal procedure, there are still significant barriers to successful investigations and prosecutions of crimes. Latin American legal precepts and judicial practices have hampered investigations into complex cases (political killings, corruption and economic crimes). Failings occur at almost every stage of the legal proceedings and begin with the filing of the complaint. Witnesses are afraid to come forward since they fear police involvement. The police often fail to register the complaint, do not inspect the scene of the crime, or conduct elementary forensic study. Once the case comes to court, the judiciary also often fails to adequately investigate the case and repeatedly postpones making a finding.

A. Criminal Investigation

The outcome of most Latin American prosecutions is determined during the investigative stage. During this phase, the majority of significant obstacles will have to be surmounted. One of the main impediments to successful investigations of complex cases is obtaining evidence of the commission of the crime as well as identifying potential defendants. Detection of economic or white-collar crimes is even more difficult due to their nature as victimless crimes in which it is unlikely that a participant will come forward. In these cases, the crime is either detected by aggressive review of random or targeted financial transactions or because of a complaint from a political opponent, a disgruntled

participant, or the news media. The routine practice of waiting for a complaint to be filed is normally useless.

The most critical actor in this initial stage is the police, which conducts the preliminary investigation and whose actions are determinant on the ultimate outcome. Even though the codes of criminal procedure largely dictate that the police must notify the judge upon the commencement of an investigation and present arrested persons before a judge shortly after an arrest, this seldom happens in sensitive cases. The practice is to notify superiors, outside of the justice sector, to determine the course to follow.

Even when the judiciary is notified of the investigation, a complicating factor is the lack of coordination between the police agency and the investigating judge or prosecutor. Police investigations are routinely completed before the case is forwarded to a judicial authority and it is unlikely that further investigation will take place. For example, in Panama, the prosecutor who is interested in police assistance must forward the request directly to the national chief of police who may then order such cooperation. Due to the delay involved, most prosecutors have conducted their own investigations personally, something for which they are untrained and lack time and resources.

Detection is hampered by the fear of witnesses to come forward or file complaints. In the cases of politically motivated killings or "social cleansings", for example, the initial investigation is complicated by the low level of literacy in many of the countries, especially in the rural areas where many of the crimes take place. In Brazil, for example, Amnesty International concluded "in general the police believed that the peasants' complaints were invalid because they were illiterate or uneducated."¹⁸ Additionally, cases arising from rural areas present special problems. A large percentage of this population lives hours from the nearest judicial facility, has its own system of mediation of disputes (especially in the case of indigenous populations), and follows its own traditions. All of these factors are not conducive to cooperation with an investigation by government officials who are viewed with suspicion.

Another impediment to successful prosecutions is the role assigned to the investigating judge or prosecutor in Latin America. First, he/she must direct a criminal investigation without any training in interrogation, forensics, or police practices. This is especially significant today, with the advent of modern crime investigation techniques. In addition, there is no specialization of judges by types of crimes so that they are likely to be investigating a mix of cases ranging from complex white collar and economic crimes to ordinary assaults. Additionally, their role is confused since they have to balance safeguarding the rights of the suspects while attempting to prosecute them at the same time. Finally, instructional judge positions are usually the first step in the judicial career ladder so that the youngest and most inexperienced judges are assigned to this role. Whether any of this will change when this role is transferred to prosecutors, under the

¹⁸ Amnesty International, *Brazil: Authorized Violence in Rural Areas* N.Y.: Amnesty International, 1988, p. 14.

accusatorial model, it to be seen but it is doubtful since the same problems that hindered judicial supervision of investigations also apply to prosecutors.

Additionally, these judges are invariably overburdened and have to delegate many investigative tasks to support personnel. Thus, it is not uncommon for the clerks ("secretarios") to be the real judges. For example, in a typical system, an instructional judge, on duty, receives 20 or 30 suspects on a Monday. By law, he/she is supposed to take their statements personally. Since this is physically impossible, the statements are taken by the staff who may also be required to make decisions about pretrial release and draft investigative orders (search warrants, etc.). Support personnel are invariably poorly paid and have received no training in investigative techniques. They are also one of the weakest links in the investigative chain and are highly susceptible to bribes.¹⁹

Sensitive cases, especially those involving the armed forces or politicians, are subject to manipulation of evidence during this stage of the proceedings. The Inter-American Commission of Human Rights detailed many of these problems in the case of Myrna Mack, an U.S. anthropologist, murdered by Guatemalan security forces in 1988. Among some of the factors which impeded the investigation were: no fingerprint evidence was obtained, the vehicle that she was killed in was not searched thoroughly, no tests were made of the victim's clothing, the scene of the crime was not secured and evidence was lost, police did not detain the suspects even though detailed descriptions were provided by witnesses at the scene, photographs were not taken during the autopsy because the equipment malfunctioned, police established the motive as robbery even though nothing had been taken, a key report detailing a political motive and identifying a suspect were kept secret by the police (one of the police authors of this report was murdered and another fled the country after being fired and threatened), at the trial, all questions relating other parties to the crime or to motive were not permitted, an appellate judge recused himself due to his inability to compel testimony from military officers, the armed forces provided contradictory evidence regarding the suspect, two witnesses fled the country after being threatened, several judges attempted to transfer the case to military courts, and witnesses retracted their statements after being threatened.²⁰

B. Interagency Cooperation

Investigation of complex crimes requires that the greatest detection assets of the state be brought to bear. Justice agencies, however, traditionally work in isolation of each other and guard their information zealously. Cooperation is the exception rather than the rule. Recently, however, this has begun to change.

One of the most aggressive and successful efforts to combat corruption, for example, was undertaken in Venezuela. After an attempted coup in 1972, justice officials

¹⁹ For a general discussion see: Luis Salas and José Rico, *Administration of Justice in Latin America: a Primer on the Criminal Justice System*, Miami: Center for the Administration of Justice, 1993.

²⁰ Inter-American Commission on Human Rights, *Fourth Report on the Situation of Human Rights in Guatemala*, *op. cit.*, pp. 22-26.

felt tremendous pressure to do something about corruption, which was rampant throughout the public sector. Venezuela's crisis was unusual in that the State had designed a sophisticated mechanism for dealing with corruption yet public corruption was rampant. A special anti-corruption tribunal was created under special legislation to deal with these crimes. In practice, however, this court had served as an additional barrier to successful prosecution rather than as a facilitator. During its existence, the court had only brought one case to trial and it resulted in an acquittal. In their defense, judges complained that they had no resources and that the laws were inadequate.²¹ In the last three years the court has assumed a more active role and is now a major player in the struggle against corruption.

The Attorney General realized the inefficiency of working in isolation from other investigative agencies and reached an agreement to cooperate with the Controller's Office, which also investigated financial mismanagement and had extraordinary powers to conduct the investigations. Under the agreement, auditors would notify a prosecutor when the first sign of criminal misconduct appeared. Thereafter, the auditors would work closely with the prosecutor in preparing a potential criminal case. This facilitated the prosecution of cases since the Controller had the financial investigative capacity which the prosecutors lacked and the prosecutors could direct the investigation to assure compliance with laws and enhance their chances of a successful prosecution. Additionally, prosecutors installed automated data management systems in order to track cases and manage large amounts of data. Finally, the new cooperative venture stressed innovation and abandonment of a tradition of prosecutors as passive figures awaiting a complaint to reach their desks.

C. Arrest and Access

Arresting defendants may also be a difficult task. For example, the Supreme Court tried former Bolivian dictator General García Meza, in absentia for six years even though he was reputed to be in the country.²² Even when the defendant is in jail, influence may result in his escape, for example, noted drug trafficker Pablo Escobar in Colombia. Human rights organizations have complained that suspects are allowed to escape in order to prevent them from testifying against their superiors.²³

Access to holding facilities is one of the primary barriers to investigation of cases. For example, in Honduras, judges who went to military facilities to present writs of *habeas corpus* were often detained themselves. Access is most difficult in areas under military control. The Inter-American Commission of Human Rights, for example, found

²¹ In 1992, judges threatened to resign complaining that they had no money for investigations and did not even have air conditioning. James Brooke, "Venezuela Still Edgy: Will there be Coup No. 3?", *The New York Times*, December 3, 1992, p. A 3.

²² Eduardo Gamarra, *The System of Justice in Bolivia: An Institutional Analysis*. Miami: Center for the Administration of Justice, 1991.

²³ Amnesty International, *Brazil: Authorized Violence in Rural Areas, op. cit.*, p. 20.

that "(o)n various pretexts, military authorities deny (Peruvian prosecutors) the means (vehicles, safe-conduct, transit rights) needed to do their job)." ²⁴

Access to the scene of the crime is also an obstacle to successful investigations. For example, in 1988, a massacre of peasants took place in Cayara, Peru. Military officials who impeded his access to the site of the massacre threatened the prosecutor assigned to the case. His final report held the military governor for the area personally responsible but the report was never acted upon. Given the seriousness of the threats, the prosecutor was forced to flee the country. ²⁵

D. Forensic Techniques and Experts

Many Latin American countries lack access to sophisticated forensic techniques for the investigation of major cases. Thus, it is not uncommon to find that autopsies or ballistic tests have been botched up, often due not to a purposeful action but rather as a result of the ineffectiveness of the State's investigative methods. Additionally, in most countries forensic experts are employed by the courts or the police and the code of criminal procedure restrict expert testimony to those of state employed experts. Finally, neither police agencies nor judicial investigators commonly have access to the types of automated equipment or financial auditing techniques that are required to successfully investigate corruption cases.

For years, human rights groups have recognized these deficiencies and have struggled to develop acceptable forensic techniques to establish human rights abuses. For example, the American Association for the Advancement of Science (AAAS) has promoted the development of new forensic techniques to be used in solving cases of human rights abuses. Dr. Clyde Snow, for example, trained a group of Argentinean physicians and anthropologists who formed the "Equipo Argentino de Antropología Forense" (EEAF). The team has investigated disappearances in their own country and cooperated with the United Nations Salvadoran Truth Commission in identifying the bodies of victims and determining their causes of death. ²⁶ The Truth Commission also relied extensively on examinations by Dr. Robert Kirschner of the Medical Examiner's Office in Cook County, Illinois, to verify the findings of government autopsies. ²⁷

Document examiners are also lacking in most countries. In the case brought before the Inter-American Court of Human Rights against the Government of Honduras for disappearances, attorneys for the victims introduced testimony from a United States

²⁴ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Peru*, Washington, D.C.: Organization of American States, 1993, p. 53.

²⁵ Philip Mauceri, "Military Politics and Counter-Insurgency in Peru," *Journal of Inter-American Studies and World Affairs*, vol. 33, 1991, pp. 83-109.

²⁶ T.M.B., "Identifying Argentina's 'Desaparecidos'," *Scientific American*, November 1989.

²⁷ Truth Commission, *op. cit.*, p. 104.

documents expert to verify a signature critical to the case. The Court called in a Venezuelan expert who confirmed the earlier finding.²⁸

Governments have oftentimes been cautious about allowing foreign experts to conduct independent investigations of sensitive cases. For example after the discovery of several mass graves in Peru in 1993, Amnesty International offered the services of two Argentinean forensic experts to examine the remains. The public prosecutor ruled that there were enough qualified Peruvian experts available. Human rights groups countered that the government had thus far not taken any steps to conduct a serious investigation giving as an example leaving one of the burial sites unguarded for six days and collecting evidence haphazardly.²⁹

In other cases, international pressure has been so great that local governments have been compelled to call on foreign agencies to overcome public skepticism about the impartiality of the national investigation. For example, in El Salvador, President Cristiani requested intervention of the U.S. Federal Bureau of Investigation (FBI) to review the bombing of a Salvadoran labor federation.³⁰ In 1993, the President of Nicaragua requested an outside investigation by FBI, Salvadoran police, and investigators from Spain to investigate a cache of arms found in the capital and apparently linked to terrorist acts in other countries.³¹ Recently, the FBI has assisted Argentinean authorities in the investigation of the bombing of the Argentine-Israeli Mutual Association (AMIA) after it was reported that some Argentinean police had been involved in the bombing.

E. Evidence and Standards of Proof

Even in cases characterized by a high level of secrecy, documentary evidence often exists. In the case of corruption, for example, it largely consists of financial records that must be kept in order for the criminal enterprise to be successful.

A major impediment to prosecutions of crimes involving more than one defendant, is a provision in many countries that bars the introduction into evidence of the confession of a coconspirator. Some countries exclude kidnappings and extortion from this exclusionary rule.³² In 1986, for example, the Salvadoran Congress considered special legislation allowing the introduction of accomplices in certain crimes. An accommodation was eventually reached in which murder was specifically excluded³³

Another barrier to successful investigations is a general prohibition against electronic surveillance. Prior practice in the United States has demonstrated that usage of

²⁸ Juan E. Méndez and José Miguel Vivanco, *op. cit.*, p. 562.

²⁹ "More Bodies Found in Mass Graves," *Latin American Weekly Report*, August 5, 1993, p. 359.

³⁰ Truth Commission, *op. cit.*, p. 113.

³¹ "FBI Investiga 'Buzón de Armas'," *El Nuevo Herald*, August 14, 1993, p. 3A.

³² Americas Watch, *A Year of Reckoning: El Salvador a Decade After the Assassination of Archbishop Romero*, N.Y.: Americas Watch, 1990.

³³ Amnesty International, *El Salvador: Death Squads - A Government Strategy*, *op. cit.*, p. 36.

wiretaps and body wires are some of the most successful tools to gather evidence of complex crimes. Although some countries are now permitting this practice in narcotics cases, the majority continue to bar this type of evidence. The Supreme Court of Costa Rica, for example, declared their wiretap statute unconstitutional.

F. Obtaining Testimony from Witnesses

While many reasons can be attributed to a lack of success in prosecuting economic or complex criminal enterprises, the most important is the mantle of secrecy that characterizes these crimes and the difficulty of obtaining eyewitness testimony due to the fear of retribution. Even when documentary evidence is found, live testimony is often needed to verify and interpret the documents. One of the most successful means of obtaining such testimony is to seek statements of coconspirators who have abandoned the enterprise.

In addition to the fears that witnesses have of retribution is a prohibition against plea bargaining in return for cooperation with an investigation. In the United States, for example, one of the most important techniques available to prosecutors and police is the offer to forego or reduce potential charges against witnesses who cooperate to bring higher-level associates to justice. The inability to offer concessions to participants in the criminal activity is a substantial impediment to successful prosecution. Likewise, there is a general ban on the use of informants and an overly broad definition of entrapment.

G. Corruption

Corruption is used to obtain favorable treatment from judges, prosecutors, the police and even the military. When this fails, violence is held in reserve to insure official compliance. Corruption is also closely linked to human rights abuses. Landowners and sponsors of death squad activity often bribe police and they also resort to extortion as a means of enforcing the "law" and supplementing their earnings.

The growth of public corruption has been so acute that it appears to be overwhelming the justice system's capacity to investigate these cases. Colombia's Attorney General, for example, handled 49,000 disciplinary complaints in 1991. In Bogota alone, over 2,000 charges were being investigated. The crisis became so acute that a special investigative unit of the Attorney General's Office was formed to investigate corruption complaints.³⁴ During 1991, this unit was investigating 29 parliamentarians, 48 judges, 65 directors of public municipal corporations, 68 directors of decentralized institutes, 72

³⁴ As a weapon to combat public corruption, Colombia's President established the "Council on Administrative Morals," under the control of a panel of distinguished citizens. The agency has authority to obtain bank records, tap telephones, intercept telephone conversations and conduct surveillance. The Controller's Office has also been brought into the fight given their extensive resources. "Corruption in Colombia," edited version of an editorial appearing in *Semana* on March 12, 1991, *Hemisphere*, Summer 1991, pp. 25, 27.

members of the armed forces, 88 police personnel, 92 popularly elected mayors, and 149 customs employees.³⁵

Venezuela is one of the countries in which corruption has resulted in some of the gravest challenges to democratic rule. Venezuela is unusual among its Latin neighbors in that it has enjoyed more than three decades of stable democratic rule.³⁶ Thus, the shock when on February 4, 1992 a serious military coup threatened to overthrow the government. The February 1992 coup attempt, and the popular support it apparently tapped into, demonstrated the fragility of Venezuela's democracy.³⁷ One of the primary justifications for the coup was the alleged pervasive corruption throughout the public sector. A subsequent military coup attempt in November 1992 was also justified on the same basis.³⁸ Thereafter, an unprecedented wave of bombings aggravated the delicate political situation.

The court system has been at the core of the corruption complaints.³⁹ Among other things, this has led to low public confidence in the justice system. Thus, many called for the resignation of the Supreme Court for its inaction in the face of widespread corruption. Seven of the Supreme Court's 15 justices stepped down.⁴⁰ Shortly before this, President Fujimori of Peru had justified his resort to dictatorial powers on the grounds that democratic institutions were steeped in corruption. A special target was also the judiciary, which he purged. Thereafter, President Serrano of Guatemala attempted a similar auto coup, again focusing on judicial corruption, but he failed and was removed.

H. Military Courts

³⁵ *Ibid.*

³⁶ Andrés Serbin, "Venezuela: Reversal or Renewal," *Hemisphere*, Summer 1992, pp. 24-27.

³⁷ At least 78 persons were killed during this attempt. Over 130 officers and more than 1,000 men participated in the attempted takeover. Andres Oppenheimer, "Few Rejoice at Failure of Uprising," *The Miami Herald*, February 6, 1992, p. 1A. The coup received a great deal of popular support. A poll reported that 33% of the people backed it. "Venezuela Sees Hero in Coup Leader," *The Miami Herald*, March 12, 1992; Andres Oppenheimer, "Democracy Losing Favor in Latin America," *The Miami Herald*, April 13, 1992, p. 10A.

³⁸ Over 300 persons died in this coup attempt. Andres Oppenheimer, "Did Failed Coup Free Perez from his Crisis," *The Miami Herald*, December 1, 1992, p. 9 A; James Brooke, "Coup Within the 'Coup' Cut the Toll in Venezuela," *The New York Times*, December 6, 1992, p. C 20.

³⁹ Complaints about corruption in the judicial sector are rampant. One form of corruption is characterized by the existence of "judicial tribes," loose associations of judicial officials and lawyers based on political and/or economic ties. These tribes act in an organized manner to protect actions of its members. A practice which is closely associated with the tribe system is reliance on user fees as a mechanism to insure corruption. Thus, a lawyer pays a judge ten times the requisite fee and the judge enters the legally prescribed fee while pocketing the rest. Complaints against this system reached a peak in October 1992 when Delia Estava Moreno was appointed to head the Judiciary Council even though there were substantial charges that Ms. Esteva was closely related to one of the most powerful tribes. Freddy Torres, "Designación de Delia Estava Agrava Crisis del Poder Judicial," *El Nacional*, October 21, 1992, p. D4.

⁴⁰ "Venezuela Reforms Promised," *El Nuevo Herald*, March 6, 1992.

In some countries, military law is absorptive and grants exclusive jurisdiction to military tribunals.⁴¹ It is absorptive in that any crimes committed by or against military personnel must be tried before military courts. This jurisdiction includes all crimes whether the act was committed in the performance of the military function or not. It is exclusive in that only the military courts have jurisdiction. The only way around this is to dismiss the accused from military service prior to trial.

The broadest interpretation of military jurisdiction was Chile's. These courts' authority extends far beyond what is traditional in that their jurisdiction extended to civilians. Indeed, more than 80% of cases before these courts involved civilian defendants. Additionally, civilian courts used the military courts as an excuse to justify their refusal to review *habeas corpus* petitions. This led the Organization of American States to conclude that "this serious self-limitation of (Chile's) Supreme Court left persons who had been submitted to war-time military courts without recourse."⁴²

It is not uncommon that civilian courts find themselves at odds with military tribunals over jurisdiction in which a case is to be tried. One of the demonstrative cases of the weakness of the judiciary occurred in Honduras in 1987. A member of the Supreme Court, Judge Mario Reyes Sarmiento, was stopped at a police roadblock and shot by police who argued that he failed to stop. The President of the Supreme Court went to the scene and ordered the arrest of the police agent. The military refused and assigned the case to the military courts for investigation. The suspect died in a bar subsequently and prior to being brought to trial⁴³.

Even though crimes committed by police or military forces are prosecuted in military courts, the Colombian Attorney General has actively pursued investigations by taking advantage of administrative procedures. These procedures allow the prosecutor to review abuses of power by public officials. In 1989, for example, the Attorney General conducted an administrative corruption investigation, which led to the firing of the chief of the National Police even though trial jurisdiction lay in the military courts. Thereafter, the Supreme Court ruled that the commander would have to stand trial for illicit enrichment. Sanctions of police have increased as the Attorney General has expanded usage of this administrative technique. However, the sanctions are still not commensurate with the severity of the offense since the highest penalty is removal from office.⁴⁴

I. Amnesty, Pardon, and Political Immunity

⁴¹ Article 221 of the Colombian Constitution assigns jurisdiction to military courts over crimes committed by the police or the military while in the performance of their duties. Peruvian law (law 24150 June 5, 1985, likewise assigns jurisdiction over military crimes, committed while in service, to the military courts.

⁴² Organization of American States, *op. cit.*, p. 157.

⁴³ Luis Salas and José Rico, *La Justicia Penal en Honduras* (Criminal justice in Honduras). San Jose. Costa Rica: EDUCA, 1990.

⁴⁴ Washington Office on Latin America, *The Colombian Drug Police, Human Rights and U.S. Drug Policy*. Washington, D.C., WOLA, 1993.

A primary difficulty in prosecuting political crimes committed during periods of military rule has been the enactment of amnesty and pardon laws by outgoing governments. A general amnesty applies to a definite set of cases in which potentially guilty parties are awarded immunity from prosecution. A pardon applies to specific persons and seeks to extinguish any sanction for stated acts.

In almost all instances, Latin American governments have resorted to pardons and amnesties as a means of "reconciliation" to avoid trying human rights offenses of prior regimes. Among the most prominent examples of amnesties were: Chile in 1978,⁴⁵ Brazil in 1979,⁴⁶ Argentina in a series of decrees issued between 1986 and 1989,⁴⁷ Guatemala in 1986,⁴⁸ El Salvador in 1987 and 1993,⁴⁹ Uruguay in 1986,⁵⁰ and Nicaragua in 1990.⁵¹ An attempt to enact similar legislation dealing with detained Noriega supporters has been defeated in Panama.⁵² One of the broadest amnesties is Chile's in which the Supreme Court has ruled that the law not only bans prosecution but also forecloses any judicial inquiries into the actions of persons during the period covered by the amnesty.⁵³

The Inter-American Commission on Human Rights received a petition in 1989 seeking a declaration that the El Salvador amnesty law of 1987 violated the duty of the government to investigate and sanction those guilty of violating the human rights of 16

⁴⁵ "Decreto Ley 2191 of April 1978," President Aylwin campaigned against this general amnesty.

⁴⁶ Amnesty Law No. 6628, August 28, 1979.

⁴⁷ Law of September 22, 1983 granted a general amnesty for all politically motivated crimes which occurred between May 25, 1973 (the date of the last amnesty) and June 17, 1982 (the date of the Junta's resignation). President Menem issued a pardon in October 1989. The Congress in December 1986 issued a "Ley de Punto Final" which effectively foreclosed any future prosecutions. See: Americas Watch, *Truth and Partial Justice in Argentina: An Update*, N.Y.: Americas Watch, 1991.

⁴⁸ Shortly before leaving office (1986), the military government issued Decree Law 08-86 which consisted in an amnesty for all persons implicated in political crimes and related common crimes during the period March 23, 1982 (when General Efraín Ríos Montt came to power as a result of a coup) and January 14, 1986 (the inauguration of President Cerezo). An earlier amnesty had covered abuses from 1978-1982. Amnesty International, *Guatemala: the Human Rights Record*, N.Y.: Amnesty International, 1987, p. 6.

⁴⁹ Decree-Law No. 805 granted an unconditional amnesty to any person involved in political crimes or common crimes with political origins committed before October 22, 1987. John J. Moore, "Problems with Forgiveness: Granting Amnesty under the Arias Plan in Nicaragua and El Salvador," *Stanford Law Review*, vol. 43, 1991, pp. 733-777, p. 736. Following the report of the United Nations sponsored Truth Commission in 1993, the Legislative Assembly enacted a sweeping amnesty encompassing the military, members of death squads, and guerrillas. Only the cases of killings of U.S. servicemen were exempted from the amnesty. "Cristiani Rushes Amnesty Bill," *Latin American Weekly Report*, April 1, 1993, p. 155.

⁵⁰ "Ley de Cautividad" in December 1986. The amnesty was the subject of a public referendum in which it was upheld in March 1989. Shirley Christian, "Uruguay Votes to retain Amnesty for the Military," *The New York Times*, April 17, 1989, p. A 6.

⁵¹ An amnesty law was promulgated following the electoral victory of President Violeta Chamorro over the Sandinistas. Currently, a new amnesty law is being debated to deal with over 1,000 former contras and members of the Sandinista armed forces who have taken arms against the government. "Rearmados Nicas Esperan Debate de Polémica Amnistía," *El Miami Herald*, August 7, 1993, p. 3A.

⁵² "Panamanian Amnesty," *Latin American Weekly Report*, May 6, 1993, p. 201.

⁵³ F. Mera, "El Decreto Ley 2,191, de Amnistía y los Derechos Humanos," *Revista Chilena de Derechos Humanos*, 1989. The amnesty exempted the case of Orlando Letelier, largely as a result of U.S. pressure.

peasants killed by government forces at Las Hojas in 1983. The Commission ruled in 1992 that the terms of the amnesty, issued after the order of arrest of the military officials involved in the murders, violated the American Convention on Human Rights.⁵⁴ The Commission has issued a similar ruling in an Argentinean case,⁵⁵ and another from Uruguay.⁵⁶

Amnesty laws have been used not only as a means of preventing conviction of the accused but also as a means of barring investigations. In 1986, a Chilean judge, Carlos Cerda Fernández, brought charges against 38 members of the military and 2 civilians for "illicit association" resulting from a pattern of illegal detentions and disappearances. One month later, the inquiry was closed by a ruling from an appellate court that the amnesty law absolved the defendants of any criminal responsibility. In June 1987, the Supreme Court ratified the earlier ruling and effectively foreclosed further investigations into disappearances and cases of human rights abuses.⁵⁷

In addition to amnesty laws, many of the countries' constitutions bar prosecution of high office holders, for example, members of the parliament, Supreme Court justices, and the top figures in the executive, during their term of office. In order to overcome this restriction, prosecutors are compelled to seek a lifting of the immunity from the Congress, oftentimes preceded by a determination from the Supreme Court that there is probable cause to proceed. Both of these processes are politically charged.

IV. POLICE

Law enforcement in Latin America has traditionally been distinguished by its militaristic character, both in organization and function. Even where police are separated from the armed forces, they are often *de facto* arms of the military institution. Nowhere in Latin America was this more evident than in Central America where police forces evolved from constabularies into armed forces.

It is not surprising that the role of police is at the core of political debate in nations emerging from civil war or military governments. In the case of Nicaragua, for example, a predominant political issue affecting the transition to democratic rule was civilian control over the armed forces and the Sandinista police⁵⁸. Ultimately, an agreement was reached

⁵⁴ Inter-American Commission on Human Rights, Report No. 16/92, September 24, 1992, Case No. 10,287.

⁵⁵ Inter-American Commission of Human Rights, "Report No. 28/92," *Annual Report of the Inter-American Commission on Human Rights: 1992-1993*, Washington, D.C.: Organization of American States, 1993, pp. 41-82.

⁵⁶ Inter-American Commission of Human Rights, "Report No. 29/92," *Annual Report of the Inter-American Commission on Human Rights: 1992-1993*, Washington, D.C.: Organization of American States, 1993, pp. 154-165.

⁵⁷ Amnesty International, "Chile Briefing," N.Y.: Amnesty International, 1988, pp. 10-11.

⁵⁸ In Nicaragua legislation was enacted in 1996 to create the National Civilian Police.

allowing the Sandinista Party to retain control over the new civilian police force. In El Salvador, on the other hand, a fundamental stumbling block to completion of the peace process was the role and composition of the new police force (the peace agreements call for the elimination of the existing major police forces and the establishment of a new force to be integrated by a majority of new members without ties to the former forces and an equal share of FMLN and government recruits)⁵⁹.

In Panama, for example, following the US invasion, the country's attention turned to the role of the police forces. At the core of the new government's program were measures to prevent the reemergence of the Panama Defense Forces. Former Vice President Arias, for example, affirmed in 1990 that Panama no longer has a military force since the army has been transformed into the police⁶⁰:

"We want the policemen of a modern, dynamic and pluralistic society. These policemen must be prepared to face common crime as they have been trying to do so in the past few days. However, they must also be able to face certain security threats in our country because of the weapons--many of them high-caliber--that the dictatorship hoarded and distributed, and because of rebel groups that the dictatorship established when the dictator himself grew afraid of the FDP. The so-called Dignity Battalions were created to serve as neutralizing agents and he trained them for certain guerrilla activity."

It is this duality of mission that is central to the nature of policing in Latin America. In 1992, a government sponsored constitutional proposal to abolish the military was defeated at the polls in Panama. While this was primarily viewed as a repudiation of an unpopular president, Guillermo Endara, it also reflected nationalistic pride in having a military. Finally in 1994, the constitutional amendment (art. 305) was enacted, formally prohibiting the formation of an army and establishing the National Police as a professional and apolitical body. The investigative or detective force (National Department of Investigations) was placed under the supervision of the prosecutorial body (Public Ministry).

Another country that is undergoing a transfer of police functions from military to civilian control is Honduras. In 1993, a commission to study the problem of violence and the police force recommended the abolishment of the old detective force (National Department of Investigations), which had played a major role in political repression and was widely considered to be corrupt. Two years later a new detective force (Directorate of Criminal Investigations) was established under the supervision of the country's Attorney General. It should be pointed out that there was a conscious decision not to employ any of the members of the old detective force. In 1996, the government established a National

⁵⁹ The National Civil Police has now assumed all of the functions of the prior police forces. "Ley Orgánica de la Policía Nacional Civil", Decree No. 269, June 25, 1992.

⁶⁰ Following the U.S. invasion in 1989, the Panama Defense Forces were disbanded and a National Police was established. The incorporation of all former members of the PDF into the new police forces made this a very difficult and controversial transition.

Transfer Junta ("Junta Nacional de Traspaso") to review all of the steps necessary to transfer the functions and assets of the police force, still under the military, to a civilian agency. Two years passed before the Congress finally enacted an Organic Law for the National Police ("Ley Orgánica de la Policía Nacional") and a civilian Council of Internal Security. The purpose of this committee is to propose to the President a slate of five candidates for the selection of the new police chief. Transfer has still not been accomplished and the Junta has been having difficulty composing its slate of candidates, to the point that it proposed that the Archbishop of Tegucigalpa serve as an interim police chief, which he refused. Recently, in a move seen by many to be a return to the past, the Congress removed the detective force from the Attorney General's Office and transferred it to the new police force.

A common reference in discussions of military versus police functions is made to Costa Rica (which has eleven police forces under seven different ministries or institutions). In 1949, Costa Rica proscribed the army as a permanent institution. However, the decision to eliminate the armed forces, while maintaining police forces, has led to ambiguity in the role of police in national security matters. Absence of an army leads to a system in which there is confusion between national security and internal order maintenance and the police are called upon to address both missions. Thus, for example, while there were disputes with Nicaragua in the 1980s, half of the traffic police were guarding the border, while government officials argued for a larger number of police to safeguard the capitol. Likewise, there is a feeling that maintaining a nonprofessional police force (for example, firing all police every four years) and depending on political patronage for selection of police are the means of avoiding the emergence of an army. This has led some commentators to argue that Costa Rica has neither a professional army nor a professional police⁶¹.

The duality of the police role, national security versus order maintenance, can be traced back to the colonial period. In most countries, their role has been determined through practice, and they have often been assigned those tasks that do not fit nicely in any other governmental scheme. In the past, some of the "police functions were carried out by magistrates, soldiers, public administrators, local officials or even personal representatives of the national sovereign." Today the police may be variously dependent upon a Minister of the Interior, Minister of Government, Supreme Court, the Army, or a variety of different ministries. Oftentimes, a conscious decision has been made to assign them in this manner to prevent the emergence of a powerful armed institution that can challenge civilian or military authority (Costa Rica, for example).

One of the few things which Latin American lawyers learn about police forces in Latin America is that their functions are divided into crime prevention and repression. Therefore, the ideal situation would be to establish at least two police forces, one that is in charge of the deterrence of crime, and another that represses crime once it has been

⁶¹ Enactment of the General Law on Police ("Ley General de Policía") was a major step towards professionalization of police forces. Law No. 7410, May 19, 1994 and Decree No. 223427-MP, June 27, 1994.

committed. The first is called the administrative police while the second is known as the repressive police. The modern trend is to assign the repressive police to the judiciary since they are legally under their direction during the investigative stage and the administrative police to the Executive. As it will be seen, this is not so easy a distinction. The attempt to separate this function has led to some severe problems for Latin American systems because investigations of crimes cannot be so easily segregated between police agencies.

Police functions in Latin America are assigned to bodies with national jurisdiction and a centralized command structure. Only in countries with a federal government structure (Argentina, Brazil and Mexico) does one find provincial and municipal police departments. Organizational models have been influenced primarily by European patterns (especially in the Southern Cone) and by the United States (Panama, the Caribbean and Central America).

Few countries have a professional police force. Entry requirements tend to be low, salaries are inadequate, training is insufficient or inappropriate (militaristic in most countries), and seldom does one speak of a law enforcement career. It is not surprising that police are normally recruited from the lower classes and many turn to crime. Modern trends in policing (community policing, for example) are ignored, and unsuccessful patterns and practices are maintained. Finally, controls over police behavior are limited to scarce internal controls which, oftentimes, seek to immunize police rather than making them accountable for their actions.

Corruption is a legacy of most Latin law enforcement units. One of the most notable examples of police corruption is Mexico. Mexicans have even developed a word for police bribes, *la mordida* or the bite. Drivers stopped by police, for example, are routinely requested a minimum fee to avoid the inconvenience of having their license confiscated and having to attend a hearing. For the police, who earn an average of \$200 monthly, bribes have become a necessary supplement. Patrol members, in turn, are expected to share the proceeds with their commanders.

Corruption is most prevalent in the struggle to control narcotics. For example, police officials were implicated in the escape of Pablo Escobar from a Colombian prison while Mexican police were linked to the murder of DEA agent Camarena in Mexico. One trafficker, Oliveira Chavez Araujo, organized a prison uprising in Matamoros allegedly to protect himself from corrupt Mexican Federal Police officials. Thereafter, the prison director and six high-ranking federal officers were arrested. Just two years before this uprising, the entire federal police detachment was imprisoned for corruption and replaced; one year earlier authorities arrested one of the country's highest ranking drug enforcement officials for offering bribes exceeding \$20 million to other senior law enforcement officials.

Poor working conditions have also resulted in police unionization and given rise to numerous strikes. Some strikes have turned violent as the central government has resorted to the military to bring pressure on the police. The government of Uruguay, for example, capitulated and awarded a 50% salary increase when police went on strike. Hundreds of

officers camped out near the presidential palace and the military refused to replace civilian police in patrol duties. Greater protection for police has also given rise to strikes. The police in Medellin, Colombia, for example, threatened massive resignations after 141 agents had been killed in the first six months of 1990.

Possibly, the most significant development in Latin American law enforcement has been the emergence of a large and unregulated private security apparatus. While there is very little information on the growth of private security, since it tends to be unregulated in the majority of countries, the presence of private security is obvious to travelers to the region. Visitors are faced with bars on most residential and commercial windows while gun-toting security guards stand at store entrances. The Confederation of Peruvian Industrialists estimates that companies in that country spend more than \$150 million annually on private security. In 1980, there were 41 security firms in all of Peru, by 1991, more than 300 were operating.

Finally, a complicating factor, as these countries debate the role of police, is the war on drugs. In Bolivia, for example, the U.S. has brought strong pressure to bear to involve the military in antinarcotics operations, arguably a traditional police function, while developing specialized and militarized police units. Like many other Latin American police forces, the Bolivian police have often found themselves subordinate to the military and involved in political rather than crime repression functions. Police are badly paid, do not enjoy the prestige of their military counterparts, and are held in low regard by the general population. U.S. pressures have led to the establishment of specialized antinarcotics units that have been viewed with jealousy by the rest of the police, and with suspicion by the armed forces, leading to clashes with counterparts in the sector.

Colombia and the United States agreed to exclude that country's military from the drug strategy and redirected U.S. assistance from the military to the police. Shortly thereafter, Bolivia also removed its military from the drug war. Finally, the Aylwin government in Chile transferred the Carabineros, the nation's police force, from the armed forces to civilian control in the Interior Ministry, after 17 years of military control.

Resolution of the debate over the role of police in democratic Latin societies will not only affect the future of the justice sector but may be fundamental in determining the persistence of the current democratization trends in the region. The debate is far from over. Colombia, in its new 1991 constitution, opted to maintain the police under military control. Of special note is the maintenance of jurisdiction by military courts over police misconduct, further removing them from civilian oversight.

V. NEW TRENDS IN POLICING

While the foregoing section indicates a pessimistic view of the future of policing in Latin America, there are encouraging signs of reform. Among these some of the most

important are the development of municipal and provincial police forces as a result of decentralization of the State; community policing; increased training; adoption of national anticrime programs; and support from international donor organizations.

A. Decentralization

Recently, there has been a trend in Latin America to decentralize government and to transfer to local governments a number of functions previously carried out by the central government. Assignment of law enforcement duties to municipal governments is a possible outcome of this decentralization strategy.

Law enforcement in the majority of Latin American countries can be characterized as centralized and exercising national and exclusive jurisdiction (Chile, Colombia, El Salvador, Guatemala, Honduras, Nicaragua and Panama). Countries espousing a decentralized model are characterized by multiplicity of police units with restricted, and sometimes overlapping, jurisdiction (Argentina, Brazil, Costa Rica, Mexico and Venezuela).

One of the most interesting developments on the heels of national decentralization programs has been the development of municipal police departments. A precursor to these departments was the Spanish model following the death of General Franco. Partially as a repudiation of the Civil Guard and the National Police, closely identified with the previous regime, and partially as an assertion of nationalism, the Basque Country and Cataluña established their own provincial and municipal police departments. In Venezuela, the wealthier municipalities also sought to create their own departments. This was viewed with skepticism since it was perceived to be a police force aimed at protecting the interests of a wealthy community against those of their poorer neighbors.

B. Community Policing

Beginning in the 1950s and continuing until the present, professionalization of law enforcement was synonymous with centralization, rapid deployment in motorized patrols, an emphasis on communications centers and usage of sophisticated equipment. This trend reinforced the military policing model that dominated law enforcement in Latin America. In recent years, the United States and European countries have introduced a new model that in many ways signifies a return to the past. Community policing is based on the premise that law enforcement should be accessible and representative of the community that they seek to serve. Decentralization of police departments and greater delegation, accompanied by accountability of local commanders, is now the rule in many jurisdictions. Rather than motorized patrols responding to calls for service, police are now patrolling on foot and seeking partnerships with the residents of the patrol area.

One of the few documented Latin American experiments in community policing took place in Costa Rica in 1996⁶². The Ministry of Public Security initiated a pilot community-policing project in a district of the capital. Four substations were established to furnish patrol services (foot and motorized patrols) and citizen advisory committee was established to assist the district commander. This attempt to establish a public and police partnership in crime prevention gave very positive results with a decrease in crime and in the level of public insecurity while also improving the public's image of the police.

A similar approach was taken in a much larger area when Mexico City Police Chief Rodolfo Debernardi took office⁶³. Debernardi began to hold regular meetings with community leaders and even undertook a population survey to gauge public opinion about crime and the measures to eradicate it. In order to educate the citizenry as to their rights and to eradicate corruption, the police distributed brochures on traffic laws, long a source of police corruption. Debernardi was unable to adequately control his police force and after repeated complaints of human rights abuses, resigned in August 1998.

C. Professionalization

Latin American police forces have been characterized as ill trained, poorly paid, corrupt and ineffective. Recently, however, there have been important efforts to professionalize these police forces. In Colombia⁶⁴, Costa Rica⁶⁵, El Salvador⁶⁶, and Paraguay⁶⁷, for example, new legislation regulating the police have been enacted. These laws generally regulate entry requirements, training, promotions and transfers, salary scales, working conditions, rights and responsibilities, oversight of police conduct and dismissal. In short, these laws establish merit-based personnel systems.

The quality of police training varies widely among the different countries even though they all have police academies. In some countries where the creation of a civilian police force was dictated by peace accords that put an end to civil war, a central focus of the curriculum is respect for human rights. For example, in El Salvador new legislation was enacted establishing a police academy that emphasized interaction with the community and rejected the military policing model⁶⁸. In many others, the curriculum is still characteristic of a military model in which more time is spent on learning close order drill than in patrol practices.

Recently, there have been regional training initiatives with the most developed ones taking place in Central America. As a result of the Central American Presidents'

⁶² José María Rico and Laura Chinchilla, "La Policía en Centro América: Hacia una reforma integral e integrada", unpublished monograph, 1998.

⁶³ José Antonio O'Farril, "Economic Hardships will Strengthen Mexico", InfoLatina, August 17, 1998.

⁶⁴ Decree 41, January 10, 1994 (applying to officers and noncommissioned officers) and Decree 262, January 13, 1994 (applicable to lower ranks).

⁶⁵ Ley General de Policía, May 19, 1994

⁶⁶ Proyecto de Ley de la Carrera Policial, 1995.

⁶⁷ Ley Orgánica de la Policía Nacional, July 9, 1993.

⁶⁸ Ley Orgánica de la Academia Nacional de Seguridad Pública, Decree 195, February 27, 1992.

Summit that took place in 1994 a series of agreements were entered into by the Central American nations. Among them, exchange of information between the different agencies, establishment of a regional planning body to coordinate the struggle against narcotics trafficking, and the design of a common police training program leading to the establishment of a regional police academy. Chiefs of police from the different countries have been meeting periodically and have now adopted a common proposal with the expectation of foreign assistance from the European Union and Canada⁶⁹.

As a follow-up to the Latin American Presidential Summits of Miami and Santiago, Brazil and Canada recently presented to the OAS an "Implementation Plan for the Miami Initiatives on Democracy and Human Rights". The plan contained specific recommendations on police and most focused on the issue of professionalization.

- "Adopt pedagogical programmes directed at agents of the State and in particular courses on human rights in police academies;
- Improve the criteria of selection, recruitment and training of police officers, so as to include respect for human rights;
- Examine and reform the curriculums for training and re-training of police officers with a view to including the correct treatment of suspects and detainees, and also deepening the police officers' awareness of the fact that they are members of a public service, at the service of the community, and that they should never under any circumstances neglect, abuse or stray from this function;
- Develop programmes and projects for the improvement of the technical facilities of the police".

The United States, at the Santiago Summit, offered financial support for the establishment of a Latin American police academy patterned after the International Law Enforcement Academy in Budapest to train law enforcement officers from Central Europe and the New Independent States⁷⁰.

D. National Anticrime Strategies

Long-term and short-term development strategies have been widely practiced by Latin American governments, especially for sectors such as transportation, education and

⁶⁹ José maría Rico, *Justicia penal y transición democrática en América Latina*, Mexico: Siglo XXI, 1997.

⁷⁰ The eight-week session focuses on personal and professional development and includes courses on financial crimes, organized crime, drug investigations, property crimes, human dignity, management of the investigative process, and management applications of computerized law enforcement information systems. Instructors from Germany, the United Kingdom, Canada, Italy, Russia and the Council of Europe are teaching units on nuclear smuggling, organized crime, VAT tax evasion, human rights, and media relations as part of the eight-week program.

health. Seldom, however, does one find a reference to the justice sector in any government's development plan. This, however, is slowly changing as governments become cognizant of the need for justice sector planning.

One of the most ambitious anticrime plans was recently revealed by President Ernesto Zedillo in Mexico⁷¹. The "National Crusade Against Crime and Delinquency" requires a coordinated effort between the federal, state and local governments to coordinate anticrime activities, assigns 3.5 billion pesos this year (17 times the budget assigned in 1995) and double that amount in the next two years destined to combat crime. The plan consists of eight reforms:

- Professionalization of police and prosecutors. The first step in this direction is a vigorous selection program to weed out poor candidates for police employment. Police training will be expanded, five regional police academies will be built and the salaries of law enforcement personnel raised.
- Doubling of the number of police, forensic experts and prosecutors to clear existing investigative backlogs.
- Establishment of a National Information System to maintain databases on weapons registrations, police personnel and criminal history information. States will be linked to the central system. Assignment of a central number (066) that can be dialed by anyone throughout the country and that will connect them with the police or prosecution office.
- Improvement of facilities and equipment especially construction of 21,000 jail beds.
- Improved coordination between the three levels of government (federal, state and local).
- Tougher criminal legislation. Some of the most important reforms are use of preventive detention in violent and/or frequent crimes, imposition of consecutive sentences to increase potential jail time, increased penalties for financial crimes and others.
- Review of the norms, registrations, personnel and operational permits of private security companies.

⁷¹ R. Davalos, I. Pilar Ortiz, A. Mayorga and M. Castillo, "Habrá depuración de Cuerpos Policiacos", *Excelsior*, August 27, 1998; Orquidca Soto and Ricardo Barraza, "México está indignado", *El Economista*, August 27, 1998.

- Development of mechanisms to permit greater public participation in crime prevention through the "Community Consultation and Participation Committees".

E. International Assistance

The justice sector was largely ignored by international donor organizations with the exception of the United States Agency for International Development. Recently, however, there has been a trend to recognize crime and corruption as serious impediments to economic development and consolidation of democracy and to fund reform programs. The Inter-American Development Bank and the World Bank have been especially active in the "Rule of Law" field.

Recently, for example, the IADB approved a \$57 million loan to Colombia to finance a \$95 million program to reduce crime and violence. Included in the program is training for police in community relations, research on ways to reduce violence, evaluation of existing legislation, development of an anti-violence communications strategy with the cooperation of the media and the entertainment industry, "police education programs to improve relations with communities, foster respect for human rights, and enhance their capacity as public servants" and citizens watch programs.⁷²

Another IADB \$25 million program will help prevent and deal with interpersonal violence and reduce the perception of insecurity in Uruguay.⁷³ Among its activities, the program will support two pilot crime prevention centers working closely with public and private sector agencies and will finance the "promotion, development and implementation of local strategies proposed by communities for crime and violence prevention". The program will also review the curricula of the National Police College and prepare a proposal for a "new, decentralized structure for the police".

In addition to large projects, the IADB has also sponsored seminars and workshops on the subject of crime and violence. For example, in 1997, experts on crime and development met in Rio de Janeiro to review strategies for reducing urban violence in Latin America.

The United States continues to furnish training and technical assistance through the International Criminal Investigations Training Assistance Program (ICITAP) of the Justice Department. Originally, this program was designed to assist in the establishment of civilian run detective forces that would have the capacity to solve major crimes. Thereafter, especially following the US invasion of Panama, ICITAP has been involved in massive police training in Haiti, Bosnia and other trouble spots, partially to allow US forces to withdraw from these areas.

⁷² "Support for Peaceful Coexistence and Citizen Security (1085/OC-CO, 1086/OC-CO, 1987/OC-CO and 1088/OC-CO), February 25, 1998.

⁷³ IADB, "Program for Citizen Safety: Crime and Violence Prevention (1096/OC-UR), 1998.

Spain is second to the United States in the provision of training and technical assistance to Latin American police forces. Spanish Civil Guards have traveled extensively in the region and offered scholarships to attend the National Police and Civil Guard Academies in Spain. The German Government has also furnished technical assistance and equipment to Latin American police forces. Chilean police ("carabineros") have also furnished technical assistance and training to their police counterparts. Finally, the Government of Taiwan has also been involved in police training, primarily in Central America.

VI. PROSECUTION

A visitor to a Latin American prosecutorial office will find that the prosecutor is possibly the least important figure in the criminal justice system. Prosecutors lack the power to supervise investigations, file charges, or exercise discretion. During the investigatory stage, they are often depositories of documents generated by the police or the investigating magistrate and during the trial, his/her presence is largely a ceremonial legal requirement.

Generally, the Latin American prosecutorial agency is the poorest entity in the system under whose leadership labor badly paid professionals. Fortunately, their role is changing as countries debate the function of the prosecutor while moving toward accusatory systems of criminal procedure. Generally, this is one of the agencies in the justice sector most in need of modernization since they are expected to combat crime under a code of criminal procedure which accords them a limited role and are assigned some of the smallest resources of the justice sector.

The passive role of Latin American prosecutors can be directly attributed to the inquisitorial model of criminal procedure in which the judge is the key actor in the process, being responsible for conducting the investigation, determining probable cause and deciding the outcome of the case. Under this system, the role of the prosecutor is largely ministerial. As countries begin to shift to the accusatorial model of criminal procedure, the prosecutorial function in Latin America will be radically transformed.

The Latin American prosecutorial systems are varied even though usage of the term Public Ministry (*Ministerio Público or Fiscalía General*) is common to all the countries. This term, however, is misleading since it describes a function rather than an institution. In some countries, the prosecutorial function is totally carried out by the Executive (Bolivia, for example). In others, the Executive intervenes in the selection of their personnel or provides administrative support (Panama and Brazil), or the prosecution function is assigned to an autonomous agency (Argentina, Colombia, Ecuador, Guatemala, Honduras, Mexico, Panama and Venezuela).

The prosecutorial body has jurisdiction over the prosecution of all crimes that reach the courts. Additionally, the law often assigns to them responsibilities totally outside of their primary function as prosecutors. For example, in Bolivia, the prosecutor is charged with ensuring that the public defenders attend daily criminal proceedings. In Venezuela, the Fiscal General acts almost as an ombudsman and is even assigned the role of ensuring that the judiciary and the correctional system comply with the law. Finally, in many countries this office is also charged with representation of the State in civil matters, intervention in family cases including juvenile proceedings, legal counseling of State entities and officials, and prosecution of corruption. As a result of the broad scope of functions that are legally assigned to them, prosecutors are hampered in carrying out their primary task, the prosecution of crime.

Much of the debate over prosecutors in Latin America has centered on their institutional situ. While some argue that they should be in the executive or the judiciary, others would like them to be an autonomous institution. For those who argue for a judicial situ, the most notable example is Costa Rica in which a chief prosecutor leads an office within the Judiciary and all of its employees are judicial officers selected by the Supreme Court. Other countries have split representation of the State between the Executive and Judicial Branches with prosecutors being employees of the latter, and *procuradores* responsible for civil representation of the State, being employed by the executive. Finally, in some countries, even though the prosecutors are employees of the Judiciary, the Executive (for example, Paraguay) appoints them. In others, the title judicial officer is illusory since they are totally dependent on the executive for their subsistence (for example, Bolivia).

The most prevalent model has the prosecutorial function being totally carried out by the Executive (Colombia, Guatemala, and Mexico). In others, the executive intervenes in the selection of their personnel or provides administrative support (Panama and Brazil). Recently, there has been a tendency among civil law nations (Costa Rica and the Dominican Republic) toward judicialization of the prosecution function. This is based on the assumption that since they have quasi-judicial functions, they ought to have some of the independence and security accorded to judges.

Finally, the least prevalent model is that of the autonomous attorney general selected by the Congress and serving a fixed term as a constitutional officer (for example, Venezuela). While this allows the Attorney General autonomy, it often leads to clashes between the other branches and this officer.

A. Passive Prosecution: the Inquisitorial Model

Under the inquisitorial model, Latin American prosecutors have limited discretion in carrying out their duties and have little control over the charges to be filed, the investigation of the case, or the presentation of evidence at the trial. Their function is determined, in large part, by the procedural system and the existence of an investigating judge.

The nature and severity of the offense determines the type of proceeding to be followed, including who may bring the prosecution. For the majority of serious crimes, the prosecution is brought by the State. However, in some cases, the injured party (for example, rape and slander) must bring the prosecution since the law assumes that the injury is a private concern. In those instances, the prosecutor may not intervene at all.

Unlike the United States, where the prosecutor has almost unrestricted and exclusive discretion in the filing of charges, this power is usually reserved to the judiciary in most Latin American countries. Even the receipt of the complaint is not restricted to the prosecutor since they may be filed with the police, the courts, or other agencies. The result is that in many countries the majority of prosecutions are initiated by non-prosecutorial entities (for example, Honduras).

Even though Latin American legislation allows some degree of discretion, it is usually limited to cases that must be brought by private prosecution or by one of the parties. In Colombia and Guatemala, however, the new codes of criminal procedure permit prosecutorial discretion under certain conditions⁷⁴.

The Model Code of Criminal Procedure, likewise, allows for voluntary dismissals and suspension of the process, except for crimes committed by a public official under color of office, with the consent of the trial judge and in the following cases: minor crimes which do not gravely affect the public interest, minimal participation by the accused in the commission of the offense, cases in which the judge can suspend the sanction, and when it is beneficial to dismiss the current case in order to facilitate the prosecution of another⁷⁵. The same code also allows the presiding judge to impose probation in those instances in which final application of the sanction is not advisable⁷⁶.

The passive role of prosecutors in the criminal process is common to most of the region. Nevertheless, in recent years, there has been a trend towards strengthening this institution by guaranteeing its autonomy and charging them with broader powers, especially during the investigatory stage.

Due to the utilization of judicial officials, and in some countries even the police (Cuba, for example) as investigating magistrates, the prosecutor is generally relegated to a paper pushing role, and his/her function has been described in some countries as "nill". A review of court records in Nicaragua in 1987, for example, indicated that in 88% of the cases the prosecutor's activity was limited to presenting the criminal complaint and

⁷⁴ In Colombia (art. 33 and 34), in a variety of crimes (incest, bigamy, child support, embezzlement, obtaining sexual favors through misrepresentation, slander, libel, certain larcenies, issuance of bad checks of small amounts, squatting, , etc. In this country, the case may also be dismissed if the accused and the prosecution arrive at an agreement regarding the type of crime and the penalty to be imposed. In this instance, the accused will receive a mitigation of sentence equal to one-sixth of the sanction (art. 37). Additionally, mediation is permitted in those cases in which the law permits dismissal of charges. In Guatemala (art. 25), charges may be dismissed if the following conditions are met: in minor crimes, the victim agrees, the judge authorizes it, the guilt of the accused is minimal, and restitution has been made.

⁷⁵ Note to article 230.

⁷⁶ Art. 231.

compliance with insignificant procedural requirements giving the impression that their filings were *pro forma*. In only 3% of the case files was there evidence that they appeared or presented evidence.

The prosecution's role in appeal proceedings is frequently more passive. Normally, the prosecutor does not appeal from judicial rulings and when appearing, he/she normally files a minimum of pleadings.

The passivity of the prosecutor serves to explain the fact that in many countries there are much fewer prosecutors than judges. For example, in Guatemala, there were 30 prosecutors appearing before 47 trial judges and 97 justices of the peace in 1986. In Bolivia, a total of 92 prosecutors must prosecute cases before 424 judges giving a ratio of almost five judges per prosecutor in 1991. Considering that the majority of the Bolivian courts are unipersonal, each prosecutor must cover proceedings in approximately five courts. This situation is further complicated by rotational systems in some departments. In Santa Cruz, for example, the prosecutors are rotated every two months, ensuring a lack of continuity in the processes.

Even though many countries require that the prosecutor act as a check on the power of the judge by being notified of all actions taken during the investigative stage, in reality they are mostly irrelevant to the process. For example, in a 1989 study of Guatemalan justice, 17.7% of judges interviewed, stated that the prosecutors have no functions in their court while only 3.5% stated that they participate in the investigatory stage, even less in trials (1.2%) and only 7.1% felt that they acted as the official accusers during the process. In the most extreme example, Chile, there have been no prosecutors since it is assumed that the investigating judge will undertake these responsibilities. A recent reform created the Public Ministry.

In many countries, prosecutors work under the most difficult conditions. For example, in 1986, Honduran prosecutors had: no support staff; no offices, desks, or even office supplies; they had to take their work to their own private offices to have it done. Moreover, the salaries and benefits of prosecutors are, frequently, woefully inadequate. Although they must meet the same qualifications for selection as judges, in some cases, the salary differences are as much as 50 percent (Bolivia, for example). For obvious reasons, this discriminatory salary policy leads some into illegally practicing law that contributes to corruption. Additionally, in some countries with specialized narcotics legislation, salary differentials between narcotics prosecutors (frequently supplemented by donor countries, especially the United States) and the rest have the potential of aggravating the low morale of the lower paid officials.

While in a majority of countries all prosecutors are lawyers; in others, lay persons are allowed to represent the State. In Nicaragua, for example, 60% of the prosecutors were not lawyers in 1991. State representation by nonlawyers is most prevalent in lower courts. For example, in the Dominican Republic, 46% of the prosecutors working at the justice of the peace level were not lawyers in 1988. Other countries have assigned these

functions to political officials. For example, in Bolivia, since no prosecutors are assigned to provinces, a promotor fiscal who often is not a lawyer and receives no remuneration for his service carries out their function.

The low prestige of the profession, combined with low salaries, has often led to abuses and corruption. For example, in Mexico, President Salinas in 1991 fired his attorney general following a critical report of police abuse and prosecutorial inaction by Americas Watch and ordered a reorganization of the office. A successor, Ignacio Morales Lechuga, was also dismissed as a result of charges that he failed to curb police abuse and corruption. Likewise, the Attorney General of Paraguay, Diogenes Martínez, was forced to resign in 1990 for failing to bring charges against members of former president Stroessner's regime. Martínez had previously refused to resign claiming that he had been appointed by the Senate and was, thus, autonomous.

B. Proactive Prosecution: the Accusatorial Model

As countries in Latin America adopt the accusatorial model of criminal procedure and respond to the need for more aggressive law enforcement, the role of the traditional prosecutor has been radically altered from an institution that "appears not to have reached adulthood" to a proactive and powerful actor in the criminal process⁷⁷.

Although the figure of a strong prosecutorial agency is not unknown in Latin America, this institution was never able to realize its full potential until new codes of procedure accorded it an active role in the criminal process. An exception is Honduras. The Honduran Congress in 1993 promulgated an "Organic Law for the Public Ministry"⁷⁸ that transformed a typical and passive agency into one of the most powerful in the region. Its success is attributed partially to the functions and autonomy assigned to it by law⁷⁹ but also because of the vision of its first director.

Creation of the Honduran Public Ministry was a consequence of a democratization process that repudiated military control over the police, sought to eliminate impunity and public corruption and espoused a proactive model of law enforcement. The law transferred the judicial police investigative and forensic medicine functions to the Ministry. In staffing a new detective force, a critical choice had to be made whether to absorb all of the personnel of the old police agency ("Dirección Nacional de Investigaciones" - DIN) or to create a totally new force. The new Fiscal chose not to hire any of the old detectives, employed a private consulting firm to design testing instruments and conduct interviews and chose detectives only from the list of candidates proposed. Transfer of all laboratories

⁷⁷ Julio Maier, "El Ministerio Público: ¿un adolescente?" in: *El Ministerio Público en el Proceso Penal*, Buenos Aires: Ed. Ad-Hoc, 1993, p. 17 ss. See also: Fernando Cruz Castro, *La función acusadora en el proceso penal moderno*, San Jose, ILANUD, 1991; and Maximiliano Rusconi, "Reforma procesal y la llamada ubicación institucional del Ministerio Público," in *El Ministerio Público en el Proceso Penal*, *op. cit*

⁷⁸ Ley del Ministerio Público, Decree Number 228-93, December 13, 1993.

⁷⁹ The law establishes functional and budgetary autonomy for the new Ministry and awards to the Fiscal all of the privileges of members of the Supreme Court.

and forensic medicine facilities to the new Ministry completed the transformation of this institution.

Unfortunately, the Congress failed to enact a proposed accusatorial code of criminal procedure, severely limiting the potential of this agency⁸⁰. Nevertheless, the office gained substantial credibility (ranking first among government institutions in public confidence polls) by conducting public education campaigns, rejecting political interference in its decisions and establishing specialized units with national jurisdiction to combat major crimes. The decision to create specialized units allowed the institution to target specific crimes of importance to the country. Special emphasis, for example, was placed on the public corruption and human rights units⁸¹ that were accorded a larger share of resources and personnel. The creation of elite prosecutorial forces focused on proactively investigating specific crimes is unique in a region in which the prosecutor was expected to wait until a complaint was filed and to devote an equal level of effort to the investigation of all crimes. In 1998, the Congress chose to remove the investigative police (DIC) from the Public Ministry and to merge it with the new civilian uniformed police force. This decision resulted in public demonstrations in front of the Congress from opponents who feared that the shift signaled an end to the professionalization and depoliticization of police.

Colombia represents another example of the new prosecutorial model. The first attempt to establish a new Public Ministry occurred in 1979 when reformers sought to create a central prosecutor's office with accusatorial powers for certain crimes while retaining the inquisitorial model for other crimes⁸². The Supreme Court, however, declared the reform to be unconstitutional. Legislators enacted a massive reform that included a new accusatorial code of criminal procedure and a new Public Ministry. The 1990 Constitution and the 1992 legislative reforms called for a Fiscal General (akin to an Attorney General), elected to a four-year term, to serve as the head of the Public Ministry. Even though the office is considered to be part of the Judicial Branch, it maintains administrative and budgetary autonomy.

The Fiscalía exercises national jurisdiction and is organized into regional offices in each of Colombia's major cities, then sectoral offices in each judicial district and local offices. The individual prosecutors investigate crimes, formalize charges, oversee the investigation of the judicial police⁸³ and final prosecution leading to conviction.

⁸⁰ In August 1998, the Honduran Congress was still considering the proposal.

⁸¹ The human rights unit was assigned the task of investigating human rights abuses of prior governments.

⁸² For a review of the new Public Ministry in Colombia see: Michael R. Pahl, "Wanted: Criminal Justice - Colombia's Adoption of a Prosecutorial Model of Criminal Procedure", *Fordham Law Journal*, vol. 16, pp. 608-634, 1993. See also: Fernando Carrillo Flores, *Presentación a la Revolución Pacífica de la Justicia*, Bogota: Fernando Carrillo ed., 1991.

⁸³ The judicial police includes the three major Colombia police forces, the Cuerpo Técnico, the DJIN/SIJIN of the National Police and the DAS.

One of the key decisions facing the implementers of the criminal procedure reform was what to do with the existing instructional judges and Colombia opted to absorb these judges (over 8,000 of them) into the new Public Ministry. One commentator upon reviewing this decision concluded that "the new system promises to produce what may be called for lack of a better term "trickle down convictions." Otherwise stated, impunity should be lowered in the new system if the prosecutors are adequately pressured by their superiors to prosecute criminals zealously, with the lowering of the impunity rate the measure of their performance. In the past, the lowering of the impunity rate could not be used as an indicator of an instruction judge's efficiency, as she was concurrently responsible for defending justice and fair play in the criminal process⁸⁴."

The results of the Colombian experiment are mixed and have been severely affected by the on-going civil war, the continuous pressure from narcotics traffickers and the resignation of the most effective Fiscal General, Alfonso Valdivieso, to run for President. If reduction of crime and "impunity" are a test, then the results are not positive. The Institute for Legal Medicine reported a 1997 homicide rate of 66 deaths per 100,000 inhabitants. In 1996, the Superior Council of the Judiciary reported that 74% of all crimes go unreported, and between 97 and 98% of all crimes go unpunished. The Government Commission on Public Spending similarly placed the impunity rate for all crimes at 99.5%. Killings by paramilitary groups (also known as "self-defense groups") increased significantly in 1997, many times with the complicity of individual soldiers or military units, or with the knowledge and tacit approval of senior military officials. The number of such killings attributed to paramilitary forces increased significantly (from 751 in 1996 to 752 during the first 9 months of 1997).

A critical flaw in the establishment of the new Public Ministry was to assign it the task of public defense⁸⁵ and then substantially underfunding it. The Public Ministry's National Ombudsman for Human Rights is severely underfunded and understaffed as the country attempts to develop a credible public defender system. The 1996 budget, for example, was sufficient to employ 558 public defenders (compared with the official goal of 2,000), providing only minimal coverage for just 70 percent of the nation's municipalities. None of the public defenders were guaranteed civil service protection.

Perhaps the highest point of Colombia's Public Ministry was the appointment of Alfonso Valdivieso as Fiscal General. Valdivieso oversaw an investigation into illegal (drug related) campaign contributions in the electoral campaign of President Samper. In what became known as "Cause 8,000" the Defense Minister and other former campaigns officials were jailed, reached agreements with the prosecutors to testify against Samper and the case was presented before the Congress. In June 1996, the Lower House dismissed the charges against Samper. During the process, the Procurator General who had fought Valdivieso throughout the process was removed from office by the Supreme

⁸⁴ Michael R. Pahl, *op. cit.*, p. 624.

⁸⁵ The Public Ministry's National Ombudsman for Human Rights is elected by the House of Representatives to a 4-year term and has the constitutional duty to ensure the promotion and exercise of human rights.

Court and charged with being involved with drug traffickers. In May 1997, Valdivieso resigned to run for President and eventually withdrew his candidacy after endorsing current President Pastrana. Some Colombian reformers have criticized Valdivieso for using his office as a springboard for national politics.

Venezuela's Public Ministry is another of Latin America's strong prosecutorial models. The Fiscal General of the country is a constitutional officer who serves a ten-year term and oversees an autonomous prosecutorial body. This institution was established prior to adoption of an accusatorial model but was accorded broad powers in the investigation of crimes, especially public corruption. Its organization includes local offices for the prosecution of ordinary crimes and specialized units with national jurisdiction. Following two attempted coups in 1992, the office initiated serious investigations into corruption at the highest levels eventually leading to the formalization of charges against the sitting president and a predecessor. The case concluded with the impeachment and conviction of President Carlos Andrés Pérez. The investigation into the Pérez case was unique because a task force composed of prosecutors, auditors from the Controller's Office and investigators investigated it.

CONCLUSION

The administration of justice in Latin America is in the midst of its most serious crisis as it is perceived by a large segment of the population as incapable of coping with the rising tide of criminality, generally inefficient and corrupt and, worse of all, irrelevant. Thus, it is not surprising that truly revolutionary reforms are being proposed. Of these, the most significant may be abandonment of the inquisitorial model of criminal procedure and adoption of the accusatorial model so prevalent in common law countries.

This change, however, will not be easy nor is there a guarantee that it will be successful. The Italian experience demonstrates the difficulty of such a radical shift. "The application of the new code created enormous unforeseen problems which could have been addressed by better planning and training. The prosecutors and lawyers were hampered by their training during the stage in which legal arguments were to be made orally. The Ministry of Justice did not gauge the demand that the system placed on the courts nor did it establish an adequate case-tracking system to evaluate the results of trials. Structurally and culturally the Italian judiciary lacks sufficient organic sensibility with respect to judicial matters and the application of the code demonstrated that the management of a reform does not simply consist in changing a law."⁸⁶ During the first six years of operation, the Constitutional Court has modified more than forty of the code articles. A number of special procedures were introduced by the new code in an effort to speed up the process. Of these, plea-bargaining was the most innovative. Between October 1989 and December 1993 was only used in less than 4% of cases before general

⁸⁶ Marco Fabri, "Comentarios", *Saint Louis University Law Review*, vol. 40, pp. 1215-1218, 1996.

jurisdiction courts. Similar results were obtained with the other special procedures with the result that the number of cases that go to trial are still very high as is the length of the process. Since live witnesses are required at trial, this delay results in a greater number of acquittals due to diminished memories of witnesses. "The hypothesis that the oral process in and of itself will accelerate the legal process and results in a more efficient administration of justice is simply wrong. On the contrary, a reform of this type, which is not adequately organized and administered can worsen the operation of the criminal process."⁸⁷

Too often Latin American legal reformers have embraced normative change as a panacea to solve critical problems. Generally, they have appointed law-drafting commissions composed of national and foreign legal academics that have copied codes from other countries with little regards for cultural differences or difficulties of implementation. These codes are then reviewed in parliamentary bodies with few technical skills to make effective judgements and whose primary focus is the financial cost of implementation and its impact on the national budget.

True reform cannot be legislative only and must be one component of an overall strategy that brings all of the State's resources to bear. The role of prosecutors under the new system is totally different as they move from being passive spectators to assuming a proactive role in the investigation and prosecution of cases. These bodies will be in need of substantial increases in their budgets as they increase personnel and acquire new technology. Extensive training is necessary since the new system requires the usage of new skills, especially in questioning of witnesses and making oral presentations, alien to lawyers. Critical decisions will have to be made as to the relationship of these prosecutors to the judicial police and forensic resources (laboratories, etc.).

A truly strengthened prosecutorial body modeled after Colombia presents the danger of excessive concentration of unchecked power and control mechanisms must be put in place to ensure that it does not become a destabilizing force to democratic development.

Adequate funding must be dedicated to establishment of a full-time public defender agency. Under the accusatorial model, a zealous prosecutor can trample on the rights of defendants with ease without an effective legal defense. Reliance on court appointed defenders or law students, as has been the case throughout the region, will not work under the new system.

Finally, justice officials must reach out to the public and engage them in the struggle against criminality. It has taken many years for the public to become as disenchanted with the legal system as it has and it will take an extraordinary effort on the part of justice leaders to regain the confidence they have lost.

⁸⁷ *Ibid.* p. 1217.

CRIMINAL JUSTICE: THE NORTH AMERICAN EXPERIENCE

Jerome H. Skolnick
New York University School of Law

INTERNATIONAL SEMINAR: Criminal Justice: Old Challenges, New Models

School of Government: Joao Pinheiro Foundation
Belo Horizonte, Brazil, September 2, 1998

In the interest of honesty and precision, I must begin this talk with several disclaimers. First, my assigned topic, the North American experience is overly broad. North America encompasses Canada, Mexico and the United States. The criminal justice systems and experiences of each of the nations is so distinctive and different from each other that I could not possibly describe them in 30 minutes, even if I was knowledgeable enough to do so—which I am not!

Nor can I describe criminal justice as a whole in the United States. But in telling you why I cannot, perhaps I can convey some sense of the organization, values and processes involved in U.S. criminal justice. For purposes of exposition, I will separate these in my talk but they are not really separable.

VALUES

All United States criminal justice authorities—police, courts, corrections and legislative bodies—are ultimately governed by the U.S. Constitution, a document subject to ever changing interpretations through case law delivered by an often divided United States Supreme Court. Nevertheless, every Justice subscribes to the basic precepts of a Constitutional democracy, which holds that police are not solely an agency of control, where those in power dictate police practices. Standards of conduct are to be made by legislatures and not by judges, and must conform to tests of specificity and clarity. Laws cannot be *ex post facto* and must be construed strictly in favor of the accused. Due process of law must be both procedural and substantive, and it must be blind to social class positions, as well as to racial and ethnic distinctions. Legal standards are supposed to be applied with scrupulous fairness, to project and protect an atmosphere of impartiality. To be sure, these high minded ideals are not always met in practice. Nevertheless, only

the rarest of criminal justice officials would deny their authority and significance.

ORGANIZATION

Most criminal justice practices, that is, policing, judging and imprisoning, are carried out within each of the 50 states, which maintain some degree of sovereignty. Each state has its own courts and prisons, and its own *substantive criminal law*, which assigns different penalties for a variety of offenses involving victims, for example, murder, rape, robbery, burglary and theft. Drug offenses have become increasingly important, however, in the administration of criminal justice, where 25 to 40 percent of the prisoners are incarcerated for drug charges.

Among the most controversial of these laws is New York's Rockefeller drug law mandating such penalties as 15 years to life for being caught with 4 ounces of cocaine. (Prosecutors sometimes use the threat of such penalties to induce small time drug sellers and couriers to give them information and to testify against higher ups.) California has become famous for its "three strikes" law, where someone who had been convicted of two prior felonies, e.g. auto theft or illegal drug sales, will be imprisoned for life if convicted of a third, even minor, offense, such as stealing a bicycle. Other states do not have a 3 strikes law. Still others have such a law, but one that requires commission of a *serious* felony to generate a life sentence. My point is that there is no uniform criminal code for the United States of America. The substantive criminal law of each state, and of the federal government, can differ, even when addressing similar criminal activity.

Moreover, when crimes are committed across state lines, e.g. bank robberies or drug sales, the Federal government, with its various police agencies, the Federal Bureau of Investigation, the Drug Enforcement Authority, the Secret Service, the Alcohol, Tobacco and Firearms Bureau, may assume jurisdiction. Indeed, because most illegal drugs are imported into the U.S., every drug sale, no matter how minor, is potentially a Federal crime. Usually, however, federal prosecutors focus on larger dealers, although they may "squeeze" cooperation out of smaller ones in the interest of convicting the bigger dealers.

LOCAL POLICE AND CRIME

The Federal police, e.g., the Federal Bureau of Investigation (FBI), investigate and apprehend criminals, leading to prosecution.

But when Americans think of “the police,” when they dial 911 (emergency) to call the cops, they are calling the local police, urban, suburban and rural. Most Americans will rarely, if ever, come into personal contact with a Federal police official. By contrast, everyone has seen their local police—patrolling the streets, directing traffic, responding to a 911 call.

American police are both reactive and proactive. As a reactive force, police are expected to respond to emergencies, private and public. When public emergencies happen, such as earthquakes or riots, the police are expected to respond.

Private emergencies usually involve criminal victimization, ranging from homicide to domestic violence. If you were to ride in a patrol car in any city in the U.S. you would find that the police are mostly answering calls made by citizens, who reach the police simply by dialing 911.

This is entirely commonplace, but also perhaps remarkable. Citizens who claim to be victims of crime, or who witness what they think is a crime being committed, can simply pick up the telephone and expect to be assisted—at no charge or fee, and regardless of their income level. Although the US is socially and economically stratified by class and race, police services, like public parks, are available to all at no charge or tax. Indeed, since the poor and more likely to be crime victims, they are disproportionately users of police. The idea that police are *public servants*, expected to serve everyone, is a fundamental feature of democratic policing. As you will soon see, I am not a chauvinist who claims that the police invariably live up to the ideal of the public servant. Nevertheless, the idea that police “serve” rather than “control” the public is a fundamental notion of democratic policing.

WHY CRIME DECLINED

During the 1980’s, as crime rates soared in the US—and in most industrial democracies—police were also expected to be proactive, to maintain public order, and increasingly, to prevent crime. Community oriented and problem oriented policing came to represent what is progressive and forward looking in policing. Since 1993, crime rates have fallen all over the country—but especially in New York City which accounts for about one-tenth of the nation’s decline.

Criminologists, among whom I count myself, are offering explanations, but with unaccustomed modesty. No social scientist, liberal or conservative, really knows the answer. As politically conservative criminologist John J. Dilulio, a professor of politics and public affairs at Princeton, said recently, "This is a humbling time for all crime analysts. It is a puzzlement."

This is not because criminologists don't know anything, but because we may, paradoxically, know too much. We know that numerous factors have historically influenced crime rates, and are reluctant to point to a single cause for rises and declines. Liberals often point to the "root causes" of crime—poverty, inequality, joblessness and racial segregation—while conservatives stress "moral poverty"—teenage motherhood, drug use, loose morals, family instability.

In fact, there is little street crime in neighborhoods enjoying high income, education and family stability. Moreover, crime is a young person's, mostly a young man's game. Although young black males disproportionately commit and are victims of crime, the most potentially dangerous person in America is a black or white male between 13 and 25, with age 17 being the peak for committing violent crime. The baby boomers, who were about 16 to 34 years old in 1980 are now about 34 to 52, beyond the prime years for committing violent crime. As that population ages, they commit ever fewer violent crimes, thus contributing to a declining crime rate.

Homicide statistics are our most reliable. The good news is that homicides, including spousal homicides, have declined sharply in the United States, as have robberies, burglaries, even rape. Murders have abated in cities across the nation, with New York City having a remarkable 50 percent decline from 1,995 in 1992 to 984 in 1996. New York City promises to have fewer than 800 murders in 1998.

Why should crime be dropping? In part, this could be the result of an incarceration rate in the nation's federal and state prisons and local jails that has almost doubled in the last decade. Between year end 1985 and mid-year 1996 the incarcerated population grew from 744,208 to 1,630,940, an average growth of 7.8 percent a year. And it is growing still, with more than 1,750,000 now imprisoned.

In my opinion, this is a dangerous trend. Prison building supplants funds for public education, so California has dropped precipitously among the states in the achievement levels of students

in the public schools. Moreover, prison growth leads to what might be called a “correctional-industrial complex” where prison builders and correctional officer’s unions develop extraordinary power in state legislatures, where they protect policies that are ever more punitive.

Nevertheless, we shouldn’t draw the simplistic conclusion that the longer we lock people up, the lower will be the crime rate. Last year, California, with its three strikes law, had the most prison growth of any state (10,954), but not the lowest crime rate. Under its three strikes and you’re out law, California imprisons anyone committing a third felony for life, even for minor drug possession or stealing a bicycle. Around 25% of California’s prison inmates are incarcerated solely for drug possession.

California Department of Corrections data as of March 1996, the second anniversary of California’s “three strikes” law showed that more persons were imprisoned for possession (not sale) of drugs than for all violent offenders combined. The CDC data show that 3,749 have been imprisoned under “three strikes” law for simple *possession* of a controlled substance, compared to 2,342 defendants who have been imprisoned for all *violent* offense categories. Indeed, the data show that twice as many defendants have been imprisoned for marihuana possession than for murder, rape and kidnapping combined. And California’s violent crime rate didn’t decline as much as New York’s.

In the 1980’s, teenagers in places like Los Angeles, Kansas City and New York entered the drug business and competed for territory and status. As increasingly lethal weapons became available, street shootouts followed, with associated rises in homicides and assaults. Since then drug markets seem to have stabilized, in the hands of older dealers who are less likely to engage in street warfare.

At the same time, police over the country, but especially in New York City, have introduced more aggressive, outreaching and efficient policing styles. This has doubtless contributed to reducing crime rates. “Quality of life” policing began in New York City in 1993, as a manifestation of the idea that *proactive* policing—rather than simply reacting to 911 calls for service—could have an impact on crime. Quality of life policing was rooted, moreover, in a larger theory of criminal behavior. Criminologists had long understood that a criminal who was capable of committing an armed robbery would commit a burglary or a trespass. In a famous article, James Q.

Wilson and George Kelling argued that disorder was an invitation to criminals.

The theory, as George Kelling and Catherine M. Coles elaborate in their book *Fixing Broken Windows* (Free Press, 1996) played out most dramatically when William Bratton was chief of New York City's Transit police. Instead of regarding those who jump over subway turnstiles to avoid paying the \$1.50 fare as minor offenders, fare jumpers were arrested and processed. This did not used to happen, because it was thought to cost more to enforce these laws, than the loss of the price of the fare. But there was a reason for enforcement. It turned out that those who jumped over the turnstiles were disproportionately among the criminals who snatched gold chains from the necks of women riders and strongarmed others.

Another part of the strategy was to reduce fear of crime by sprucing up the appearance of subway cars. For years, subway cars were defaced with grafitti, regarded by some as a form of folk art. But to most riders, graffiti seemed menacing, as if the subways were out of the control of constituted authority. These strategies dropped subway crime dramatically.

When Bratton became New York City's Police Commissioner he adapted similar strategies to the street. During a previous administration, the police ignored minor offenses, like washing the windows of cars during rush hours, drinking a can of beer in public, riding a bicycle on the sidewalk. Such low level offenders would be issued a citation, like one might receive for exceeding the speed limit or making an illegal turn. But police can issue a citation only if the offender possesses identification, like a driver's license. When ID is absent, it is lawful for police to arrest a low level offender, until his identity can be established

I have witnessed such an arrest in a neighborhood where apartments lack air conditioning. A young man was drinking a can of beer on a hot night. Since the young man did not have ID (he had left his wallet in his apartment) the police could lawfully handcuff and search him under an exception to the US Constitution's 4th Amendment which prohibits unlawful searches and seizures by police. Why the exception? For reasons of safety, the Supreme Court has held, a search "incident" to an arrest is not unlawful. The police don't really care much about punishing these young men. But if the arrestee carries illegal weapons, they face more serious charges. Moreover, the weapons will be confiscated. The police believe that this form of gun control has helped reduce homicides in the city.

Bratton's perhaps most important accomplishment has been in introducing a statistically sophisticated review of each of New York City's 75 police Precinct's, holding the commanders responsible for what happens in the Precinct— for complaints as well as crime reduction. After some months of this, about half the commanders were replaced.

Across the country—in part as a result of the Federal Crime Bill and its Community Oriented Policing Program—police are becoming more focused on community priorities, such as gangs, drugs and crime “hot spots.” This sort of accountability is in some part responsible for lowered crime.

And something else is happening as well. The U.S. economy has been booming, unemployment is down, the minimum wage is up, and jobs are opening in the service sector. Since crime is local, positive economic news about jobs effects crime rates, especially in communities where crime and victimization are most pronounced, and where crime rates have declined most noticeably.

POLICE INTEGRITY

Proactive policing is not, however, an unmixed blessing. In New York complaints have also risen as the crime rate has declined. Where once the police could get away with being lazy, now they must show activity. But as the police become more active, some become overly aggressive. There have been some appalling instances of excessive force. In a most notorious case, four police beat a Haitian immigrant on the way to the stationhouse and then one of them sodomized him with a toilet plunger, four police have been indicted, and others are facing indictment and suspension.

Like other citizens, police are supposed to obey the criminal law. If they commit fraud or theft, they are supposed to be prosecuted like any criminal, and sometimes they are. During the past couple of years, I and other criminologists and police specialists, especially at the National Institute of Justice, have been developing the concept of “police integrity” which can be defined as adherence to professional standards to ensure fairness in law enforcement to all community members. Indicators of a lack of integrity include: bribe taking, false testimony, use of excessive force, evidence of bias or prejudice, arrest or detention for political reason, and violation of standards for monetary gain.

An agency can be characterized as "lacking integrity" when there are discernable "patterns" of abuse. Individual and isolated

events require vigorous investigation, analysis, punishment to offenders, and corrections to the agency. Reform begins with a review, analysis, and understanding of internal subsystems, patterns and practices—such as hiring, selection, training discipline, supervision, accountability, promotions, and policies and procedures.

External influences such as media, corrupt political influences, or “see no evil” political influences that sustain corrupt practices are also part of the problem.

Interest in police integrity was sparked in the 1990’s by several widely publicized incidents, notably the videotaped beating of Rodney King by members of the Los Angeles Police Department; the perjured testimony of detective Mark Fuhrman in the trial of O.J. Simpson; and reports of police criminality and brutality in several U.S. police departments, especially in N.Y. and Philadelphia.

Assuming that you have access to CNN, some of you will have seen the notorious videotaped beating of Rodney King by the Los Angeles Police Department. Because of my supposed expertise in the area of policing, I have written a good deal about the incident, mostly in a book I co-authored with James J. Fyfe title, *Above The Law: Police and the Excessive Use of Force*. I was also called by CNN and asked to interpret it for the viewers. I said that most of the viewers would likely focus on the beating itself because it was so horrific and compelling. But they would have a deeper understanding if they thought about the group of a dozen or so police who were onlookers. This suggested to me first, that such beatings were not unusual. Since the beating took place where police and civilians could witness it, the officers who did the beating believed they could count on the onlookers to back up any story they told their superiors about what happened to Rodney King. Moreover, the onlookers could count on being believed by their superior officers against any civilian witnesses in the event of an investigation.

Subsequently, because of the videotape and public outrage, the police officers were indicted by the Los Angeles District Attorney’s office, and charged with several serious crimes, notably aggravated assault. You will also recall that the trial was moved to Simi Valley, a predominantly white populated suburb of Los Angeles (on grounds of excessive publicity that would lead jurors to be unable to render a fair verdict.) The Simi valley jury acquitted the officers.

CIVIL RIGHTS AND DOUBLE JEOPARDY

However, the police were not thereby removed from legal “jeopardy.” Although the “double jeopardy” clause of the U.S. Constitution prohibits retrial for the same offense, there is an exception to the rule. The U.S. Supreme Court has ruled that a person may not be tried twice by a state or by the Federal government. Nevertheless, subsequent prosecution is not barred when a different state or the Federal government brings the charges. Scholarly critics contend that although this theory of sovereign jurisdiction makes sense in international law, but it is overreaching for courts to say that the U.S., California and Georgia are different sovereigns

The double jeopardy doctrine poses a dilemma for liberally inclined legal scholars. On the one hand, if the law interprets the sovereignty of states broadly, allowing defendants to be tried twice, that seems unfair. If you are acquitted in a California court, you may be retried, usually in a Federal court. for the same crime.

On the other hand, up to and sometimes beyond the 1960’s, it was virtually assured that a Southern police official who criminally assaulted a black person or a vagrant would not be tried for the crime. Or, if tried, would not be convicted by a white Southern jury. In the 1960’s both the U.S. Congress and the Federal Courts passed legislation and made rulings that reinforced the Federal government’s role in punishing police who violated the civil rights of citizens, usually those who are of African-Americans, but not exclusively. This is what happened in the Rodney King case, where the offending police were retried, and more effectively by a Federal prosecutor, and convicted of a criminal civil rights violation, and sentenced to 3-5 years in Federal prison.

RACE, CRIME AND THE LAW

It is hard to exaggerate how powerfully the law has shaped the life chances of Americans of African heritage, for good or ill, and in ways that we scarcely think of today.

For example, criminal statutes made it a felony for blacks (and other non-whites) to intermarry in thirty-nine states—including states in the North and West. Many of these laws were still in effect following

World War II and remained in effect in 13 states until 1968, when the United States Supreme Court declared such laws to be unconstitutional.

These “anti-miscegenation” laws, asserting that the children of “mixed” marriages would be defective, arose out of racial theories often breached in practice. Black women were taken or raped regularly by white men who were rarely, if ever, punished. The laws criminalizing intermarriage delegitimized the offspring of relations between white men and black women so that they could not inherit their father’s property, and were intended to prevent black men from having consensual sex with white women under any circumstances, including marriage. Any breaking of the sex-color line taboo between a black man and white woman could be--and in the peculiar logic of the deep South should be--considered as the moral equivalent of rape, even if blessed by the sacrament of marriage.

In the context of such racial theorizing, accusations of rape against black men made by white women were rarely disbelieved. Such accusations were likely to draw the unbridled viciousness of white vigilantes, who remained unpunished for the crimes they committed while carrying out the lynching--which included whipping, torture, burning, and eventually hanging the victim (the “strange fruit” of Lillian Smith’s acclaimed novel.)

The institutions of southern justice--police and courts--typically ignored the crimes committed by those participating in the lynching. Consequently, lynching became an effective form of social control, largely preventing blacks from crossing a color line drawn in blood. Southern blacks passed around stories, which became legends, about sex, terror, and the meaninglessness of the official legal order. Lynching maintained the caste superiority of whites

and the bloody etiquette of cross racial sex; and it undermined any trust Americans of African descent might have in the legal order. “Nothing has more eroded confidence in the criminal justice system” Randall Kennedy, a former law clerk to Justice Thurgood Marshall and a Professor at Harvard Law School, has recently written, “than the long history of willful refusals to punish white anti-black vigilantes.”

In his recent book, *Race, Crime and the Law* Kennedy discusses and deplors how African-Americans are doubly victimized by crime. “One out of every twenty-one black men can expect to be murdered,” he writes, “a death rate double that of American servicemen in World War II.”ⁱ

More recent crime statistics show that not much has changed. Homicide victimization rates for black males and females continue to be higher than for other segments of the population. Black males were about 8 to 9 times more likely than white males to have committed a homicide during 1996, most of which were intra-racial. In 1996, about 9 out of every 10 murders involved victims and offenders of the same race (when the race of the offender was known.) One out 3 black males is currently under the supervision of a criminal justice agency, that is, incarcerated, on parole, or probation.

A perceptive recent analysis of crime statistics, and especially of African-American violence, is to be found in Franklin E. Zimring and Gordon Hawkins *Crime is Not the Problem: Lethal Violence in America*. Zimring and Hawkins show that America does not have higher rates of property crime (burglary, theft and other property offenses) than other industrialized nations. According to the crime statistics they analyzed, residents of Sydney and Los Angeles have about the same chances of being burglarized, while Americans are more susceptible to being killed,

assaulted and raped. America still leads in violent crimes, especially lethal violence, but with homicide rates dropping in the United States, America seems to be catching up (or, rather, down) to its western European counterparts.

But however high American rates of violence might be, Zimring and Hawkins argue, “It is beyond foolishness to regard American violence as solely, or mainly, or even distinctively, a black problem.” In part, they argue, this is because American blacks reside in locations where the social facts are such as to precipitate the greatest violence, regardless of race; and partly because tendencies to lethal violence seem to be endemic in the United States. If all homicides by blacks were cosmetically removed from America’s crime statistics, Zimring and Hawkins say, the U.S. homicide rate “would still be a statistical ‘outlier,’ far beyond the experience of other industrial democracies,” by more than three times.

Yet American crime patterns are changing so rapidly that books published in 1997, which must rely on crime statistics published in the early 1990’s, are somewhat outdated by the time the book is distributed in the bookstores. Violent crime increased significantly in all age groups between 1985 and 1994, and most significantly among young black males. Juvenile homicides peaked in 1994, but in 1995 we begin to see a positive change. For the first time in years, firearm homicides by and against black youth are declining.

Still, although American violence is surely not, as Zimring and Hawkins point out, a “distinctively a black problem,” it nevertheless remains *disproportionately* a black problem. Most persons (54 %) arrested for violent crime in 1995, were white, which suggests that blacks (who are about 12 percent of the nation’s population) are disproportionately

arrested for committing violent crime. It may also be that police are more likely to arrest violent black criminals than violent white ones. Homicide statistics, which are the most reliable crime statistics, however, suggest that police are arresting whites and blacks with some evenhandedness. Yet as crime declines, so does black criminality, which should help to undermine fears of crime committed by young black males, who are responsible by far for most of the violent crime by committed by blacks.

To conclude, there are two important aspects of American criminal justice I have scarcely discussed. One is the death penalty, the other is the so called War on Crime and Drugs.

CAPITAL PUNISHMENT

The Supreme Court could, if it chose, abolish the penalty of death, but the present conservative court is not about to do away with it. I will not burden you with a discussion of the doctrinal zigs and zags of death penalty jurisprudence, but you will appreciate its complexity from a discussion of the most recent major Supreme Court case, *McCleskey v. Kemp*. Here, the defense introduced a complex statistical study which showed that when victims were white in Georgia, perpetrators (black or white) were four times more likely to be condemned to death than when victims were black.

The Court conceded that the system was skewed against black victims, but the court said that “apparent disparities in sentencing are an inevitable part of our criminal justice system.” Accordingly, the question was whether officials had discriminated against McClesky in *this* case, not systemically. The court said they had not. But even if McClesky had won on these statistical grounds, there are potential dangers to “leveling up” to reduce racial discrepancies in capital punishment. This would be to introduce a measure of gruesome affirmative

action by executing more blacks who murder black victims, and those who oppose capital punishment could scarcely be pleased with such an outcome.

WAR ON CRIME AND DRUGS

No criminologist has been a more knowledgeable and articulate critic of the War on Drugs than Michael Tonry, a law professor at the University of Minnesota. In his book *Malign Neglect: race, crime and punishment in America*, Tonry is sharply critical of the punitiveness of U.S. crime policy since the 1980's. The most extreme example of a law discriminating against African American males is the Federal law which penalizes those who sell 500 grams of cocaine powder, an amount larger than what most street dealers possess, with a minimum of 5 years imprisonment. Yet a person selling 5 grams of crack cocaine, a relatively trifling amount, is also subject to a five year minimum penalty.

As Tonry points out, the color line is drawn sharply here. In 1995, 88.4 percent of those convicted in Federal Courts of selling crack cocaine were black, while only 4.5 percent were white. As a result, the average sentence served by black prisoners in Federal prison (71 months) was 41 percent longer than the average served by whites (50 months); while in the early 1980's the average time served by blacks was comparable to that of whites. This did not happen because federal judges had turned into racists. The overriding reason was the 100:1 rule in the Federal sentencing statute enacted by Congress in 1986 (along with stiffer mandatory minimums for violent and gun crimes.)

I want to conclude with this thought: Perhaps at some future time, when we see more social and economic equality in our populace, we can ignore the racial impact of criminal laws, regardless of intention to discriminate. But, at present, race remains such a conspicuous factor in the policing of the United States, and in the effects of our

crime policies, that we are not yet there. As we approach the millenium, the color line of punishment in the United States—especially in the War on Drugs-- is all too evident and something we need to worry about and address.

Jerome H. Skolnick teaches at New York University School of Law and is co-Director of its Center for Research in Crime and Justice.

WORKS DISCUSSED IN THIS ESSAY

Randall Kennedy, *Race, Crime, and the Law* (Pantheon, 1997)

Franklin E. Zimring and Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America* (Oxford, 1997)

Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* (Oxford, 1995)

Craig Reinerman and Harry G. Levine, ed., *Crack in America: Demon Drugs and Social Justice* (University of California Press, 1997)

SEMINARIO INTERNACIONAL. SEGURIDAD PÚBLICA: ANTIGUOS DESAFIOS, NUEVOS MODELOS

Escuela de Gobierno de la Fundación Joao Pinheiro / Fundacion Konrad Adenauer
Belo Horizonte, 2 y 3 de setiembre de 1998

Panel: Modelos internacionales de seguridad pública: América Latina

Sofía Tiscornia - Facultad de Filosofía y Letras - Universidad de Buenos Aires / Centro de Estudios Legales y Sociales

El objetivo de esta exposición es compartir con ustedes algunas preocupaciones que las nuevas reformas y los nuevos modelos de los sistemas de seguridad latinoamericanos están, a mi entender, planteando. Digo, "a mi entender" en la claridad que no soy ni funcionaria ni experta, en el contemporáneo sentido de poseer un tipo particular de *expertise*. Antes bien, prefiero verme a mi misma, como una vieja antropóloga preocupada por la implementación de nuevos modelos de gestión pública sobre nuestras ricas, tradicionales y poco democráticas culturas jurídicas.

El problema de la seguridad pública, estrechamente vinculado al problema de la gobernabilidad de las recientes democracias latinoamericanas es, teniendo en cuenta los presupuestos que lo organizan, un tema nuevo en la región.

Pero la cuestión de la novedad, no necesariamente resulta en que el problema tienda a resolverse en sistemas e instituciones capaces de plantear políticas dirigidas, por ejemplo, tanto a prevenir y asegurar efectivamente la no violación de los derechos humanos y civiles en la región, como a defender pluralidad de viejos y nuevos derechos. De no ser así, los nuevos movimientos de reforma no podrán resolverse en otra cosa que no sean las viejas máscaras a los que la historia política latinoamericana nos tiene acostumbrados.

Pensar modelos de seguridad pública que respondan al horizonte de la defensa de los derechos es, en buena medida, proponerse hacer el riguroso y difícil ejercicio de reconocer que los viejos modelos de seguridad representan puntos de vista que limitan la visión del problema que dicen encarar. Si lo que las nuevas reformas nos están proponiendo es fundamentalmente re-ajustes, re-aggiornamientos de los sistemas de garantías - en sus versiones anglo-sajonas o en sus versiones europeas -, la implementación de estas reformas será siempre parcial e inacabada y, es posible, que en contra todas las buenas intenciones que las nutren, se reputen más como adecuaciones parciales y como complicados maquillajes para responder a coyunturales cambios políticos y económicos en la región, que como nuevos paradigmas capaces de construirse como resultado de las nuevas formas de relaciones y luchas sociales que estos cambios conllevan.

Los latinoamericanos somos tributarios y actores de una historia de resistencia a la autoridad, de impugnación del orden establecido antes que de conquista de derechos para integrar una sociedad de pares, de “hombres puros” que se han reconocido iguales entre sí¹. Como ya hace varios años dijera Octavio Paz, mientras para los norteamericanos el mundo es algo que se puede perfeccionar, para nosotros, es algo que se debe redimir². Ser esta historia, reconocer lo que somos, es la única clave en que podemos pensar las reformas de los sistemas de seguridad. Y es la única forma en que podemos construir democracia y participación, nuestras viejas deudas.

La primera cuestión que me interesa debatir entonces es acerca de, de qué estamos hablando cuando hablamos de Seguridad Pública. Sin duda que esta cuestión es bien diferente del problema de Orden Público. Creo que podemos coincidir que la cuestión social del Orden Público, cronológicamente anterior al tema de la Seguridad Pública, supone un concepto decimonónico y positivista cuyo objetivo es evitar el des-orden, la ruptura del orden político establecido. Tal como lo plantea Recassens y Brunet, este concepto se resume en una ecuación simple: “contrastar la conducta de los ciudadanos con la normativa y las costumbres “pactadas” por la “sociedad” y protegidas por el Estado. Los contraventores, enemigos del bienestar público, deben ser separados del colectivo y deben ser castigados” (1994:78). En las instituciones de seguridad, se privilegió un modelo político de Orden Público, por sobre un modelo profesional. Ello ha redundado en una marcada preocupación por el delito político - entendido como cualquier forma de disidencia al régimen político autoritario dominante - antes que por la investigación científica de la delincuencia común y el crimen en general. En este paradigma, los cuerpos policiales son concebidos como cuerpos especializados en la represión de vastos grupos de población, antes que en la investigación de delitos dañosos para todos los grupos sociales.

El concepto de Seguridad Pública, en cambio, se plantea como alternativa a la cuestión del Orden Público. Emerge como cuestión política y social recientemente, como uno de los problemas de gobernabilidad que debe resolver el Estado de Derecho de las democracias contemporáneas. Supone una valorización compleja del conflicto, siempre renovado, entre los derechos de la gente, como derechos inherentes a la persona y la protección de esos derechos como condición indispensable para su efectivización. Ello resulta en que el bien protegido no es el orden establecido ni las normas que lo sostienen, sino los derechos y las libertades.

¹ Decir “los latinoamericanos” y caracterizar una historia es, sin duda, englobar en una sola categoría intereses y movimientos muy disimiles. Solo quiero hacer referencia a tradiciones intelectuales e históricas divergentes de las que han resultado diferentes formas de concebir la autoridad, el estado y el problema del orden social (ver: Melossi, D.1992; Pitch, T.:1996; Tiscornia, S.:1996).

² El pachuco y otros extremos, en: El laberinto de la soledad, FCE; 1994, México, pag.27

Y como todos sabemos, los derechos y las libertades son cuestiones complejas y difíciles de resguardar. Porque los derechos y las libertades, antes que ser la letra y el espíritu de la ley, son protagonizadas y defendidas por actores sociales concretos. Grupos sociales que no están dispuestos a reconocer acriticamente un solo sentido del orden público. Actores que apelan a viejos derechos para defender libertades conquistadas y que conquistan libertades para codificarlas en nuevos derechos.

Es más, cuanto más se profundiza el ejercicio de las libertades, aseguradas en los pactos y tratados internacionales - en el caso de Argentina incorporados a la Constitución Nacional -, mayores son los conflictos que se deben enfrentar. Porque además estamos tratando de pasar de una concepción del orden urbano armada sobre un modelo decimonónico y positivista, por un lado, y por el modelo del Estado terrorista por el otro, a un modelo en el cual, si las libertades y los derechos aparecen asegurados en la Constitución, es más que inevitable que cada vez haya más actores que luchen por su vigencia y exijan su tutela. No porque creamos necesariamente en la letra de las leyes o de las Constituciones,³ pero sí porque ello nos afirma aún más en la demanda de nuestros derechos.

Y es entonces cuando la cuestión aparece presentada en forma de falsas contraposiciones. Una de ellas es la que opone Libertades a Seguridad. Esta oposición argumenta que a medida que se avanza en la conquista de libertades, para que las libertades sean ejercidas es preciso una tutela eficaz. Esta cuestión es cierta, siempre y cuando la tutela eficaz no implique resignar parte de las libertades para asegurarlas como tales. Porque, lo que habitualmente resulta es que cuando demandamos por una protección más eficaz, los encargados de protegernos demandan medios eficaces para hacerlo, argumentando que esto es conveniente, aún cuando perturbe alguno de nuestros derechos y libertades. Aquí es entonces que esta oposición suele resolverse en favor del valor Seguridad, frente al valor Libertad, descuidando que no son comparables y que si pensamos que lo son, podemos resignar, frente a determinadas circunstancias, el valor seguridad frente al valor libertad.

Voy a dar algunos ejemplos que plantea esta falsa antinomia. En mi país, a diferencia de muchos otros, la Policía Federal expide un documento por todos conocidos, llamado cédula de identidad. El propósito de esta cédula, inventada a comienzos de siglo, es principalmente contar con un prontuario de cada ciudadano que permita a la policía ejercer un control rápido y, fundamentalmente, exhaustivo sobre todos los habitantes de

³ La "creencia en las leyes" refiere básicamente a la existencia de una cultura jurídica y política en la que la aplicación de la ley no aparece, a los ojos de la mayoría de los ciudadanos, como una forma de ejercicio arbitrario del poder político, sino, antes bien, como una forma consensuada de arbitrar los conflictos. Sobre el "descreimiento" en las leyes, ver, entre otros: Nino, C.: *Un país al margen de la ley*; Emece, Bs. As. 1992. El descreimiento en la aplicación justa de las leyes por los tribunales locales puede coexistir en cambio, con una cultura política en la que la demanda de derechos sea un rasgo predominante. (ver, entre otros O'Donnell, G.: "Contrapuntos. Ensayos escogidos sobre autoritarismo y democratización"; Paidós; 1997

la nación, y en especial de los delincuentes.⁴ El problema que desde principios de siglos a la fecha, esta facultad de ejercer un control exhaustivo ha depreciado el valor libertad frente al valor seguridad. En nombre de la seguridad y del orden nos hemos visto y nos vemos obligados a salir a la calle con la identificación correspondiente so pena de ir a parar unas cuantas horas a la comisaría solo por haber ido a hacer compras en un mercado.

¿Porqué razón, por otra parte, una institución del Estado, funcionarios públicos, pueden reunir y concentrar en forma secreta la información acerca de afiliaciones, participación política, antecedentes contravencionales, etc. etc. de todos los ciudadanos?. ¿Porque un funcionario público puede detener a alguien en la calle, sin que la persona este cometiendo un delito y requerir su documento y demorarlo en la comisaría?. Sin duda estas cuestiones afectan gravemente las libertades.

Aquí, la resolución más común de la falsa antinomia diría: “de acuerdo, restringe las libertades pero es un instrumento idóneo para lograr seguridad”.

El problema es que tampoco es eficaz ni eficiente. Demorar cientos de miles de personas por año en las comisarías para detener a algunas pocas decenas de delincuentes habituales, es sin duda un despropósito y un despilfarro de recursos públicos y de libertades ajenas.

Otro ejemplo, quizás opuesto, es la ampliación notable de la seguridad privada en las región. Es por todos conocido que la expansión de estas empresas ha superado largamente las tareas de vigilancia, prevención de riesgos y control de factores - problemas a cargo de la seguridad pública -. No voy a analizar ahora la aparición de este fenómeno y la características particulares que tiene en nuestro país. Solo quiero referirme a este caso como un ejemplo claro en el que el valor seguridad está claramente ponderado por sobre el valor libertad. Residimos en ghettos y predios enrejados; debemos mostrar credenciales para entrar en nuestra casa, club; debemos rodear barrios enteros para pasar de una zona a otra porque arbitrariamente se cortan - se privatizan - las calles. Asistimos, sin duda a la aparición de nuevas formas de legalidad, no escritas ni codificadas, salvo en reglamentos de copropiedad para el solo conocimiento de los beneficiarios / propietarios de la privatización.

⁴ La cédula de identidad tiene su origen en el Convenio Sudamericano de Policía de 1905, ratificado en 1920. En su artículo 10 especifica que la cédula “procuraría facilitar que toda *persona honesta* se provea de una cédula o certificado de identidad, la cual además de *ponerla a cubierto de posibles molestias*, ha de ser un elemento de información personal (...) (subrayado nuestro). En 1968 se crea el Registro Nacional de las Personas cesando la vigencia de la cédula de identidad expedida por la policía Federal, como instrumento de registro e identificación de las personas. Desde ese entonces, la policía Federal ha reclamado la coexistencia de ambos documentos -la cédula de identidad por ella expedida y el Documento Nacional de Identidad, expedido por el Registro Nacional- argumentando que mientras el segundo es un “documento” valorado sólo en esta función, el segundo -la cédula policial- cumple una función relativa a la “seguridad”. La policía Federal ha continuado expidiendo cédulas y exigiéndolas como documento probatorio de identidad.

Creo que estos ejemplos pueden resultar ilustrativos para preguntarnos acerca de cuáles son, entonces, los principales desafíos que presenta hoy el tema de los sistemas de seguridad pública, entendidos como sistemas de protección de derechos y libertades.

El consenso experto. Explicaciones / Legitimaciones y diagnósticos

Sin duda en estos últimos años mucho se ha avanzado en la consolidación de un consenso experto dispuesto a encarar nuevos sistemas de seguridad pública. Entiendo que a esta organización del consenso experto se corresponde un diagnóstico acerca de los principales obstáculos que deben enfrentarse. Es sobre este diagnóstico que se plantean los modelos de reformas a los sistemas de seguridad regionales. Y es sobre él que debiéramos preguntar si cierta despreocupación por los ambientes culturales en los que los nuevos modelos de reforma se insertan, no terminarán abonando la reproducción de una vieja costumbre latinoamericana: rendir homenaje a la letra de las leyes y a los concomitantes sistemas de seguridad y, al mismo tiempo, no preocuparnos por seguir su espíritu. (Melossi: 1997; Salas, L. y Rico; J.M:s/d; Tiscornia, S.: 1998)

Existe hoy en la región una importante y dispar cantidad de trabajos que abordan el tema de las reformas de los sistemas de justicia penal; de los sistemas de seguridad y de las instituciones policiales (entre muchos, las compilaciones de artículos de la revista Pena y Estado; las publicaciones sobre el tema del ILANUD que recogen, en general las presentaciones a congresos especializados; los trabajos publicados por WOLA; etc.) De la revisión de esta bibliografía interesa enunciar, brevemente, las grandes líneas de coincidencia acerca del estado de la cuestión.

Entiendo que el primer consenso explica porqué los sectores democráticos de la región deben abordar el tema de los sistemas de seguridad. Podemos enunciarlo, a grandes rasgos, de la siguiente manera:

1. El tema de la seguridad era un tema clásico de los sectores conservadores. Como tal se resolvía en la ecuación: orden social igual a mayor represión, leyes mas duras, menos garantías, menos libertades. En fin: combate, cuando no guerra a la delincuencia, al desorden, a la subversión, a la disidencia política. En definitiva, todos aquellos a los que alcanzaba el largo brazo del poder definidor, vigilante y coercitivo.
2. Los sectores progresistas, libertarios - un tanto más tarde denominados democráticos - debíamos ser capaces de dar respuestas, de proponer y debatir políticas idóneas para plantear alternativas a la cuestión de la inseguridad urbana, de la criminalidad y del delito. Comprendíamos que la criminalidad y los delitos no eran ya solo un problema de las clases dominantes. Parecían afectar, en todo caso, a todas las clases sociales y, en esta situación, son las clases más pobres quienes más desamparadas están.
3. El tema de la inseguridad ciudadana, en especial en nuestra región, esta estrechamente vinculada con la violencia y los abusos policiales y la corrupción e ineficacia de los

tribunales. La violencia policial ejercida sobre los más pobres e indefensos denota no solo la persistencia de metodologías de los anteriores regímenes dictatoriales, sino también la complicidad de los tribunales y los políticos.

4. Estos temas deben ser planteados al debate público desde una perspectiva democrática. Solo ello redundará en el fortalecimiento de los frágiles sistemas democráticos, porque nos permitirá la paulatina creación de consenso. Del viejo consenso con el que el público nutre los sistemas democráticos fuertes. La construcción de consenso nos liberará de las ataduras de la coerción política característica de nuestros regímenes autoritarios.

Así las cosas, el consenso experto despliega un diagnóstico de la situación, el cual, aún teniendo en cuenta las diferencias locales podría ser enunciado de la siguiente manera:

1. Escasez cuando no inexistencia de estudios sobre los sistemas de seguridad regionales. Ello debido tanto a la focalización en los estudios sobre fuerzas armadas - principales actores de los gobiernos dictatoriales en la región - (Waldman y Schmid: 1996; Bretas: 1997; Tiscornia: 1997, entre muchos otros) cuanto a una histórica despreocupación de las elites dominantes y de las elite pensantes por la cuestión del crimen y su prevención y represión. Despreocupación anclada en sistemas de seguridad y policiales que presumen que las clases privilegiadas de la sociedad deben ser protegidas antes que objeto de control y vigilancia. (Bretas: 1997)

2. Fuerte dependencia y sujeción de los organismos judiciales a los poderes políticos y ejecutivos. La administración de la justicia penal se describe como colapsada, ineficiente e inoperante. No persigue adecuadamente los delitos, no garantiza de los derechos ciudadanos (Maier; 1991; Salas y Rico; s/d; Zaffaroni: 1984; Binder: 1997, entre muchos otros). Estructurada sobre un sistema inquisitorial, la organización de los tribunales responde a sistemas centralizados, jerarquizados al extremo de tornar imposible el control democrático de las decisiones judiciales, con una vieja y consolidada organización burocrática que responde antes a los fines e intereses de los funcionarios que la integran que a los ciudadanos a los que deben servir. En esta situación los tribunales se tornan cómplices obligados de los abusos que el poder político inflige a una ciudadanía desarmada.

3. Militarización de las policías como resultado tanto de su forma de organización como de haber estado o bien bajo el mando operacional de las fuerzas armadas, o bien dirigidas y comandadas por militares, o bien bajo la jurisdicción de los ministerios de defensa. La militarización policial, aún cuando se definan como cuerpos civiles armados, se despliega tanto en modelos de organización castrense como en un cuerpo consolidado de doctrinas, prácticas y sistemas informales y domésticos que privilegian prácticas autoritarias, represivas, brutales y de encubrimiento corporativo. (Palmieri, G.: 1998; Rico, J.: 1998; Oliveira Tiscornia: 1997; Bretas, M.: 1997, entre muchos otros)

5. La presencia de un sostenido aumento de la criminalidad en la región que resulta en un concomitante crecimiento de la percepción de la inseguridad, abonado por nuevas formas

delincuenciales de difícil control, principalmente porque se desarrollan al amparo de poderosos grupos de poder en complicidad con extendidos sectores de la administración política. En especial todos los delitos vinculados en diferentes modalidades al narcotráfico y a la venta ilegal de armamento. Pero también, los delitos callejeros y la fuerte sospecha de que estos son posibles por la complicidad policial y el “punterismo” - la protección clientelística que ejercen los partidos políticos sobre grupos marginales -.

4. Todo ello resulta en altísimos niveles de descreimiento y desconfianza de la opinión pública en las posibilidades de que los tribunales y las fuerzas de seguridad tengan la capacidad mínima para asegurar la paz social y la resolución de los conflictos. En mi país, el 85% de la población no se siente protegida y, cuando se le pregunta por qué motivos, un 44.4% responde que por falta de confianza en la policía, un 12.0% porque piensa que creció la delincuencia y sólo un 3.2% porque la delincuencia es más violenta (Centro de Opinión Pública, agosto de 1996; Graciela Romer y Asociados, marzo de 1996). La desconfianza en la justicia ha crecido desde un 42% para 1984 a un 89 % en 1996 (Gallup, Universo: Capital Federal, Mendoza, Rosario y Tucumán)

O sea, nos encontramos ante un importante consenso tanto respecto a la urgencia de ocuparse del problema desde una perspectiva democrática, como respecto al diagnóstico de los principales obstáculos que el ocuparse del problema supone.

Creo que en tanto continuemos caracterizando estos problemas como “obstáculos” estamos cerrando los caminos para pensar reformas eficientes a nuestros sistemas de seguridad.

Quiero decir, la metáfora del obstáculo evoca una barrera que, en medio de un camino justo hacia un lugar deseado, crea una dificultad para llegar a destino. Los obstáculos pueden moverse del lugar, eliminarse, limarse. No forman parte intrínseca del camino y del lugar hacia el que conducen. La retórica de los obstáculos, paradójicamente, obstaculiza el análisis conceptual, en tanto pensamos que se trata de disfuncionalidades que pueden ser removidas y no, cuestiones que forman parte y dan forma local al problema.

Así las cosas, qué se plantea frente a los obstáculos diagnosticados?

Nuevos y viejos desafíos.

Creo que debiéramos reconocer que una actitud bastante frecuente entre nosotros, es la incorporación acrítica de modelos y políticas de seguridad – particularmente de raigambre anglosajona, en estos últimos años -

Ello resulta, muchas veces, en exportación de modelos, contruidos sin un debate que haya incorporado, mínimamente, aquello que Darío Melossi denomina “el ambiente

cultural” en el interior de los cuales se desarrollan los sistemas de seguridad pública. Voy a dar algunos ejemplos.

Muchas de las reformas de los sistemas policiales en la región, por ejemplo, la reciente reforma de la policía de la provincia de Buenos Aires, en mi país, proponen la departamentalización de la policía, favoreciendo una perspectiva descentralizadora que supone que una policía departamental esta llamada a tener un mayor conocimiento de los problemas comunitarios, un mayor acercamiento al público, puede obtener mayor colaboración y apoyo de los habitantes locales y, también, puede aliviar, reenviandola a otras instancias, la carga burocrática que los sistemas altamente centralizados de policía suponen. Sin duda que el modelo de policía local ha resultado eficaz en los países anglosajones. La cuestión es que la departamentalización no es un bien en si mismo. Al igual que la policía comunitaria, representan sin duda modelos más democráticos de gestión de conflictos, principalmente porque suponen una continua interacción entre el público y los funcionarios, suponen un continuo flujo de monitoreamiento del público sobre las policías que resulta, en un mayor control sobre la gestión policial. El problema, a mi entender, es que pocas de estas condiciones se cumplen en nuestra región. Las posibilidades reales de plantear interacciones fluidas entre los funcionarios policiales - por más locales que sean - y la gente, no depende de las buenas intenciones o la bondad del modelo. Depende, fundamentalmente, de lo que insisto en llamar, el ambiente cultural en el interior del que se desarrolla la actividad policial.

Para enunciarlo en burdos y gruesos rasgos. Mientras la cultura democrática norteamericana y anglo - sajona se ha construido sobre la base de una sociedad de iguales, las nuestras son sociedades jerarquizadas, integradas si, pero cada uno en su lugar. La sociedad de iguales se construye sobre el consenso y sobre la lucha por participar en el consenso. La sociedad jerarquizada se construye en cambio sobre la coerción y la lucha por la participación se vincula a la lucha contra la opresión, más que a la lucha por derechos de inclusión. Esta caracterización tan general, resulta en muy diferentes actitudes de los actores en conflicto frente a la acción policial. Pavarini desarrolla acertadamente el problema al contrastar las diferentes tradiciones en que ha sido pensado y operacionalizado el concepto de control social. Así, este puede referir a una lectura conflictual, que advierte el perfil autoritario de la situación de control y, entonces, en el mismo acto, define también un espacio de libertad en oposición al mismo, esto es lo que sucede frecuentemente entre nosotros. La otra actitud, no percibe conflicto alguno en la acción de control y resulta entonces en una acción de adhesión al mismo. (1995: 58)

Pero estas realidades - estos ambientes culturales - no son necesariamente un obstáculo. Pero es claro que no podemos ser mágicamente democráticos. Otro ejemplo más ilustrativo quizás. Podemos coincidir, tal como lo plantean muchos trabajos, que una fuerza policial democrática debe responder a dos grandes características: *accountability* y *responsiveness*. Y los enuncio en inglés porque ambos conceptos ni siquiera tienen una ajustada traducción al español. Y obviamente que no se trata de deficiencias de nuestro idioma. Sino que todos estos conceptos: transparencia, control del público, policía

comunitaria, *policing community*, ciudadanía, etc. etc. no pueden tener más contenido histórico concreto que el que le prestan las relaciones sociales sobre las que actúan. No afrontar estas cuestiones nos hundirá nuevamente en el viejo error de nuestros bien intencionados juristas: rendiremos homenaje a la letra de la ley y no cumpliremos su espíritu. Como decían los viejos españoles: “se acata, pero no se cumple”.

La mirada acrítica a la que me refería más arriba, aparece también en la escasa importancia que, en el diseño de nuevos modelos de seguridad pública, se otorga a los intereses concretos de las diferentes agencias que se ocupan del problema.

Ello resulta en gravísimas superposiciones interagenciales: supongamos que la cooperación internacional y expertos lúcidos elaboran en cualquiera de nuestros países un inteligente y viable plan de reforma judicial, policial y penitenciario. ¿Cómo se enfrenta esta reforma con los intereses de otras agencias tales como la DEA, el FBI, la INS interesada cada una en el control en Latinoamérica de lo que cada una ha definido como crimen, peligrosidad o amenaza?

Un simple ejemplo: en más de un ciudad latinoamericana el poder político, de acuerdo con la DEA mantiene y permite el pequeño tráfico de drogas y la consecuente red de informantes, soplones y *dealers*, a cambio de información sobre el gran tráfico y el gran lavado de dinero. O sea, operan en otro nivel, pero exactamente igual que la criticada policía de calle: una red de informantes -*buchones, soplones, etc.*- que se mueve continuamente al margen de la ley, incomodando y abusando del ciudadano común. Qué control comunitario, que control legislativo de las policías es imaginable en esta situación? Qué proyecto de seguridad vecinal es posible en este escenario? Ninguno, no debemos ser hipócritas: ninguno.

Me parece entonces que es necesario retomar dos cuestiones. La primera, creo que debiéramos emprender un trabajo sostenido para tener adecuados diagnósticos acerca de cuáles son los principales conflictos que resultan en la emergencia de situaciones o áreas de inseguridad, que permitan elaborar planes acotados de prevención y represión.

La segunda cuestión es debatir prolijamente la transformación de las policías. Porque, aunque las policías no son, sin duda las principales responsables del problema de la seguridad pública, su lugar institucional, su ambiguo rol de defensora de las libertades democráticas pero, al mismo tiempo, conservadora del orden existente, las pone en el principal escenario de la cuestión. Asimismo, en nuestra región, por nuestra historia, las policías están formadas como conservadoras de un solo sentido del orden, como cuerpos con amplias y discrecionales facultades para coartar libertades, antes que como aseguradoras de la paz social.

Respecto a la primera cuestión, es importante centrar el empeño en diagnosticar seriamente de qué estamos hablando cuando hablamos de delitos e ilegalismos que producen inseguridad, porque solo entonces podremos plantear políticas para enfrentarlo. El problema de la seguridad pública no es el problema del orden y, por lo tanto de la adecuación coercitiva de las conductas a las leyes. El problema de la seguridad es el problema acerca de cómo se transforma el sistema de seguridad para que este dirigido a defender derechos y no solo a imaginar como controlarlo para que nos violen los derechos humanos durante la represión del delito.

La información de los sondeos de opinión, por ejemplo, es interesante por la información explícita, pero también porque todo aquello que es que es posible inferir desde allí. Sabemos que la gente se declara cada vez más temerosa de ser víctima de delitos tales como robos violentos y homicidios. A su vez, quienes parecen ser más víctimas, o se declaran así, son los sectores más pobres. Por supuesto que el delito y el crimen existe y por supuesto que las principales víctimas son los más pobres. Aquellos que no tienen recursos para protegerse con la seguridad privada y que también son los principales desatendidos por la seguridad pública. Y por ello es sin duda urgente pensar políticas de resguardo para estos sectores. La cuestión es, ¿qué políticas?

Y a este respecto hay una cuestión planteada por el criminólogo Ian Taylor. Taylor dice: El miedo al delito en las clases más pobres es real, pero lo es también - o fundamentalmente - como metáfora generalizada de inseguridad y sentido de la desarticulación social. Es esta inseguridad social y cultural que alimenta el apoyo de la clase trabajadora y de los desocupados a políticas y estrategias de represión ostensible en la que el control de los delincuentes sería un medio para restaurar el significado perdido de comunidad o de identidad (trabajadora, política, etc.). (Ian Taylor, 1982:37) O sea, el mecanismo sería: “soy un marginado de mercado pero no de la comunidad política, no soy un delincuente. Nos negamos a ser identificados como tales y, para ello, estamos dispuestos a resignar libertades y a apoyar represiones”.

De esta cuestión deriva otra, no menos importante: ¿en que estamos pensando cuando se plantean políticas comunitarias de seguridad? Quiero decir, en que comunidad estamos pensando?. No podemos dejar de reconocer que la idea, el concepto de “comunidad”, tal como el concepto de “pueblo” ha sufrido importantes transformaciones en estos últimos años. Una comunidad es un grupo humano que tiene, al menos, intereses comunes ¿Que son comunidades hoy?. ¿La villa de emergencia, la favela, son una comunidad?; ¿el barrio residencial, es una comunidad? ¿Una provincia, un estado, es una comunidad?. De ninguna manera. Si nos empeñamos en definir comunidades según circunscripciones geográficas, en primer lugar debemos reconocer que más bien parece tratarse de un conjunto de grupos con intereses diversos que conviven - con diferentes niveles de conflictividad - en un área geográfica y cultural marginada o no, que, alguna vez, hace varios años ya, pudo ser denominada como comunidad.

Si estamos de acuerdo en esta cuestión, la primera tarea debiera consistir en el reconocimiento de los diversos grupos de interés que conviven en una misma unidad

local. Y en el reconocimiento que muy difícilmente podamos unir a los residentes de clase media alta, los ocupantes de casas abandonadas, las minorías étnicas, los desocupados, etc. etc. mediante apelaciones abstractas del “bien de la comunidad, o políticas comunitarias” en defensa de la seguridad barrial.

La cuestión es que los diversos grupos de interés que conviven en un barrio no solo tienen intereses diversos, sino también cuotas de poder diferente. Y muchas veces estas diferentes cuotas de poder resultan en que algunos puedan definir o lograr que se definan conflictos como delitos. El problema es cómo se hace para que los diferentes actores dispuestos a discutirlos argumenten desde un piso mínimamente común y no algunos desde el lugar de los siempre víctimas y otros desde el lugar de los siempre autoridad moral.

Resumiento, el piso de homogeneidad del que debemos partir es, sin duda, el de la defensa de las libertades, con toda la complejidad que de ello resulta.

La segunda cuestión es debatir prolijamente la transformación de las policías. Para ello creo que, en primer lugar, debiéramos proponer abandonar lo que podría llamarse “el síndrome de Atenea”. En la mitología griega, Atenea nació armada y adulta de la cabeza de Zeus. Algo similar ocurre muchas veces en nuestros países cuando las reformas y la leyes surgen “armadas y adultas” de la cabeza del legislador o el experto, de su voluntad iluminista y razonable. Se construyen así políticas que se imponen sobre complejas realidades que no son conocidas por el legislador o el experto acabadamente.

Evitar el síndrome de Atenea, supone elaborar leyes y reformas que sean el resultado de diagnósticos y estudios precisos por una parte, y consensos progresivos con todos los interesados, por la otra. A mediano y largo plazo sino, tenemos más de lo mismo. Si algo se parece a Robocop, aquella figura que era capaz de reconstruirse, aún luego de su casi total exterminio, son estructuras burocráticas organizadas en base a lealtades espúreas, complicidades y sistemas rígidos y altamente jerarquizados.

Si reconocemos que las instituciones policiales en nuestro región -como otras instituciones- funcionan sobre, cuanto menos, dos legalidades, códigos o estructuras simultáneos que se acoplan, complementan o divergen, según cada caso, es muy ingenuo suponer que cambiando solo uno de ellos, el otro cambiará inexorablemente.

Quiero decir, la importancia de los usos y costumbres policiales en la organización del trabajo cotidiano son fundamentales, en nuestras policías y en todas la policías del mundo, por características específicas del trabajo policial que no es posible de desarrollar en esta conferencia⁵. Si a ello le sumamos que en nuestras policías los controles internos

⁵ Ver, entre otros: Recassens I Brunet, A; Tiscornia, S.: Violencia policial, de las prácticas rutinarias a los hechos extraordinarios. En: Izaguirre, I (comp.) Violencia social y derechos humanos. Editorial Universitaria de Buenos Aires; 1998

y externos son débiles, avanzar en transformaciones de estos cuerpos sin un background importante de información, es, para ser piadosa, un ejercicio de soberbia.

Así las cosas creo que los nuevos desafíos radican en pensar como anclamos las nuevas reformas en nuevos contenidos. Si se han ya diagnosticados las principales falencias de nuestros sistemas públicos de seguridad, si ya, con bastante acierto, sabemos que es lo que no queremos, la cuestión es cómo trabajamos en estas, no ya instituciones, sino sociedades democráticas pero autoritarias, con fuertes identidades nacionales pero altamente fragmentadas en su interior, para construir sistemas de seguridad preocupados por la defensa de los derechos y no solo por la represión del delito con respeto de las garantías.

Creo que solo con esta perspectiva de máxima podemos pensar no solo en mejorar los controles, tarea sin duda ardua y, a mi entender, poco factible en nuestros países, sino fundamentalmente en ir paulatinamente dejando de pensar los sistemas de seguridad como “males necesarios”. Construir instituciones como males necesarios solo nos puede conducir a conformarlas con las viejas identidades a las que están acostumbradas: instituciones contra el público, funcionarios enfrentados a la gente (Palmieri, G.: 1998:322). En definitiva, quizás debemos volver a leer al viejo Foucault, en el entendimiento que el poder se construye en los extremos menos visibles de su ejercicio, allí donde se vuelve más capilar, mas local, “saltando por encima de las reglas de derecho que lo organizan y lo delimitan”, invistiéndose en instituciones y adoptando la forma de técnicas. En definitiva, asir el poder en los límites menos jurídicos de su ejercicio (1980:143).

Bibliografía citada

- AAVV: Congreso Regional sobre la Reforma de la Justicia Penal; ILANUD; 1991
 AAVV: Policía y sociedad democrática. Revista Pena y Estado, año 3, nro. 3
 Bretas, M.: Observaciones sobre la falencia de los modelos policiales. En: Revista de Sociología de la USP. San Pablo, mayo de 1997
 Foucault, M.: Microfísica del Poder, Editorial La Piqueta, Bs.As. 1980
 Maier, Julio: Situación de la justicia penal: Fallas de los sistemas escritos y de la organización de los tribunales. En:
 Melossi, Dario: La radicación cultural del control social (o de la imposibilidad de traducción). En: Revista Delito y Sociedad, nro.9/10, 1997; Buenos Aires.
 Melossi, Dario: El estado del control social; Siglo XXI; 1992
 Oliveira, A. y Tiscornia, S.: Estructura y prácticas de la policía en la Argentina. Las redes de ilegalidad. En: Seminario sobre control democrático de los organismos de seguridad interior en la República Argentina. CELS, Bs. As. 1997
 Palmieri, G.: Reflexiones y perspectivas a partir de la reforma policial en El Salvador. En: Revista Pena y Estado, nro. 3 año 3.; 1998

- Pavarini, Maximo: El control social en el fin de siglo. En: Cuadernos de postgrado, Facultad de Ciencias Sociales; nro. 3; Buenos Aires.
- Paz, Octavio: El laberinto de la soledad; Fondo de Cultura Económica, 1981
- Pitch, Tamar: ¿Qué es el control social? En: Revista Delito y Sociedad; Año 4, nro.8; Oficina de Publicaciones del C.B.C; Buenos Aires; 1996
- Recassens I Brunet, A.: Violencia policial y seguridad ciudadana. En: Imágenes del control penal. Universidad Nacional del Litoral. Santa Fe; 1994
- Salas, L. y Rico, J.M.: Administration of justice in Latin America. Centro para la Administración de Justicia; Costa Rica; s/d.
- Taylor, I.: Contra el crimen y por el socialismo. En: Revista Delito y Sociedad, nro.4/5, 1994; Buenos Aires.
- Tiscornia, S.: "Peligrosidad política o peligrosidad social? Seguridad ciudadana y procesos de construcción de hegemonía en torno al (des)orden democrático. En: Fichas de cátedra nro.1 - Facultad de Filosofía y Letras - UBA; 1985
- Tiscornia, S.: Seguridad ciudadana y cultura de la violencia. En: Revista Encrucijadas. Universidad de Buenos Aires; nro. 5, año 3; 1997
- Tiscornia, S.: Violencia policial, de las prácticas rutinarias a los hechos extraordinarios. En: Izaguirre, I (comp.) Violencia social y derechos humanos. Editorial Universitaria de Buenos Aires; 1998

Subject: Corrections Seminar

Date: Mon, 28 Sep 1998 10:12:18 -0400

From: Robert Buchholz <rbuchholz@infolion.com>

To: blima@fjp.gov.br

67

Sept. 28, 1998

To: Ms. Blima Carvalho
From: R. Buchholz
Subj.: Corrections Seminar

Dear Blima:

I tried several times in the past weeks to contact you via e-mail without success. Perhaps I used the wrong e-mail address.

I do want to express my appreciation for all your help in getting me to the seminar and for your valuable assistance while I was there. My presentation was limited due to the time constraints, but I would be happy to put you in contact with officials at the Albany County Correctional Facility in the event you require additional information concerning the correctional process in the United States.

Please do not hesitate to contact me at any time. Once again, many thanks.

Best Regards,

Robert Buchholz

ESCOLA DE GOVERNO

Alameda das Acácias, 70 - São Luís - Pampulha
Belo Horizonte - Minas Gerais - Brasil
CEP: 31275-150

Telefones

Diretoria Geral: 448 9713

Diretoria Adjunta: 448 9713

Secretaria Geral: 448 9593 e 448 9591

Secretaria de Ensino: 448 9595

Superintendência de Ensino: 448 9592

Superintendência de Extensão: 448 9594

Sup. de Pesquisa e Pós-Graduação: 448 9640

Fax: (031) 448 9613

E-mail: esegov@sp.gov.br