

A MEMORANDUM ON THE RULE OF LAW AND CRIMINAL VIOLENCE IN LATIN AMERICA

Hugo Frühling

A number of perceptive analyses of recent developments in Latin America have indicated that the return of democratic rule to most countries in the region has improved the ability of most Latin Americans to exercise their freedoms.. Yet this trend has been accompanied by rising levels of crime and other forms of violence, which adversely affect the enjoyment of rights by the citizenry, diminish the quality of the democratic system and raise doubts about whether a rule of law system is in place in these countries. Among the manifestations of this criminal violence are the activities of state agents, who are often involved in acts of lawlessness (Pinheiro, 1999; Mendez, 1999).

The general picture is one characterized by the emergence of a variety of violent criminal gangs which have not only become increasingly organized, but are also often able to ensure the preservation of social order in large, distressed urban territories where the government is unable to carry out this function. Drug traffickers in the *favelas* of Rio de Janeiro and the *poblaciones* of Santiago and Medellin not only run illegal businesses, but also provide means of livelihood for local residents and in return, they obtain their allegiance, or tacit support which helps them to avoid state prosecution. Interventions by law enforcement institutions to cope with this challenge are rare, either because police officials themselves are corrupt, or because the violent tactics they use further alienate local residents. Preventive programs in existence reach only a small proportion of those who should benefit from them and there are serious questions as to how well are they managed by state institutions. Naturally, there are differences among countries with respect to the levels of violence they experience and the institutional strength of their state institutions.

A major consequence of the growth of violent crime is the implementation of ad hoc preventive and control policies which often do not respond to the actual security needs of the poor, and moreover, prove all too frequently to be repressive and inefficient. The application of “*mano dura*” approaches to crime has become a commonplace in the region,

and has led to growing prison populations, increasingly use of pretrial detentions, and the occasional or frequent use of deadly violence by the police (Ungar, 2005). These policies are the result of a general climate in which harshly repressive measures are considered acceptable and necessary.

Despite such repressive measures, some countries appear to be unable to control crime and unable to reform their own police forces. An important illustration of this situation is Guatemala, where the penetration of organized crime into the police led to the creation of an International Commission against Impunity set up by the United Nations to help in the investigation of particularly notorious crimes, in an effort to prevent the total collapse of Guatemala's criminal justice system. The operation of that commission in Guatemalan territory was authorized by the Guatemalan Congress.

This memo will briefly describe the consequences of increasing insecurity for the rule of law and for the enjoyment of rights by vulnerable groups, and will then describe the other side of the coin: Although lawlessness has been increasing, state legal and judicial reform efforts have never been stronger in the region. Almost all the countries in the region are replacing inquisitorial criminal justice systems with accusatorial systems. Whatever the limitations these judicial reform efforts have faced, they seem to be somewhat at odds with the situation described above, in which there is a generalized lack of respect for the rule of law and widespread use of arbitrary violence. Who is, then, interested in legal reforms? Who is advocating them and whose interests do they serve? Finally, we will define some questions regarding Latin American legal culture that must be answered in the future if we want to explain why lawless behavior is so common and what can be done about it.

Lawless Violence and Citizenship

Post-authoritarian Latin American political regimes have been described as democracies without citizenship, in which individuals enjoy political rights, but for a variety of reasons are unable to exercise fully their basic civil rights. For example, in many Latin American countries citizens lack the ability to seek redress from the legal system. Referring to Brazil,

Holston and Theresa P.R. Caldeira (1998) speak of disjunctive democratization, in which democratic procedures coexist with fundamental violations of rights which are the consequence of judiciary failures, repressive police tactics, and the legal marginalization of the majority of the population. The masses are socially and legally excluded and thus, their distrust of law enforcement and other institutions becomes deep and widespread. In environments where there is little trust in the legal system and there are few defenders of the legal system, all kinds of illegal conduct occurs, as nobody sees it is in their interest to abide by the law. Vigilantism is common, going hand in hand with impunity for all types of crimes.

The types of problems that characterize these societies are as described above: the persistence of violent crime committed by private actors; continuity of state practices that violate human rights, including the rights of inmates in state prisons; persistence of discriminatory practices by state agencies including the police, which adversely affect the rights of the poor; and lack of access to the legal system in general.

We know, however, that not all Latin American countries face the same situation with respect to the functioning of the legal system. Certain countries are characterized by a long history of institutional stability and a strong legal culture where state institutions receive high levels of public support, as well as a widespread sense that the law is more relevant for social practices (Uruguay, Costa Rica and Chile are members of this group). In fact, O'Donnell points out that not only there are variations from case to case, but also within one state or society there may be wide variations in compliance with legal norms. So-called distressed areas or districts are extreme cases in which the state is partially replaced by an alliance that includes drug traffickers, social leaders, and in some cases even police officers (Arias, 2006). The situation in most affluent neighborhoods in Latin American urban centers is probably quite different. Police there tend to be respectful of citizens' rights and citizens in most cases conform to the law. Compliance with the law also differs in different social groups. Respect for the law is extremely important in business circles, which does not mean that corruption or illegal behavior does not occur. But in fact, the enforcement of contracts and other legal provisions that protect the functioning of markets is essential for

private enterprise to flourish. There may also be variations in the attitudes of different state institutions towards the law. The national police of Nicaragua are widely regarded as more respectful of the legal system than the nation's judiciary, for instance. In the case of Chile, the Internal Revenue Service is widely regarded as a corruption-free institution, while some other state agencies are much less respected in this regard.

Thus, ideas, values and expectations of the law by at least some segments of influential public opinion who have been willing to accept recommendations from the international donor community explain why despite the gloomy scenario we have depicted, there are more democratic laws, more and better-trained judges and prosecutors in Latin America than ever before. Even in the least law-abiding societies of Latin America, these reforms have received support from influential circles of policy makers, lawyers, academics, some business leaders and human rights activists. Although the initial purpose of the reforms may have been to improve the legal climate in order to foster foreign investment or to reduce crime, rather than to produce more democratic societies, certain important changes have occurred, as described in the following section.

Legal Reform in Post-authoritarian Latin America

Throughout Latin America, these reforms have been conducted at the national level and are very similar in content (Hammergren, 2006). They were brought about partly by the democratizing processes that began in the 1990s and were influenced heavily by the financial and technical support received from the international donor community.

Over the last 20 years, the region's judicial systems have experienced important quantitative changes. The number of judges, courts, and auxiliary organizations and personnel (public defenders, public prosecutors among others) has doubled or tripled in many countries. Where they did not exist before, public defense and prosecutors' offices were created, and where they did exist, their size has also increased. Many countries approved legislation to create judicial councils, and constitutional tribunals. New courts were created to deal with family law and juvenile crime (Hammergren, 2006).

Budgets and salaries have grown, and the judiciary and the public prosecutor's offices attract today more ambitious and better-qualified young lawyers. There seems to be an increase in demand for

judicial services in many countries. Finally, procedures and the way in which the judiciary operates have experienced far-reaching changes. Twelve countries have adopted the accusatorial system with oral proceedings, which in fact represents a much more transparent system than the one that used to exist. The new system has also brought about further changes: detention powers of the police have generally been reduced, trials are faster, and in some countries, new services for crime victims have been established. Public defense in the criminal field has improved and has more resources than ever before.

This is not to say that the improvements have been dramatic. Public opinion of the judicial system is still very low throughout the region. According to the Latinobarometro, only a little more than one third of respondents in Latin America express confidence in the judicial system. In a ten years period, there has been little change in the proportion of those who express confidence in the judiciary. This might be explained by several reasons. As Hammergren says, judicial corruption continues to be a problem in many countries, and procedural delays still plague the system. Thus, it not surprising that citizens do not perceive that the system has changed for the better. However, citizens perceptions could also be based in their belief that the courts are too inclined to protect the rights of suspects. In any case, the notion that people perceive realities through social and political constructs is applicable here, and therefore attitudes toward the law help shape a critical perception of judicial change. This brings us to another important aspect of the relationship between law abidance and the prevalence of violent crime in the region. Culture, whether civil or legal, plays a role in determining whether citizens of a particular society abide by the law or constantly break it.

Questions of Law Abidance

We know that citizens of Latin American countries differ with respect to how legitimate they perceive their institutions and norms to be. We also know that attitudes about the law and legal institutions differ among countries and among social and professional groups in each particular society. We can also advance here an hypothesis that the system of beliefs shared by the population regarding public authority, and the rights and obligations each member of a society believes he or she has, are related to levels of violence. Failed states could be characterized by a widely shared disdain for authority and the rule of law, as well as the conviction that rules are only followed by the very few who are unable to do otherwise. In such states, violence generates violence, the arbitrariness of the police is

accepted by significant segments of the population, and there is little compliance with the law (Botelho Junqueira, 2003).

If this is true, then the following proposition should be considered an appropriate interpretation of what happens in many countries of the region: In certain societies, large segments of the population believe rules are widely disrespected by others, which justifies their own disrespect for those rules. In such societies, the state cannot rely on self-compliance to maintain order and therefore it becomes increasingly ineffective in eliciting compliant behavior, which also affects the state's ability to deliver services which would enhance its legitimacy. In such societies, the propensity toward violence could grow, since significant segments of the population are available to participate in illegal activities. These societies lack a civic culture. In addition, the social cooperation which is essential for the strengthening of a democratic polity is very weak in such societies. Thus, key elements of the concept of citizenship which are based on the assumption that rules that protect the rights of citizens are widely respected and could be enforced are not present.

Two elements of the previous statement are, in our view, relevant here: The first is the capability of the state to rule and enforce norms. The second deals with the attitudes of the population towards the law (Bergman, 2008). The two concepts are interconnected, as the capability of the state to enforce norms is partly determined by voluntary self-compliance by the population. However, at some historical point the state was able to enforce norms despite the lack of a civic culture. Historians point out that anarchy followed the wars of independence in Latin America, but some countries were better able than others to establish a central authority during the 19th century. In the Chilean case, for instance, the consolidation of a central authority facilitated a gradual acceptance of a political opposition. In Chile, as in most countries, some form of democratic rule was established before a truly democratic culture existed. This democratic and legalistic culture was developed over the course of many years during which political participation was highly restricted. This suggests a situation that is somewhat analogous to what appears to occur in certain countries of the region: Enhancing the capabilities of the state to enforce rules becomes a critical element of any policy dealing with crime and violence. The reason for

Comment [K1]: What does "political community" refer to?

this, as Bergman has stated in the analysis of compliance with tax laws, is that voluntary compliance with the law depends to a certain extent on the credibility of legal enforcement by state institutions. Unfortunately, that capability is not purely a technical issue which depends on the enactment of good laws, or the availability of skilled professionals. It requires political leadership, the support of broad coalitions and policies aimed at reforming the police and other state agencies to enhance the capabilities of the state to enforce the law.

According to Bergman, compliance with criminal law -- or any type of law, for that matter - - depends to a great extent on voluntary compliance with rules. No state is capable of investigating every infraction of a legal norm that may take place in a particular society. Voluntary compliance depends on the existence of an environment in which people perceive that state authorities are legitimate, that they are able and willing to enforce the law, and that most other citizens obey the norms. In such an environment, moral cynicism, that is, the realization that certain values deemed to be legitimate are violated by many, is limited. People do not necessarily obey the rules for fear of being punished if they fail to comply, but because they believe compliance is the norm, and defying the norm might put them in the minority that deviates from the rules. Thus, the credibility of the law enforcement system is an important contributing element of any legal culture. However, the larger the number of deviations from the law, the more difficult it becomes to enforce legal rules. This can be explained by at least two factors: First, if violators of legal norms are relatively few, more police and judicial resources could be applied to detect and convict them. Second, in a more law-abiding environment the police could count on greater collaboration from third parties or witnesses.

In environments where compliance with norms is rare, not only are the police less effective, but they are also more violent, which in turn produces less collaboration from the public and even less effectiveness.

Conclusions

I have tried to relate in this memorandum three sometimes disconnected analyses of the relationship between popular attitudes about law, recent legal and judicial reforms, and attitudes about the law held by certain legal professionals, academics and policy makers. Over the past decade, two parallel developments have taken place in terms of the relationship between law, violence and citizenship in Latin America. The first one development is the increase in crime in almost all countries, with the ensuing negative consequences in terms of fueling state violence in response and a deterioration of the rule of law as a reality. The economic, political and social consequences of this phenomenon are all too evident, as there are only a few examples of successful attempts to reduce crime. While the growth of violence seems uncontrollable in some countries, in others the reality is a cause for concern but not yet acute.

The second development refers to the expansion of a legal reform movement in Latin America, the consequence of which has been the expansion of resources channeled to the courts and public prosecution and public defense systems in many of the countries of the region. Today it seems clear that the reforms have not achieved some of their primary goals. But the reality of violence does coexist with efforts to modernize legal institutions, a situation which must be considered in any evaluation of the exercise of civil rights. That these reforms have been carried out with significant support at a national level reveals that even in the less hospitable environments of the region, democratic reformers have been able to make progress.

These reforms as well as policing reforms that have been attempted have not succeeded in bringing down rates of crime and police abuse. This may be due in part to the widespread lack of civic culture that characterizes some of the countries. The culture that does exist, which has been shaped by historical processes, reflects a propensity to disobey norms, distrust institutions and tolerate violent behavior. This is by no means the by-product of a single cultural tradition, as there are significant differences with respect to its influence among the countries of the region. To reverse this situation and move Latin American societies toward a civic culture, there seems to be a clear need to improve governmental capabilities to enforce the law, particularly with regard to criminal activity. This should

provide the impetus for increasing voluntary compliance with rules, which may in turn help bring down crime rates.

The key question in environments where there are high levels of crime is how to focus the law enforcement effort. There are many criteria that could guide the selection of priorities. In my view, expanding resources to provide security for low-income people is an important one, and another is focusing on the prevention and the solving of crimes where the probability of success is greater. Voluntary compliance rests in part in the subjective perception that law enforcement is credible, and therefore demonstrating success in efforts to reduce crime is essential.

Comment [K2]: I am not sure if you are referring to the prevention of crime or the solving of crimes that have been committed.