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Summary of the Presentation at Southern Methodist University (SMU) November 8, 1997: Judicial Reform in the Americas

by Hon. Roberto MacLean

The last few years have witnessed the beginning of a reinforcement of democratic processes and institutions in Latin America and the Caribbean and, at the same time, a gradual but nevertheless strong transformation of state-run economies toward private enterprise and ownership and toward systems oriented to the market. On the other hand, the two richest and most industrialized countries of the Western Hemisphere, the United States and Canada, have changed their often contradictory policies and priorities, developed during the years of World War II and the cold war, and have begun to look to other aspects of their relationships with their southern neighbors, in which the protection of American and Canadian interests in the region is not the paramount objective of their economic policy, but a more comprehensive and long-term agenda looking for: the expansion of markets; the increase of the flow of trade, in both directions; the growth of private enterprise, both large and small, both national and foreign; the reduction of poverty; and the suppression of inequalities and injustice as a way of fighting terrorism, drug trafficking, and corruption, and as a long term road to strong and lasting democracies and growth.

Both the World Bank and the Inter-American Development Bank support these changes and have moved from programs addressed to building or reconstructing physical structures to programs that stress the social content of development, like health, education, and promotion of the role of women and children. One of the later programs was to encourage the development of the private sector. Within that area particular attention was paid to the works of Nobel Prize winners in Economics, North and Coase, as well as to the work of de Soto underlining the economic impact on trade, investment, growth of the legal system, and the resolution of disputes. During the last three years, the World Bank has carried out in its judicial program different types of activities in Argentina, Bolivia, Peru, Ecuador, Venezuela, Trinidad and Tobago, Panama, and Guatemala. Three of them, Venezuela, Bolivia, and Ecuador, are already freestanding projects, and Peru and Guatemala are in the process of preparing a project. The Inter-American Development Bank is also active in several programs in the Hemisphere, even though giving emphasis to other aspects, and not concentrating on the economic effects of justice and law.

The differences between the industrialized countries of the Americas and the countries of Latin America and the Caribbean in these areas are not simply between Civil Law and Common Law. Indeed, most of the Caribbean countries are Common Law also, but one in which legal cultures are different in regard to the effective role of law in society, the social role of the judge, the gap between law and reality, and what could be termed as a culture of service that is more present and alive in some societies than in others. The differences in the sources of law, classifications, terminology, codifications, technical divisions, concepts, and institutions, even though at first they might seem very difficult, are really not the core of the problem, but of a secondary importance when one has to face practical situations. It is against this background that the practice of the World Bank has been outlined with the following central ideas.

First, the administration of justice is not a mere exercise of authority but, essentially, a service provided by the state to the community that consists not only, or even mainly, in the application and interpretation of the laws, but in the peaceful resolution of social conflicts. The judge ought to be, more than an oracle of the law, an administrator of crisis. As in any service, the measure of achievement and success is how the service meets the needs and the expectations of the users of the judicial system. Second, the main challenge facing serious and conscientious reformers is one of the characteristics of the legal culture in developing communities due to the lack of real popular participation in the process of lawmaking, and lack of adequate and updated information. Thus, the gap between law and reality is even bigger than in societies in which interested parties can take a much more active participation in law making. The contrast between law and reality is almost an identifying feature of Latin American laws in many aspects, and the reason for the development of many alternative informal normative systems in the continent. In this, judges have a central role to play. Because, of all the legal actors, the judge is the only one who can not avoid or postpone facing this contradiction. And the response to this challenge is critical.

Third, in most Latin American and Caribbean countries the social prestige of the legal system and of the judiciary is very low compared to those in the United States or Canada. This is due mainly because the machinery of justice is not prepared to meet these challenges. And in order to be prepared, it is necessary, before anything, that judges assume a role of leadership in the process of changes and are not limited to the role of bureaucrats. One of the lessons learned by the World Bank is that it does not matter how much political support a judicial project gets from government or Congress in a country, or how much financial support international donors are prepared to give, if judges, and later, other members of the legal community, are not prepared to assume responsibilities and take the tasks upon their shoulders. If judges are not prepared to assume a leading role, all other efforts will be wasted.

Fourth, this leading role is of the utmost importance not only nationally but also internationally, because the impact of justice in an interdependent economy goes beyond political frontiers and territorial boundaries. In an age of international trade organizations and treaties, like the WTO or the NAFTA, Mercosur or the Andean Pact, Miga or the ICSID, the immense majority of international trade or investment disputes are still solved by national courts or national arbitration boards. So, the commitment of judges must be complete in order to meet not only the challenges of their own countries, but of their time in a global society.

Fifth, the methodology that has been applied in most of the countries in Latin America begins with the identification of issues in nine different areas: (1) the legal context in which the judiciary works; (2) the administrative organization of the judicial system; (3) the economic cost of justice and how this cost is distributed in society; (4) judicial training and legal education; (5) real functioning of rules of procedure; (6) alternative methods of dispute resolution; (7) physical infrastructure and equipment; (8) perception by the community of the judicial system; and (9) the impact of the judicial system in the community.

Sixth, as a complement to the identification stage, the following step is the organization of judicial workshops by judges, from judges, and for judges in order to: (1) receive information about what is really happening in the field, since in most countries that information is not readily available; (2) receive suggestions from the people who know the field best as to possible and practical solutions that are realistic; (3) motivate judges who normally do not have opportunities to compare notes with other colleagues or to be listened to by their superiors; (4) gain allies to the reform process by informing them of all the components and other elements involved in the project; and (5) identify possible leaders to carry out the different stages of the process and measures to be adopted. These workshops have been carried out with success in Venezuela and also in Guatemala. Peru has also organized some workshops with other variations.

Seventh, when the previous steps have been completed and a report is produced with findings and recommendations, the next stage, which is beginning to be applied, is that of pilot programs to improve performance of courts in specific types of cases in which indicators can easily identify the different results in type and volume, from the presentation of claims to the effective enforcement of judgments.

These stages represent only the beginning of an effort to meet the challenge of our time to achieve peace, democracy, growth, and social justice in the continent. That challenge has to be met with the realization that a good system of justice is not a concern only of judges, law professors, and lawyers, but of all the community because there is at stake freedom, happiness, and the right to dream and to hope.
