

# THE JUDICIAL CAREER IN LATIN AMERICA: AN OVERVIEW OF THEORY AND EXPERIENCE

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## I. Introduction

With the growing Latin American interest in judicial reforms, efforts to introduce judicial career systems have proliferated throughout the region. The present paper explores the reasons for this development, the changes it has produced, and the impact on sector performance (output and outcomes). It also draws on extra-regional comparative experience to see how common problems have been addressed and with what success in other settings.

More recently, progress in other dimensions of reform has further heightened attention to the judicial career,<sup>1</sup> among Latin Americans in general, their political and judicial leaders, and donors participating in reform programs. This trend is linked to the failure of many other reform mechanisms (ranging from higher budgets and automation to new laws<sup>2</sup>) to produce anticipated improvements in performance and the search for explanations in the judiciary's human resource base -- "who the judges are" as defined by their skills, attitudes, and understandings of their job. A second source of interest arises in the application of neo-institutional analysis (North) to the judiciary and thus a concern with the structural sources of judicial behavior (Hammergren and Messick). Since many of these are found in the in the organizational rules and practices affecting who applies and is chosen for judgeships and further shaping on the job incentives, the career system or human resource management writ large again becomes an issue. In some sense, neo-institutional analysis only added a new vocabulary and theoretical status to what others had perceived intuitively. However, by focusing on the institutional environment and the role of subjective models, values, and incentives, it provides a systematic framework for analyzing organizational change and may introduce questions ignored by sheer intuition.<sup>3</sup>

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<sup>1</sup> While this paper looks specifically at the case of judges, the general arguments are also relevant, and being explored elsewhere, for professional and administrative staff of all judicial organizations -- prosecutors, defense, state counsel, police, etc. Similar concerns have been expressed as regards the formation, further training, and professional quality of the private bar.

<sup>2</sup> In saying this, I do not mean to detract from the importance and the impact of alternative measures. Personnel reforms are no more the panacea than are new laws and automation, and except in the most extreme cases, laws and equipment probably can affect operating procedures and outputs. However, I am more dubious than some of my colleagues as to the breadth of their impact and their ability to eliminate or avoid subversion by underlying problems like corruption, unequal treatment, limited access, or judicial incompetence. As others have said, good judges make good law and automating a corrupt process is likely to produce automated corruption. For an alternative views, see Buscaglia and Dakolias and Blair and Hansen. Neither stresses career systems, but they do differ as to what works.

<sup>3</sup> Still both approaches tend to skimp on the breadth of their attention. Whereas intuitive "theory" highlights values (and how to recruit judges already holding them or otherwise instill these perspectives), institutional analysis often ignores both these and subjective models in favor of incentive systems.

## II. Background

The judicial career has a special meaning in Latin America which must be understood as a prelude to reviewing events. Although its creation was a goal of many judiciaries, even prior to the past decade and a half of reform, its precise meaning is somewhat vague and has undergone change over time. The meaning has altered sufficiently so that some countries which assumed they had judicial careers are now taking moves to instate one! Most simply put, in Latin America, the judicial career has been equated with a sort of judicial civil service system and still more specifically with guaranteed (sometimes permanent) tenure in office thereby protecting the seated bench from the vicissitudes of political change or even those within their leadership (Salas and Rico, 1990). Described as *inmovilidad* (immobility), and sometimes further limited to the specific position occupied, the central idea was that judges should not be removed from office except for very specifically defined abuses of their terms of service. Obviously a career system could/should imply more, but traditionally *inmovilidad* has been the minimal common denominator of the judiciary's understanding and to some extent that of other political actors.<sup>4</sup>

The additional components, which have only recently begun to be explored, include the systems for selecting judges, for promotions or lateral transfers, for providing them with means and incentives to improve their knowledge and on the job performance, and for evaluation, monitoring, and discipline. Latin Americans began with *inmovilidad* because irregular and usually politically motivated appointments, dismissals, and transfers have long been seen as the biggest obstacle to adequate performance. By increasing institutional and individual dependence on the preferences of political elites, they undermine the judiciary's ability to operate through the objective application of the law.<sup>5</sup> However, the realization that a permanent, but otherwise ill prepared, unaccountable, and possibly poorly motivated judiciary might be worse than one without guaranteed tenure has called attention to these other factors, and to a broader definition of the judicial career. This in part explains the decision to introduce careers where they in theory already existed.

The other part of the explanation is that many constitutionally guaranteed career systems were commonly violated in fact. Over much of their independent histories, but with increasing frequency in the past few decades, many Latin American nations have seen a proliferation of irregular removals of Supreme Courts, individual tribunals, and occasionally of a good portion of the existing bench. Ironically, these actions were sometimes offered as a prelude to establishing a professional career -- but once the purges were accomplished, the improved system usually was forgotten. Thus, despite movement toward a broader definition of career systems, guaranteed tenure remains a principle component, sometimes to the detriment of the other elements.

## III. The New Issues in Designing Career Systems

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<sup>4</sup> Judges commonly use "career" in a second sense when distinguishing between external and internal recruitment -- when an appointment is made "from the career" it means a seated judge has been picked. This does not mean however that a career system exists.

<sup>5</sup> Widner offers an interesting comparative perspective.

As participants in a civil code tradition, Latin American judiciaries have inherited another distinctive cut on the judicial career, however much violated in practice. In theory, the bench is a career alternative to other forms of public and private legal practice, and judges enter service at an early age and remain there until retirement. A few constitutions and organic laws have formalized these operating principles, but even where they have not, most judiciaries have followed them for at least part of their historical development. While some provision was normally made for external recruitment, most often at the level of the Supreme Court, internal recruitment and thus an internal career was an expectation, and one whose violation was normally seen as irregular no matter how frequently it occurred in fact. In many countries, recruitment began at the clerical or administrative levels and judges learned their work on the job before assuming the bench. While this formal and informal system began to break down at mid century or sometimes earlier,<sup>6</sup> it still shapes thinking about what a career should be and almost automatically excludes a number of alternatives -- for example the common law tradition that judges join the bench after a private career or the US practice of electing judges. In these alternatives, a judicial career is a less relevant concept although many of the problems entailed in designing one (how to choose, evaluate and reward judges)<sup>7</sup> must still be faced.

This cultural preference poses an important parameter on subsequent discussions meaning that Latin Americans will couch the issues in terms of early selection of judges, in service development of additional skills, and a bias toward promotion from within. Because a career system in this sense is a foregone solution to a series of broader problems we can think of it as part of the institutional environment (subjective models and values or path dependencies) within which specific practices will be developed (and incentive structures will have to operate).

That said, the creation or modification of a specific career system still requires numerous decisions of detail which will determine how well it serves the ends of improving overall judicial performance. Those decisions in turn depend on how we define improvement and what we expect a judiciary to do. Without entering into further exploration of the last two questions, it bears noting that a failure to address them adequately and to envision the career as a means not an end in itself are major sources of problems. Abstract goals like “merit” appointments or the choice between external or internal recruitment is fairly meaningless until one determines what is expected of the judiciary. A further impediment, and another effect of the institutional environment, is the legal community’s frequent belief that such alternatives do have universal answers -- that arrangements should be selected on the basis of their conformity with doctrinal principles (or “judicial science”) and independently of the results they may have in practice.

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<sup>6</sup>Reasons for its disappearance include the collateral impacts of several otherwise positive developments -- the spread of mass based party systems (and the use of judicial appointments for patronage), the greater importance of constitutionally based governmental institutions (and thus of controlling the outcomes of judicial decisions), and some professionalization of administrative staff (making it less practical to place young lawyers in those positions). In addition, factors like declining judicial prestige and salaries often served to make the bench a less attractive option for newly graduated lawyers, or one they intended to take only until something better came along. Hammergren, 1998.

<sup>7</sup>However see discussion below of the English (and majority) variant of common law practices which does approximate a career system.

This is a very powerful subjective model, deeply rooted in Latin American legal culture, and one which affects many other aspects of reform programs.<sup>8</sup>

The general argument, whether developed deductively or inductively, is that the form taken by the judicial career will improve performance by ensuring the selection and retention of the right kind of judges, by insulating them from outside pressures (threats to organizational and individual independence) that could shape their decisions, and by providing them with incentives to perform properly. A career system in this larger sense, should also include monitoring, evaluation, and disciplinary mechanisms to detect problems and eliminate incumbents indisposed for whatever reason to perform to standards. Its design involves a number of details relating to the career's specific content and how (and by whom) it is will be managed. The latter may be seen as transcending the limits of the career system itself and introducing issues of judicial governance, independence, and accountability, but the elements are difficult to separate. Latin Americans have recognized this, and to some extent can be seen as placing too much attention on the who and how, and not enough on certain aspects of content. Among the specific design details and some major alternatives are the following:<sup>9</sup>

*Terms of service for judges:*

- Lifetime tenure/ permanent tenure till retirement/ fixed terms/ fixed terms with chance for reelection
- Universal rules or different systems for different levels -- Supreme Court may have more or less guarantee than lower levels
- Tenure in post, rank or the individual

As this is where concern first focused, it is an appropriate place to start. Nonetheless, one early conclusion is that the answers cannot be separated from the remaining questions. A decision to vest tenure in the position held, the judicial "rank" or simply in the individual (who may be moved about but not dismissed<sup>10</sup>) has implications for how evaluation and promotion will be

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<sup>8</sup>While rarely treated in these exact terms (institutional analysis is a late comer to judicial studies), many observers have commented informally and a few have done so in print (Saez, Thome), on the noninstrumentalist outlook of Latin American jurists. This is most visible in law drafting, where a high premium is placed on conformity with doctrinal principles rather than downstream results. To some extent, this is an element of universal legal culture (the expectation that judges will hew to the law rather than their own appreciations of a problem). It just seems to have taken an extreme form in the region. For a relevant discussion of its workings in constitutional decisions in Costa Rica, see Wilson and Handberg.

<sup>9</sup> The discussion here and in section V draw on a variety of sources. Country details come for the most part from the author's work in the countries mentioned, complemented by additional informant interviews and some secondary sources. Among the latter, Haeussler, ILANUD, Dakolias, Guatemala Supreme Court, Honduras Supreme Court, Salas and Rico (1990), and articles by Correa warrant mention. USAID's sector assessments for most of Central America and Ecuador, a series of publications (Rico et al., Salas and Rico, 1989) drawn from the assessments, a 1998 USAID assessment of the Panamanian judiciary (headed by the author), and the Chemonics report for the World Bank project in Bolivia (and the author's World Bank project evaluation and institutional review for that country) also inform the work.

<sup>10</sup> Some judiciaries have taken the tack of punishing obstreperous judges by placing them in especially unpleasant posts or jobs. In countries where tenure is in the position (e.g. Panama) this is not possible, but it has been a

managed, just as a decision to feature outside recruitment will have an impact on how promotions are decided (i.e. if mid level entry is allowed, than seniority cannot be the sole criteria for advancement).

The traditional judicial preference has been permanent tenure until a fixed retirement age,<sup>11</sup> seen as providing the most protection from outside influences. Tenure reduces, but hardly eliminates these pressures. The potential for their exercise depends on how it is vested and the rules for transfers or promotions. The choice of post, rank, or individual is usually not debated, and evidence as to its consequences remains anecdotal; most systems have an implicit tenure in post, but in many this is less than absolute. Permanent tenure of whatever form, unless combined with a promotion system based only on seniority, cannot eliminate manipulation when a judge wishes to move, horizontally or vertically. Judges with explicit permanent tenure in the position to which they are assigned, still have to reapply for transfer or a higher ranking position. When, as in Panama, this is combined with completely internal, top down management of the system (and fairly opaque selection criteria) the result may be a considerable impingement on the independence of individual judges by the upper levels of the hierarchy.

Qualified tenure, requiring periodic reelections or ratifications (used in Costa Rica prior to 1994, in Peru since 1930, in Colombia from mid century until 1991, and apparently, following recent changes, in Mexico's federal judiciary), poses many of the same problems. However, as a comparison of the first two cases suggests, the extent of their realization depends on such factors as the motives and outlooks of those making the decisions, and their susceptibility to external pressures. The relatively independent Costa Rican Court was rarely accused of abuses in its reelections of lower level judges, and even the legislative selection and reelection of justices was viewed as relatively objective.<sup>12</sup> In Peru, on the other hand, ratifications have been sporadically used by political elites (through pressures on the judges or judicial councils applying them) to conduct virtual purges of the bench.

Compulsory reelections are appealing from a second standpoint, meeting the demands of an evolving system or one under reform, where it may be difficult to predict eventual needs. They also may help address a problem even of stable systems, that of determining fitness for service at a fairly early age. For systems undergoing radical change, a transitional period of fixed rather than permanent tenure may have advantages. Another alternative, explored below is to structure incentive systems so that the less fit leave at their own volition.

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frequent practice in contemporary Peru. Here it has been facilitated by the creation of a back log reduction program where certain judges perform a nearly clerical task of completing cases tried but lacking a final written resolution.

<sup>11</sup>Most systems with permanent tenure set a retirement age, ignoring the possibility of "lifetime" appointments. Governments have often raised or lowered the age as a means of manipulating Court membership. Current discussions usually assume that judges should retire at about the age of other civil servants. Aside from whatever cultural preferences exist for fixed retirement (seen as an advantage for the judiciary as a whole), there are temporary benefits – as a peaceful means of easing out judges selected under former systems.

<sup>12</sup>However, in 1999, the legislature's failure to ratify the chief justice, already reelected president by the Court for a second eight-year term, suggested that objectivity, or at least the Assembly's deference to judicial preference was threatened. Significantly, this is linked to a small opposition movement within the Court itself.

Both traditional and reformed systems often operate differently for the ordinary bench and the members of the Supreme Court (or any separate Constitutional Court). Traditionally, where fixed terms were applied, they were usually shorter for lower instance judges. The disadvantages of this arrangement far outweigh the benefits, and when reformed systems use fixed terms, it is most often only for the Supreme Court. For example, Costa Rica, having moved to a permanent career system for its ordinary judiciary, retains eight-year renewable terms for its Supreme Court. Colombia, Mexico, and El Salvador have adopted similar policies. This recognizes the more overtly political nature of the Court's decisions and a consequent desire to keep it more in touch with changing values. It may also be a way of minimizing partisan conflict over the Court's composition -- especially if combined with staggered appointments so that sudden changes in the composition of the selecting body will not radically change the Court's outlook.

### *Terms of initial selection and advancement*

- Inside -- outside recruitment
- Promotion by seniority or by "performance" (including that on the job and as determined by competitive examinations)
- Criteria for selection, performance evaluation
- How and by whom is evaluation done?
- Use of training as recruitment/promotion criterion

Surprisingly, this is the area where least debate has centered and where initial decisions have been relatively less subject to reevaluation. The basic arguments for and against inside or outside recruitment and promotion by seniority or performance are generally recognized -- an overly closed judicial caste versus the benefits of their accumulated experience, and the unambiguous, if inadequate standard provided by seniority versus the slippery, but potentially more appropriate performance measures. In the face of their inability to evaluate the tradeoffs, many countries have opted for a middle road. This often takes the form of allowing or requiring a certain percentage of outside candidates or nominations and using seniority as one standard in combination with efforts to evaluate on the job accomplishments and overall fitness. The problem, as with many of the other choices, is that each variable will function as part of a larger system -- and it is the whole, not the parts, which determine whether its advantages or disadvantages predominate. A middle road decision may reduce some of the most obvious vices, but to maximize benefits one must think beyond the impact of individual elements.

The key to unlocking the potential benefits arguably lies in the third element -- the criteria used for selection and performance, and it is here that analysis has been weakest. Although most countries have or are moving toward some sort of merit system, the central problem has been operationalizing that concept -- deciding what constitutes merit and ultimately what one expects from their judges. However simple or complicated their formulation, most sets of standards have been subject to criticism, on the one hand because they frequently function as a facade behind which the old criteria of personal and political contacts continue to operate, on the other because even when taken seriously, they are perceived as inappropriate. Panama's current system has

been criticized on both counts. The merit rankings of entry-level candidates and judges applying for promotion or transfer, aside from the basic requisites (a law degree, minimum age for certain positions) feature a test on Spanish and knowledge of the judicial personnel system and organization, as well as points for post degree courses (but with no effort to check for quality either of the course or student performance in it). Even with this minimal system, it is frequently charged that the higher level judges who make the final choices will send back lists of candidates for the inclusion of favorites who did not make the first cut.

On the other hand, efforts to introduce more demanding examinations and to stick by the results (if not the rankings of the inevitable lists) have attracted their own critics -- usually because they are long on book learning (as one observer noted, an ability to recite laws from memory is a questionable asset) or introduce elements like "judicial vocation," psychological examinations, or medical requirements whose validity or relevance is itself in doubt. In countries which have introduced large judicial training programs, there has been some move to use these as an initial screening system. Since the required courses are usually short, themselves of uneven quality, and costly to extend to all potential candidates (or if fees are charged, not fully accessible), the practice has its own problems. In El Salvador, its initial rounds resulted in the disqualification of most participants and a consequent decision to lower the standards for inclusion on the list of nominees. Countries like Guatemala, which is attempting to set a minimum score on the entrance exams by law, may thus be adding new complications.

Because for most countries, merit appointment is an innovation, most attention has gone to initial selections. Most have not reached the point of having to consider its use in the rest of the career track. A few countries either use (Brazil, Panama) or plan to use (Mexico) similar procedures (written and oral examinations, credit for professional training or publications, experience or in this case seniority) to decide promotions and transfers, but they will also require (whether they recognize it or not) some means of evaluating on-the-job performance. Evaluations are also essential to improving the performance of judges not up for or interested in promotions.

That said, there are many ways to do evaluations and to use their results. Traditionally, judicial superiors (members of the next highest court) have either formally or informally provided much of the input, as have, but usually less officially, local and national elites and party leaders. The trend to reduce political input is a positive one, but it also shifts more of the responsibility to the judicial hierarchy. Even where superior courts no longer appoint lower level judges, they are the most logical source of information on how judges and administrative staff within their district operate. However, relying exclusively or predominantly on their judgment can increase undesirable patterns of dependency, internal patronage systems, and an overly insular culture. In recognition of this phenomenon, some courts have introduced innovations like external performance evaluation by teams of specialists who visit courts periodically to observe actual performance and interview a wider range of court personnel. The teams also talk to superiors, but are able to weigh their comments against other sources of information. Where teams are composed of other judges (Costa Rica, Bolivia), the method has usually been accepted. The use of outsiders (and especially as in El Salvador, law students), has been opposed because the evaluators, it is said, are not sufficiently knowledgeable. Two other logical sources of

information, lawyers and other court users, have been widely resisted. The reasons are obvious and not wholly invalid. Judges fear these individuals will take the opportunity to retaliate against negative rulings, or still worse, refusal to take bribes or requests for special favors. Experience elsewhere suggests the problems are not insurmountable, but so far Latin Americans have not been convinced.

### *Who selects the judges?*

- Supreme Court, internal council, outside council, Congress, executive
- If a new body (council) is created for this purpose, how is it formed and selected?

Considerably more attention has gone to the question of who will make judicial appointments. This is an inevitable consequence of the traditional preoccupation with partisan intervention, but it often seems to embrace the dubious assumption that just choosing the right selection committee will guarantee their choosing the right judges - or perhaps only that eliminating the inappropriate (i.e. political or clientilistic) criteria will make the use of the appropriate ones automatic.

Historically the constitutionally dictated arrangements varied considerably, both among countries and over time in each one. Many Latin American countries deviated early from European practices of leaving this function with the executive (via the Ministry of Justice) and instead gave the Supreme Court (and sometimes lower level tribunals) the job of selecting all but their own members (Salas and Rico, 1990). Except in Colombia, where after 1957 even these decisions were vested in the Court,<sup>13</sup> the justices were usually selected by a mix of entities and branches of government. Often the executive prepared a list which had to be ratified by the legislature. Sometimes justices were simply elected by the Congress (much of Central America), or (Bolivia) nominated by one house and elected by the other. Venezuela and Peru were the first to adopt judicial councils (effectively installed in 1969) to make the initial and final selections (Venezuela) and (Peru) to prepare lists from which the executive made the final choices (again subject to congressional ratification in the case of justices).

The constitutional arrangements were usually honored even when irregular dismissals and replacements occurred – that is to say, the constitutionally authorized bodies made the decisions albeit under considerable external pressure.<sup>14</sup> However, even in normal times, there was ample opportunity for manipulation by political leaders, whether or not they were formally included in the process. The extent of extra constitutional interference also varied depending on the government in power and the nature of political conflicts. Frequently, after a period of excessive intervention, constitutional changes might be introduced to create a less vulnerable arrangement, which almost inevitably proved no better than what it replaced. In a few cases (Colombia after 1957, Chile in the 1920s, and Costa Rica after 1949), warring political factions actually reached

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<sup>13</sup> Ecuador recently adopted the Colombian system of *cooptacion* (i.e. self selection by the Court). In line with post 1991-Colombian practices there is pre-selection by a judicial council.

<sup>14</sup> However, when they refused to capitulate, they might as in 1969 Peru be replaced by a more complacent membership.

agreements on mutual disengagement. Such agreements not only gave all or most of the responsibility to the judiciary; they also extended to a tempering of partisan input in whatever powers the other branches of government retained. In Colombia, this entailed the Court's agreement to maintain a partisan balance in judicial appointments. In Costa Rica, a less formal arrangement allowed the two major parties to alternate in the selection of Supreme Court justices (who in turn selected the rest of the judiciary).

These agreements, accompanied by but not limited to changes in formal procedures, are part of the informal system shaping all the structural arrangements. Informal rules frequently divided up judgeships among parties or factions, and might give justices or other appointive authorities (e.g. members of Venezuela's judicial council) control over a certain portion of lower level appointments. For example, in Bolivia post 1982, by informal understandings,<sup>15</sup> each justice was selected to represent one of the country's departments and controlled appointments within his corresponding judicial district (Gamarra). In a similar fashion, members of Mexico's federal Supreme Court allegedly divided responsibility for selecting certain lower level judges, creating internal judicial cliques. In Venezuela, the process arguably reached its most institutionalized and politicized form, giving rise to what are called legal tribes, each associated with a member of the judicial council and including not only the judiciary but also private lawyers who could count on special treatment by "their judges."

The myriad forms taken by prior selection processes, their different degrees of stability, and the variable influence of partisan, personal, regional, or institutional interests had a still greater variety of effects on such characteristics as judicial independence (at both the individual and institutional levels), professionalization, predictability of decisions, accessibility, and equity of treatment. The most negative effects were in countries where neither the formal nor informal rules showed much stability,<sup>16</sup> and judges were simply placed and replaced by whomever held national power. Still, they may not have been much worse than more institutionalized systems where formal and informal arrangements divided up the judgeships along partisan or clientilistic lines. And even in countries where the politicians and the other branches of government exercised less interference, there has been a concern that the judiciary's own control of appointments has produced a form of internal clientilism, damaging to individual if not institutional independence, discouraging professionalism, and often accompanied by a sort of planned irrelevance to changing societal concerns.<sup>17</sup>

Clearly the concern about who picks the judges and the broader impacts of the arrangement

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<sup>15</sup> This extended the effect of a 1851 law. The most recent selection of justices suggests the understanding may no longer be honored and that national party preferences will prevail over those of local notables, even if aligned with the same party.

<sup>16</sup> Honduras may represent the most extreme example with a resulting high level of judicial turnover (Salas and Rico, 1989). Ecuador is another case where a change of administration often meant a major shift in the composition of the bench. Under its military government (1968-1980) and the following civilian regimes, Peru has also experienced extensive movement on and off the bench, much of it motivated by partisan or ideological concerns (Hammergren, 1998).

<sup>17</sup> This has been especially criticized in Chile. See Valenzuela.

selected are not new ones. In the current reform context, the usual preoccupation with the purely partisan implications has been superseded or joined by a concern that the system produce better judges. The solution increasingly favored throughout the region lies in the creation of external judicial councils, structured so as to eliminate or nullify the usual political criteria, overcome what are often seen as overly narrow institutional biases, and emphasize professional qualifications.

The council model is derived from earlier European innovations. Its elaboration is rarely informed by a detailed familiarity either with specific European variations or their performance.<sup>18</sup> Had it been, the Latin American examples might have been structured differently and accompanied by far less optimism about their ability to eliminate past vices. Not surprisingly, its introduction in each country has been accompanied by extensive debate and negotiation over its own selection, composition, and powers, as well as its shared or exclusive role in the selection process. In the realization that they are not going to eliminate extraneous influences, most countries have instead attempted to balance them-- creating a council composed of representatives of the various branches of government, political factions, or social forces. Where that alone is insufficient, the council is sometimes given only a part of the selection process, with the executive, legislature or judiciary itself still holding a say in the final decisions.

This effort to create neutrality by expanding the interests represented has discouraged the old winner-take-all mentality and with it a major threat to judicial independence. It has not been without problems. In El Salvador, partisan battles in the Assembly led to a month long period without a Supreme Court. In Bolivia, even after the Council's creation, there was a two-year delay in filling the Court's vacancies, selecting a new Chief Justice, and replacing over two hundred vacant or expired judgeships.<sup>19</sup> There have also been debates over whether the judiciary should have representatives on the council, and if so in what proportion. Answers range from Costa Rica's "internal council," almost completely composed of judges and presided by the Chief Justice, to Colombia's council whose members may not have held judicial positions in the two years preceding their appointment. Over the short run, these debates have discouraged attention to other criteria for selecting Council members, and to the Council's own determination of criteria for judicial appointments. Finally, the addition of a new body has often brought conflicts between it and the Court, especially when the latter is not represented on the Council. Courts have often fought or delayed the creation of a Council for just this reason. In this context the Costa Rican model, which once created, preceded immediately to the implementation of a career system, begins to look more interesting.

### *Who manages the career?*

- Is this the same as above or some different body?
- Are the functions combined under one managing body or split/shared?

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<sup>18</sup> For a discussion of the failings of the council model in Spain, see Ibanez. For a global discussion, see Rico.

<sup>19</sup> The new Chief Justice was finally selected by the Court's members, over two months after the new Court was seated. Conflicts with the Council (and probable behind the scenes political negotiations) also temporarily paralyzed efforts to start filling vacant positions at the lower levels.

- Is there a specialized office to handle discipline? How independent is it and where is it located organizationally?

While many of the arguments and arrangements discussed above are relevant here, management of the judicial career is more complicated, and once the debates over the selection system have been resolved, can generate a second series of conflicts. Selection is potentially separable from the issues of career advancement, performance monitoring and evaluation, discipline, and dismissal. Some Supreme Courts (Argentina, El Salvador) having lost the appointment battle, have struggled to keep these other functions, benefiting from gaps in new laws and the argument that these other tasks are more appropriately done from within. Partisanship is often less important here, and the debate usually focuses on institutional interests -- pitting a Court which perceives itself as losing important intra and extra organizational powers against a Council which believes it can and should receive them.

Received doctrine and recent experience with any of the possible arrangements offer little guidance. Discounting those of Venezuela and Peru and their unexemplary early history, most councils are too new to have coped successfully even with the challenge of introducing selection systems, while judiciaries which have retained either or both powers are still attempting to demonstrate an ability to overcome past failings. For the time being, El Salvador's accidental division of responsibility (by legislative error) may be the best solution -- forcing a friendly competition between the Court and the Council over the question of how the former will use the latter's evaluations, especially since the Court retains disciplinary authority. If leaving the ultimate arrangement uncertain, this has encouraged both organizations to experiment with new ways of taking their responsibilities seriously. Letting this arrangement persist for a while may both provide suggestions as to what division will work best and also help advance what others have neglected, the question of what career management really means and what mechanisms and content it best includes.

As this example suggests, discipline, like selection, can be separated from ordinary career management. It has also been much harder to remove from whatever body (often the judiciary, and frequently, the immediately higher court) traditionally exercised it. More objective observers would agree that wherever located organizationally, disciplinary functions should be vested in a specialized body, the members of which are either judges or individuals with judicial experience. Usually this body's ability to recommend or apply sanctions is limited to noncriminal actions -- where indications of the latter are found, ordinary or special (for higher ranking judges) proceedings are conducted by another entity. It may also be important to separate its activities from several other functions, for example normal evaluation and monitoring. While monitoring and evaluation systems and agencies can provide input to the disciplinary bodies, in doing so they may undercut their own effectiveness, both as reliable sources of information on system performance and as a means to encourage improvements.

As regards discipline alone, the delicacy of the theme, and the judiciary's reluctance to admit the need for discussing it have made this the most universally neglected aspect of the career system. Even in countries where formal mechanisms have existed for some time, there is little

information on their operations or results. The possible variations in arrangements, the several issues to be considered in deciding among them, and the likely consequences of each are virtually unexplored. Just to mention a few, there are the questions of organizational placement, within or outside the judiciary, and wherever located, the relative independence of the office itself. Second are the kinds of issues it will see, how it gets its information, the sanctions it will apply, and what means it will use to make its determinations, including the investigated party's ability to present her own defense. Third is the extent of its ability to initiate investigations ex officio and the resources it is provided for doing so. There are no universal answers to these questions. The most important considerations in shaping them are context specific, arising in the kinds of problems anticipated, both as regards the extent of judicial malfeasance, and the traditional threats to judicial independence, and the priorities assigned to such purposes as broadening public accountability, weeding out the bad apples, or just eliminating certain widespread vices. A radical change in organizational location, practices, or purpose will need its own informational campaign to alert the judges and the public as to the new rules. It will also require rewriting the old rules which, never having been adequately enforced, are usually completely irrelevant to real needs. The traditional neglect of these topics may have some justification in that disciplinary systems, while necessary, are a notoriously bad means of changing behavior. Still, they are an important adjunct to more effective measures, and thus cannot be ignored forever.

#### ***What to do with existing Bench?***

- Are they replaced entirely, grand fathered in, or given a chance to apply or opt out after a certain period?

This is really a special category because it is a purely transitional one. Nonetheless since these decisions will affect the short to medium implementation and impact of the career, they are important. Quite obviously the sitting bench usually has a preference for being grand fathered in, while the strongest external (and some internal) critics usually prefer either wholesale or eventual renewal. From the standpoint of meeting various criteria -- fairness, real reform, and a feasible program -- eventual renewal seem preferable. This gives the opportunity to the seated bench to apply for permanent position within the first few years of the new system's enactment. Whole sale renewal, whatever its intrinsic appeal, is usually both impossible and impractical. It begs the question of whether there really are better candidates "out there" who could be convinced to join the bench, and also overlooks the not inconsiderable merits of keeping some experienced judges around. However, insofar as the latter may be experienced in bad as well as good practices, their automatic retention is hardly the best recipe for effective reform.

#### **IV. Incentives and Self Selection: the Neo Institutional Formula**

The traditional approaches to the career have featured the "system's" ability to choose and retain the right judges. Students from the neo-institutional school have begun to promote a series of alternatives taking some of that responsibility out of the hands of the selection and promotions committees and placing it directly in those of the seated or would-be judges. This solution also

involves structural manipulation, but it attempts to bridge the gap plaguing most human resource systems – that between the structures governing entrance and those defining the environment in which members function. The underlying idea is to focus more attention on that environment so that it encourages and rewards the sought after behaviors and qualities (and sanctions those not desired) rather than placing reliance on an ability to detect them at one point in time (when it is easiest for candidates to dissimulate). Among the hypothesized advantages are the attraction of candidates with the right fit (once they realize this is what counts) and a reduced risk of not retaining good candidates who find their sought after qualities are irrelevant to real operations.<sup>20</sup>

Conventional evaluation and monitoring systems partly function on this logic. The institutional approach differs in attempting to structure incentives into normal operations so that “doing well” becomes its own reward. Innovators are rewarded by a chance to innovate, and scholars by a chance to study, not by the usual promotions or increased salaries. Development of external reference groups (for example review boards composed of bar members or NGOs who could comment on judicial decisions) could be used to give peer recognition (or apply disapproval) for those seeking this kind of reward. The organization may also retain conventional rewards and sanctions, but attempt to program their delivery so as to change the costs and benefits of deviant or correct behavior. Suggested schemes include tying pay to output or encouraging delayed gratification (and overriding the temptation to take bribes) by offering the largest pay increases later in the career and increasing the size of pensions (Hammergren and Messick)<sup>21</sup>.

The concept is an appealing one in the abstract. Its operationalization does lead to certain problems. In as much as it is based on incentives, it takes the challenge of defining merit to a second level: here one must not only decide what qualities one is seeking, but also determine what rewards and conditions will attract or retain those holding them. Obviously, the difficulties encountered in the first part of the equation will only compound those in the second half. Even assuming that problem can be overcome, there are other hazards. The ideal judge, however, defined, clearly has several characteristics, and because some may be more easily incorporated in this scheme than others, there is a danger of over rewarding them. One wants judges who are studious but not to the exclusion of other traits. Peer approval is important, but incorporates its own biases. Innovation must be accompanied by a respect for established process, and an inclination to stick to principles should be tempered with a concern for their practical consequences. Conceivably, the ideal arrangement might concentrate the desired traits in different judges, but this would also require a means for ensuring they be assigned to the right jobs and cases.

A part of the necessary balance can be attained via the reprogramming of the conventional

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<sup>20</sup>This is hardly a concern limited to Latin American judiciaries. A variety of judicial and nonjudicial organizations in developed countries have expressed concern that candidates picked by a rigorous selection system leave after a few years when they find the organizational environment does not reward the talents for which they were chosen. Conversely, even the most rigorous selection system may choose the candidates an organization does not want, by failing to focus on traits or vices which will only be discovered as they assume their duties.

<sup>21</sup> Despite the joint authorship, the credit for these ideas belongs to Richard Messick.

awards (prestige, salaries and other benefits, job security), but here the suggested solutions depend on the programmer's ability to second guess the target's calculations. The hypothetical claims as to the effects, for example, of delaying salary increases until late in the career (as a means of containing susceptibility to bribes early on) may be convincing in the abstract, but we won't know whether they work until they are tested over time. As with all political choice arguments, they rest on two critical and fairly debatable assumptions: their ability to encompass all the factors taken into consideration by the decision-maker and to predict how the judge or other actor will evaluate them. Most depend on actors' taking the long range view and so leave little room for impulsiveness, the distortions caused by the immediate context, or the fact that past experience may discourage counting on any long term promises. They also may overemphasize the incidence of real decisions as opposed to the force of habit or behavioral inertia. Perhaps one has to decide whether or not to take a bribe, but many other behavioral vices (formalistic decision making, failure to consider all the legal and factual elements, prejudice, or delays) just occur because that is that is how things have always been done. Finally, although it is desirable that judges think ahead, one should really ask whether the goal is a judiciary based on twenty-five year olds who are already worried about their pensions. In short, most of the arguments for focusing on incentives seem to follow a one-size fits all logic, ignoring the always inevitable and often desirable differences in outlooks and values among individuals and within the same individual at different points in his or her career or just at different times in the day.

Nonetheless the concept warrants further exploration if only as an adjunct rather than an alternative to the conventional reliance on selection and performance monitoring. Whether or not actually applied, it does highlight the utility of a more thorough investigation of the motives behind individuals' entrance into the career and the factors keeping them there. It also encourages more attention to how normal operations may themselves elicit inappropriate behaviors or drive out the judges we really want to keep. The answers may point more to macro organizational change than to the micro politics of individual incentives. Before we attend to individuals' calculations of the rewards of accepting a bribe versus the attendant risks we should be more concerned with the improvement of monitoring and evaluation systems as a whole, to how merit is defined, measured and rewarded, to the examples set by leadership, and to the role of organizational as well as individual accountability. Neo-institutional analysis may not provide the key to shaping judicial behavior, but it adds a host of neglected insights to explaining why judiciaries perform as they do and at the very least can help identify and eliminate the most egregious examples of systemic perversity.

## **V. Latin American Experience and Emerging Trends**

Despite the growing attention to judicial careers and the emerging consensus as to their critical role in shaping system performance, the practical response has been disappointing. Progress has been made in recognizing and eliminating the most negative traditional practices, but even here it has been slow. Such historical arrangements as the renewal of entire Courts with every change of administration, exceedingly short term limits for lower level judges, and other practices which

seem designed only to facilitate political intervention have yet to disappear entirely. In some countries, moves in that direction have suffered recent checks as the usual vested interests become more fearful of the consequences. The introduction of the simplest reform measures – fixed, renewable terms or permanent tenure, a relatively standardized procedure for making appointments, promotions, and transfers, and evaluation and monitoring systems -- is still more spotty. Legally mandated change may be ignored in practice, subject to subversive interpretation,<sup>22</sup> or fail to go into effect for the lack of complementary enabling legislation or a failure to create the bodies responsible for carrying it out.

The obstacles here, while difficult to surmount, usually amount to the force of the interests vested in the prior systems, augmented at times by new political conflicts which increase the stakes of judicial control. As with the prior democratic opening, such otherwise positive developments as the emergence of new social and political forces, breakdown of old party and electoral systems, or an increased attention to corruption have brought their own unanticipated and temporarily negative inputs to judicial reform. The last section of recommendations to the Bank explores some possible remedies. The remainder of the current section examines some other less purely political setbacks in light of recent experience.

A second type of problems emerge when new mechanisms once implemented fall prey to the forces or vices characterizing the prior system. The most common example is when partisan battles which once raged over the executive or legislature's direct choice of judges are transposed to that of the councils or other bodies created to replace them.<sup>23</sup> Less frequently, new vetting or disciplinary systems may be circumvented<sup>24</sup> or challenged as violating the rights of those affected by them.<sup>25</sup> The most famous example and that most directly affecting Bank activities was the Fujimori government's unilateral removal of some of its selection powers from the Peruvian Judicial Council when the latter appeared too keen about exercising them. However, El Salvador's Judicial Council, intended to distance appointments from both the Court and the political parties, had part of that purpose undercut by its initial enabling law (later amended) – giving the judiciary (and ultimately the Chief Justice) a majority of its members. A 1999 constitutional amendment in Mexico, allowing the federal Supreme Court President to replace the judicial representatives on the Council, has been questioned for similar reasons. As in these cases, often there is a honeymoon period when it appears the new structures and

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<sup>22</sup> One example is contemporary Bolivia where after a several year delay, a judicial council now exists to prepare lists of candidates for all positions. The opposition recently challenged the interpretation of those powers – suggesting that any effort to rank or vet the lists infringes on the authority of the bodies making the final selections.

<sup>23</sup> See Rico and Ibanez for discussions.

<sup>24</sup> In Peru, just as the judiciary's internal control office seemed to advance in detecting judicial corruption, its powers were transferred to its district branches, under the control of the respective Superior Courts. Whether this was sheer coincidence, an attack on the popular magistrate who headed the office, or a effort to undercut the office itself cannot be determined, but most believe it was more than accidental.

<sup>25</sup> The most dramatic example of this type occurred not with the judiciary but with Mexico's Procuraduria General de la Republica (Federal Attorney General's Office). Reforms introduced by Salinas' Procurador (from the opposition party, PAN) led to a purge of fiscales and investigative police suspected of involvement in drug trafficking. They were later reinstated by judicial order and the Procurador, as a result of this and other actions, was eventually replaced.

procedures will meet the reformers' expectations, followed by changes threatening to reverse initial advances.

Even without such overt clashes, new mechanisms and those in charge of implementing them have been slow to get off the ground. Colombia's judicial council had still not introduced a career system or scheme for evaluating candidates six years after its creation. Interviews with judges it had selected indicated they believed personal and political connections remained the dominant criteria (Gomez). El Salvador's Court and Judicial Council continue to debate their respective responsibilities in evaluating judicial performance six years after the Council's creation. The Council's first efforts in creating lists of candidates were criticized for insufficient rigor. Although the frequent adoption of two-stage systems has the advantage of eliminating the old winner-take-all mentality, it also affords a veto power to any party choosing not to cooperate. The results are rarely the kind of impasse that has occurred in Bolivia (where every organizational actor and many of their members seem to disagree as to how the system should work), but it does mean that a perfect understanding on one part can be undercut by disagreement on another.

These delays in implementation may represent covert resistance or a simple failure to understand new roles. As those responsible are often ex-judges or similar officials, the latter explanation may be more important than is credited. Individuals accustomed to performing a function in one institution are unlikely to change their behavior only because of a new organizational location. If appointments were always made on the basis of recommendation by party leaders and friends, it may be unrealistic to suppose those in charge will suddenly embrace a new vision of how this should be done. Much like a Peruvian attorney who, asked to suggest judicial candidates for a study tour, inquired whether they were to be selected on the basis of friendship, political contacts, or some other criteria, the problem is sometimes a failure of imagination.<sup>26</sup> This in turn leads to a third source of problems and one where assistance agencies might more easily make a contribution – the absence of better models.

Many of the setbacks in introducing new appointment criteria and entire new career systems lie here. When push comes to shove, everyone knows what was wrong with the old system, but they are far less clear as to what a new system would look like and their efforts to imagine one often fall far short of the abstract goals. In judicial career systems, as in many other areas, the devil really is in the details. New mandates and new organizations represent a potential for improvement, but are hardly sufficient to guarantee it. As the prior discussion suggests, there are a lot of details and most have been insufficiently explored.

First those charged with the task are being asked to operate outside their expertise. They have usually had no training in human resource management and no exposure to more than the most theoretical discussions of how it might be applied to the judiciary. Their familiarity with other systems (whether regional or extra-regional) is usually sparse, often inaccurate, and generally limited to selection alone (discounting evaluation, monitoring, discipline or promotions). They

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<sup>26</sup> The example comes from the author's own experience with a USAID project in the late 1980's.

are usually aware that the US elects judges (although often mistakenly believing that this is universal) and reject that model as incompatible with their own tradition and culture. They also have some familiarity with the continental system and the use of judicial schools as a means of screening and preparing entrants. This model is often preferred, but discounted because of costs. They may be aware of reformed systems in neighboring countries, but usually have no information (none may in fact be available) as to their impact. There has been a regional imitation effect as regards the organizational structures for managing appointments and careers – a widespread adoption of judicial councils, two part selections systems (most often with lists prepared by the councils), and the addition of training facilities, sometimes as part of the initial screening. The details as to the composition, mandate, and operating procedures of these agencies are, however, usually based on political negotiations, tradition (what was done before or what is done in comparable bodies in other sectors), or sheer invention. Technical assistance provided by donors has had little impact; it is often too brief<sup>27</sup> and frequently dismissed as interesting but irrelevant to national reality.

Once those charged with further designing and implementing new selection and career systems finally focus on these tasks (and as noted, that may take years), they face three constraints: the legal framework may already circumscribe some of their choices;<sup>28</sup> human and financial resources pose limits on their ability to attract and keep candidates; and they themselves may lack the necessary skills and knowledge to carry out their job. The latter may be the most serious and least recognized obstacle as indicated by the difficulties encountered designing selection systems, the first step in implementing careers, and the rather rudimentary nature of initial results. Generally they range from a simple comparison of curricula (the *concurso de merito*) with some minimum requirements to more complex systems involving written and possibly oral tests on knowledge of the law (*concursos de oposicion*), possibly combined with psychological and medical examinations. In Guatemala and El Salvador, candidates may be graded on performance in compulsory courses, a practice several countries are considering adopting. Unfortunately, although even prior systems excluded candidates with outstanding legal actions against them, these are often not adequately checked.<sup>29</sup> More extensive background investigations are virtually unknown<sup>30</sup> and lists of candidates are frequently not sufficiently publicized to allow those with relevant information to provide it.

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<sup>27</sup> The most common practice is to invite a member of an existing judicial council (Spain, Colombia, and Costa Rica are frequent choices) to give a few lectures; the quality varies and the stay is usually too short for the invited dignitary to come to grips with the local situation.

<sup>28</sup> The judicial organic law may fix elements of how the career will operate, to the extent of stipulating who is eligible, what kinds of screening may be done, and how candidates should be ranked. This or a judicial career law, if one has been enacted, will thus guide, limit, and sometimes unnecessarily complicate further choices. Authorities are beginning to recognize the advantages of issuing such details as a *reglamento*, which can be changed more easily, but those backing a law may do so for this very reason.

<sup>29</sup> In the recent (May, 1999) elections of Superior Court judges for two Bolivian judicial districts, it was charged that at least three of those appointed had pending legal problems.

<sup>30</sup> Observers claim they are honored in Brazil (see Rosenn, Nalini, and Gonsalves). In smaller countries, with better communication systems they may be unnecessary – and in many others one suspects the real failure is one of will, not information. In Bolivia's recent problems with the backgrounds of two newly appointed Superior Court judges, many of the council members and Justices may have been unaware of this impediment. However, it is unlikely that all of them were, and it would only have taken one voice to start further investigation.

Here, as in some of the other proposed mechanisms (publication of test results, ranking of lists by the agency preparing them, psychological and medical exams) additional controversies have begun to emerge. Many involve the candidates' right to privacy, the introduction of irrelevant and discriminatory criteria (medical<sup>31</sup> and psychological exams) and the fear that some aspects (and especially input from the general public or private bar) will be used vindictively. A related fear, borne out by experience in some cases, is that the selection criteria will only be used to exclude candidates – and that for those the selecting body wants included, will be ignored. Even the written tests and weighted scoring systems have attracted complaints – the first because they emphasize rote memory of the law (not exactly the first priority in selecting a good judge) and the others because, like Bolivia's new 500-point scale, they sacrifice quality for quantity – years of experience or number of publications as opposed to the value of either.

In many countries any kind of objective selection criteria would be an improvement over what existed. Thus, one should not be too critical of the first efforts. An effort to familiarize themselves with systems elsewhere might have expanded the alternatives considered and avoided some obvious mistakes. However, as no country seems happy with its means of selecting judges, it would not have provided clearly better models. A set of objective criteria is a good start, especially if it is actually used. For most countries, it will probably take years to implement a rudimentary but standardized system – one which sets objective criteria (no matter how superficially defined), applies them to all candidates, and eliminates the obvious errors and points of contention. Its major accomplishment will be to eliminate the most egregious forms of partisan and patronage interventions in the selection and further handling of personnel.

These first cuts are destined to sacrifice scientific accuracy for simple feasibility. Questions as to the importance of seniority, the opportunity for lateral entry, and the importance to be accorded practical and academic experience will be handled mechanistically, utilizing fairly arbitrary formulas – for example requiring that a certain percentage of candidates to higher level positions come from private practice, or that every other position be awarded to an internal candidate, with the others being competed openly. Entrance examinations and those for higher positions will emphasize knowledge of the laws or possibly link this to performance in special courses. Absent better information on the relevance of these criteria, it is likely they will not produce the “best judges,” but they will produce better ones, on the average, than the systems they replace.

For the few countries which have systems in operation (Brazil, Chile, Uruguay, Costa Rica, Mexico at the federal level since 1996)<sup>32</sup>, the next task is to move beyond these simplistic

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<sup>31</sup> The notion of not discriminating against the physically handicapped is not well developed in Latin American, where the blind and deaf are most often excluded from judicial positions. In Costa Rica, there are currently legal actions pending against the Court for its elimination of candidates with chronic medical conditions.

<sup>32</sup> Mexico's new system is one of the more sophisticated. Potential judges take a common course and psychological examination which determines whether they will be considered as candidates. Following this there is a three part examination (multiple choice test on legal knowledge, written test, and oral examination before a panel of judges) The results are used to form three-person lists for the Court's final selection. Those judges already on the bench will

conceptualizations to evaluating their results and a more profound examination of what they want in judges and how their selection and the rest of the career system can guarantee they get them. Discussions here have already begun to revolve around later recruitment (Brazil) so that candidates come with practical experience and a track record, more representative selection (Chile) to avoid a closed judicial caste or one which only reflects the values of a narrow sector of society, and an emphasis on characteristics beyond academic accomplishments (Costa Rica) which will have a bearing on performance. These discussions, not surprisingly, are linked to broader debates about the role of the judiciary, the values it enforces, and its connections to society writ large. They are unlikely to be answered satisfactorily until society writ large weighs in on them -- and until all parties have a better grip on how their judges are currently performing.

Getting there requires a much broader view, information not only on judges' performance but also the impact of the entire system, and attention to other reform goals. To maximize the effect of new selection systems and as a source of information for these more fundamental questions, attention is required to several other elements, and especially the mechanisms for training, monitoring, evaluating, and disciplining judges. Except for training, these issues have received least attention even in the more advanced countries, since they are the most threatening to the judicial image, independence, and corporate identity. A few Latin American systems have incorporated evaluation and disciplinary mechanisms in their reform plans and new organic laws, but many continue to exist only on paper. Others, while in operation, are still too new to allow a realistic assessment of their likely impacts.

Throughout Latin America, discipline, like selection, has traditionally been subject to extensive political manipulation. The mechanisms in place, often applied by immediate superiors, seem designed for that purpose. They were arguably more effective in encouraging judicial timidity and formalistic decision making than in eliminating real problems, and in some cases facilitated corruption. There has been some move to alter these arrangements through the creation of specialized judicial inspection offices or the transfer of disciplinary powers to judicial councils. Structurally these are improvements, but much depends on their members' ability to develop effective working arrangements. Where a council holds this power, it is usually too busy with other business to have focused its attention on discipline. From this standpoint, a separate inspection office, or a semi-independent unit within the council, appears more practical, but for this very reason, may be difficult to create, or once created, constrained by political pressures, efforts to manipulate its membership, or limits on its resources and powers.<sup>33</sup>

Monitoring and evaluation are no better developed and are points on which the judiciary is understandably nervous. Like discipline they could easily be vehicles for political control;

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be required to take the examinations if they wish to continue after their current term ends and will be subject to some sort of formal evaluation every six years thereafter. The process is managed by the Judicial Council and its training institute. Interview with federal judge, May, 1999.

<sup>33</sup> In addition to the Peruvian case (see fn 24), in Haiti the office created with foreign assistance, lacked funds to allow its inspectors to travel outside the capital, and was not to make such visits without authorization from the Ministry of Justice.

beyond this they interfere with notions of judicial independence, both at the individual and institutional level. While reform laws may mention performance evaluation as part of career management, and may give the responsibility to a council or other body, the immediate obstacles have been the failure to design programs to allow this to occur, and the absence of inputs like statistical systems, or standardized formats for collecting other relevant information. Here, as with discipline, the preoccupation with selection has discouraged focused attention. However, passive and active opposition to their introduction also plays its role and is strengthened by uniting the reformers' concern with independence and the interests of those adverse to further reform. It is also embedded in the profession's resistance (any profession, not just the judiciary) to intervention in its special terrain.

Training does not suffer this neglect (Blanco, Buscunal et al., Correa, Costa Rica Supreme Court, Guatemala Supreme Court, Haeussler, ILANUD, Stanga, Valenzuela). Donors and judiciaries have spent millions of dollars in this area, but the impacts have almost universally been less than promised. The immediate obstacles, which warrant no further discussion, are obvious:

- Training, absent minimal reforms to improve human resource quality, change institutional incentive systems, and ensure that those trained will remain in the organization, will not have much impact on individual or institutional behavior.
- Training to be effective at changing behavior must be targeted at the desired changes. Too much training has involved the transfer of knowledge on the dubious assumption that the more judges know the better they will perform.<sup>34</sup>
- In many countries higher level judges have effectively resisted inclusion in training programs. Unless they are reached, possibly through courses designed to recognize their special functions and sensitivities, they can negate the impact on their lower level colleagues.
- Short, off-site courses are often a necessity, given resource constraints, the quantity of participants, and the need to introduce them to often dramatic changes in procedural and substantive law. However, their effect is likely to be brief, unless complemented by on-site assistance and structured so as to repeat lessons (Stanga).

Training is an important part of any career system, but like any other reform element, its contribution depends on the details of its design and implementation. Beyond the points made above, which are already influencing reform programs, there are additional considerations more specific to the design of a career system as opposed to overall reform. First, while training is obviously critical at the entry level (and for the initiation of broader reforms), it is not a one-time intervention. Members of a profession require continual education; to encourage this, promotion and evaluation systems should recognize (require) periodic training and facilitate opportunities for participation. Second, to avoid a common tendency to make all training equal

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<sup>34</sup> Aside from common sense, this also contradicts an elementary principle of adult education: most adults no longer have time for learning for learning's sake, but instead want to learn what will directly contribute to their job performance.

(and so encourage the proliferation of less relevant courses), career planning systems should identify the kinds of training needed by each type and level of professional and monitor the quality of what is delivered. Eventually individualized programs may be introduced, taking into account more specific needs and learning styles. Third, training needs and formats can be expected to change with the human resource base. The kinds of remedial training required with the initial shift to a career judiciary should become less necessary as better judges are recruited and with luck, as the quality of basic legal education improves.

In summary, virtually all Latin American countries have recognized the need to improve the judicial human resource base and the importance of a merit-based career system in achieving this goal. Progress has been impeded by the strength of interests vested in the prior arrangements, the simultaneous entrance of new political conflicts, and in most cases, the failure to comprehend all of what is involved. Changes made to date have placed excessive faith in new organizational arrangements and laws and focused on eliminating the old vices rather than implanting a truly new system. This has also discouraged attention to the variety of elements a career system must cover and to the detailed choices required in each one. Just eliminating the most egregiously flawed traditional arrangements probably has improved the quality of the bench, although absent any evaluation, this must be taken on faith. It seems doubtful that most judiciaries, political leaders, and citizens realize how much remains to be done, or recognize the desirability of exploring the various alternatives. Greater familiarity with established systems in other countries, and the criticisms they are facing, might be of some help. It would not produce clearly superior models, but it might educate those responsible for developing them as to the difficulty of their task and the likelihood that whatever is first adopted will require continuing adjustments and eventually a redefinition of its fundamental purpose and the terms of its success.

## **VI. A Comparison with Extra Regional Experience**

Although many countries have better selection systems and better judges than found in much of Latin America, even the most successful have their critics, and most are undergoing continual reform. A common problem is the changing demands on judiciaries and their members, and the consequent need to reassess both who the judges are and what constitutes good performance. Some reference is made to these discussions below; however, the most important generalization derived from extra regional experience, and especially that in the developed world is that the guiding principles and initial choices are few, and that success is largely a matter of details and of the impact of the surrounding institutional environment. What works, more or less, in the United States, Great Britain, or France (the three examples covered here) cannot be imitated successfully elsewhere, unless the receiving country also duplicates the broader context in which it is embedded.

### **The United States**

Of the three examples, the United States arguably relies on the two worst mechanisms: election of judges and a less than fully transparent system of executive appointments, often with approval

by a legislative body. Taking into account fifty state systems, the District of Columbia, and the federal judiciary, there is far more variation, but most are encompassed in these two grand alternatives.<sup>35</sup> There are additional objectively negative traits: the importance of political recommendations, backing, and in some cases campaigning; the absence of transparent, clearly specified criteria for selection by either means; frequent *inmovilidad* for the executive appointees; excessively short terms for others; the frequent lack of formal evaluation; and the impediments to removing misperforming judges until retirement, reelection or reappointment. No one would recommend these arrangements for any Latin American country, and yet in the US, the overall results are relatively satisfactory<sup>36</sup>

The reasons are not hard to identify. First, whether elected or appointed, judges are chosen from among practicing lawyers<sup>37</sup> thus providing an ample track record for those interested in having it. Second, a very active legal community and broader public are interested and will vocally protest the patently ineligible and beyond this, frequently conduct and publicize their own rankings<sup>38</sup> of candidates. It also helps that an active press and notions about privacy, libel, and the protection of the individual's image do not take the form they often do in Latin America – in the U.S. a public figure is far less immune to criticism and would have a hard time of challenging even malicious public display of his or her past record. Third, there is an ample pool of qualified candidates from which to choose, and overall, salaries and prestige make the jobs attractive. While salaries are still markedly lower than those in the private sector, late recruitment helps mitigate this potential obstacle. Fourth, especially at the state level, but also at the federal, concerns about the quality of the judges selected have produced a series of reforms, adjustments, and complementary mechanisms which over time have tended to eliminate the worst practices or modified their impact.

For the federal judiciary certain formal and informal characteristics seem impervious to change - legally<sup>39</sup> mandated presidential appointment with legislative ratification; the predominant role of outside recruitment rather than selection of higher level judges from those already on the bench;<sup>40</sup> the role of the legislative parties and especially federal senators in suggesting or

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<sup>35</sup> It is especially difficult to generalize because even within individual states, there are frequent variations by level of judge, and between mid-term and full term appointments. (See Rottman et al for a complete listing) While roughly forty states elect some judges, they often do not elect all of them. Furthermore, as observers point out, far more judges are appointed than would appear the case, because mid-term selection is often by gubernatorial appointment. Two states (Virginia and South Carolina ) have legislative elections, believed by some (Meador, p. 59) to be superior to general elections because they do not require political campaigns. Many states have adopted nonpartisan judicial elections or prohibit judicial campaigning for this reason.

<sup>36</sup> If public opinion is any indicator, the US does not do that badly (see NCSC).

<sup>37</sup> There is however a large body of non lawyer judges. Numbering roughly 13,000 they constitute 40-45 percent of the state and federal judiciary but serve only at the lowest levels. (Kritzer in Jacob, p. 91, note 29).

<sup>38</sup> The American Bar Associations ranking of federal candidates remains controversial, both as to impact and quality (Goldman, p. 199, O'Brien, passim) However Goldman cites studies suggesting its influence on decisions.

<sup>39</sup> In effect, the Constitution only specifies Senate advice and consent for Supreme Court Justices. The Circuit Court of Appeals Act of 1891 extended the provision to the members of that body, and in 1948 its recodification stipulated it for all federal judges. As O'Brien (p. 34) notes, "[t]he judicial appointment process is thus more firmly grounded in political norms than in the Constitution."

<sup>40</sup> Opinions vary as to the impact of this trait. There has been some recent tendency to select Supreme Court Justices

eliminating candidates for partisan reasons; the absence of a transparent set of criteria for making initial and final selections; and the fact that most of the negotiation over choices is done behind closed doors. Recent administrations have made an effort (itself criticized by some) to recruit more representatively, and as a result the percentage of women and minorities on the bench has increased. While partisan identification remains the *sine qua non* for appointments, screening processes (even if not publicized) have improved over the decades, and the dual party system probably facilitates a consensus on the more qualified candidates. These arrangements are also generally agreed to discriminate against brilliance (likely to have ruffled feathers in some quarters), those without political contacts, and the ideologically committed of whatever stripe. Although judges enjoy permanent tenure, and few have been removed for cause, the federal judiciary itself has taken more responsibility for monitoring performance and for attempting to treat potential problems, whether by discipline or gentle nudging (Rottman, p. 29). Training is provided for newcomers to the bench and for those who wish it at any stage in their career.

At the state level there has been far more experimentation and formal as well as informal change. The proportion of states using electoral systems remains high, but has diminished over time as this is the single most criticized practice. Criticisms focus not only on the obvious negative results: a more politicized judiciary, the need to finance judicial campaigns, and the possibility that judges will shape their actions to influence their chances of reelection. They also frequently note that the presumed advantage – popular participation – is inadequately met at best. A review of results and poll-exit interviews indicate that voters often ignore this part of the ballot or choose arbitrarily (Sheldon and Lovrich, 1999).

As noted, far fewer judges are actually appointed by this means because of the widespread adoption of gubernatorial appointments to judgeships falling vacant mid term. Nonpartisan or unopposed retention elections have become more frequent, as has the use of nominating commissions under appointive and some electoral systems.<sup>41</sup> The so-called Missouri Plan (introduced in that state in 1940) with a nominating commission, gubernatorial appointments, and unopposed retention elections is now used in fourteen states (Rottman, p. 29). While sometimes only a cover for the usual partisan input, some commissions have developed very systematic and sophisticated screening programs thereby ensuring a higher quality of finalists for the ultimately political selection. States have also been less adverse to adopting evaluating and monitoring systems<sup>42</sup> and using them for reappointment or reelection (Rottman, pp. 96-105). Innovative techniques (surveys, judicial statistics, peer evaluation, self-assessment and videotaping of court procedures) have been introduced for this purpose (Woodson). Compulsory continuing education is also increasingly found (Rottman, pp. 86-94). States have more leeway for creating and utilizing disciplinary bodies: judicial conduct organizations may include judges, lawyers, and ordinary citizens. Despite limited information on their impact,<sup>43</sup> many of these

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from federal appellate courts (Meador, p. 57), and over the last decades, a significant number of federal lower court judges have come from the state bench or “from the ranks of federal magistrates and federal bankruptcy judges.” (Goldman, p. 198)

<sup>41</sup> Nominating commissions became popular in the 1970s and are now used by 34 states (Rottman, p. 29)

<sup>42</sup> See Esterling for a discussion and examples from four states.

<sup>43</sup> Perhaps because it is far easier to measure than merit or performance, most US studies have focused on either the

techniques provide useful, but so far ignored models for countries attending to improve their appointment and career systems. Their development has been aided by a number of very active foundations and research institutes which have focused on the quality of judicial performance, seeking to publicize and encourage the adoption of best practices. They and their work also provide models for Latin America and for donor assistance programs.

These foundations have been active in promoting another rather specialized practice of US judiciaries rarely found elsewhere and also meriting wider adoption. This is an emphasis on judicial outreach – on getting judges into the community to promote understanding of their roles and encouraging public involvement in programs aimed at strengthening the rule of law and related community services. As elsewhere, US judges do not come from representative backgrounds and enjoy a special status, but because of the country's history and the widespread use of judicial elections, they have never been as isolated from their communities as their colleagues in other nations. Nonetheless, judiciaries themselves and various public and private organizations have shown a growing concern about citizens' insufficient understanding of their courts and a less than perfect confidence in their performance.<sup>44</sup> This had led to calls for a better public relations and information system and for judges' spending some of their time on such efforts. The calls are frequently resisted as incompatible with the judicial role, but some judges (especially those working in lower level, or family and juvenile courts) have accepted the new duties enthusiastically. The overall impact has yet to be evaluated, but in isolated cases, judges have successfully involved communities in programs to provide services for at risk juveniles or improve court facilities.

## England

Although sharing a legal tradition with the US, most common law countries are closer to the civil law approach as regards judicial recruitment. They do select the bench from among experienced attorneys, but do not usually elect its members, and their preference for internal recruitment produces an informal career system. In England, party identification (and patronage), once a prime selection criterion, has virtually disappeared. One indication is the percentage of higher court judges who had served in Parliament – only 13 percent currently as opposed to 58 percent between 1832 and 1906 (Kritzer in Jacob, p. 91). The selection process has also become more formalized. The Lord Chancellor's Office (which effectively manages identification and screening<sup>45</sup>) created a special unit, the Judicial Appointments Group, for this purpose. It nonetheless occurs behind closed doors. Vacancies were announced publicly and outsiders (including non judges) allowed to sit with the Appointments Group for the first time in

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composition of the bench or judicial voting patterns. See Goldman, pp. 200-6.

<sup>44</sup> Recent surveys indicate that complacency about US citizens' trust in their legal system is no longer warranted, if it ever was. In a few states, the numbers expressing faith in their courts is no better than in many developing countries. Kritzer and Voelder, 1998. Even the Supreme Court only received a 50 percent vote of confidence in one recent poll (Scheb). Generally, however, citizens blame the system, not the judges.

<sup>45</sup> As in the United States, formal authority for making specific appointments often lies elsewhere – with the Crown, the Prime Minister, and the Judicial Committee of the House of Lords. While all may have input, the key role is that of the Lord Chancellor's Office.

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Judges (with the exception of the lower level magistrates or justices of the peace<sup>46</sup>) have traditionally been selected from among the barristers, the more experienced, elite class of lawyers responsible for arguing cases in court (as opposed to solicitors who prepare or brief them, and handle other written work). Even barristers, however, are expected to enter at the lower judicial ranks, and only gradually move up to its higher reaches. As a whole, England's much smaller (as compared to the US) private bar and judiciary facilitate familiarity with each others strengths and weaknesses, making it less likely that the clearly problematic will be considered. Transparency is limited to the legal community, and one common criticism is the tendency to maintain a closed legal caste, highly qualified judges who may also be out of touch with popular sentiments. The caste now avoids political identification and has always encouraged mutual understanding of roles. Barristers, who usually do not specialize in prosecution or defense, criminal or civil cases, reach the bench with an ample view of judicial processes, to such extent, that one observer (Posner) has likened their role to that of US law clerks – doing so much of the judiciary's work that they can easily move from one side of the bench to the other (and also, Posner's real point, eliminate the need for more judges). The phenomenon has its critics, one of whom (Flanders) holds that the elite barristers have little knowledge of the interlocutory (pre-trial) handling of cases monopolized by their solicitors and consequently, are less efficient judicial managers.

For much of its modern history, this closed, stratified, elitist system has been seen as a positive force in the country's legal and broader development. In recent years it has been criticized for these very characteristics – as regards its ability to deal with an increasingly heterogeneous population, to promote a more democratic, egalitarian culture, or to master the complexities of modern legal issues and a growing demand.<sup>47</sup> This has led to recent moves to eliminate the traditional distinction between barristers and solicitors; how this will effect judicial composition remains to be seen.<sup>48</sup> In the developing world, countries which have adopted this system, face the same criticisms, but here they may require more urgent attention. Although their judges, especially at the higher levels, are often superbly trained, their small numbers and elite status are more problematic. At the very least, they simply cannot provide services for the majority of the population, and when they do reach the masses, they may be out of touch with the latter's concerns or consciously or unconsciously enforce their own class interests. While often less overtly politicized than many Latin American judiciaries, they have been accused of many of the same vices – corruption, collusion with repressive, predatory governments, a general lack of effective independence, and an inability to control the activities of the lower reaches of their organizations where adequate formation and professional culture may also be lacking (Widner).

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<sup>46</sup> There are over 30,000 lay magistrates as opposed to roughly 3,000 lawyer judges. Kritzer in Jacob, p. 91, note 29.

<sup>47</sup> Observers have long speculated about the apparently lower rate of litigation in England, which obviously allows a smaller and more centralized court system than in the US. See Posner for a discussion, including his revelation that despite a higher rate of reported crimes in England, those going to trial are far fewer than in the US.

<sup>48</sup> It was only in 1993 that a former solicitor was appointed to a High Court. Kritzer in Jacob, p. 89.

There are indications that the “English” system contains elements to facilitate its own improvement. The sense of professional responsibility and institutional tradition, maintained in all but the most corrupt variations, could encourage self-correction in a political environment which allows it. In many countries there are also private advocacy groups, composed of activist lawyers, which could prove important allies. However, the system itself does not provide much as a model for Latin America. Its most important assets are the products of an institutional culture developed over decades, and its major flaws are those Latin America is also facing. Ironically the structurally dissimilar, and probably inferior, US system may have more worth copying, not in its grand elements, but in the various adjustments of detail it has made to override them.

## France

Latin American nations have not looked to the common law tradition for lessons or examples on the judicial career. Instead they have seen the continental systems as better sources of models, albeit often imperfectly copied. The best known of these is the French variation, understood in Latin America as involving pre-selection for and through a long term training program, management of the career by a Judicial Council, and individuals’ movement up through the ranks based on performance and seniority. Except for these grand outlines, the system is actually little known or understood in Latin America; it is assumed to be the model of preference, but one which for reasons of cost cannot be adopted as practiced. Latin Americans also seem unaware of the growing controversies surrounding it, especially as regards the creation of an insular class of judicial bureaucrats, the opportunities for political intervention in promotions and lateral transfers, and the frequent pressures on judges (especially investigating judges) to shape their actions and decisions to favor political elites. Still less attention has been paid to the alternative selection mechanisms for parts of the French judiciary: the French commercial courts’ use of unpaid, elected, lay judges and the lateral recruitment of high ranking administrators for the separate administrative court system.<sup>49</sup>

As in Latin America, most French judges in the ordinary courts enter the career at an early age. Since 1958,<sup>50</sup> the majority (80 percent) are recruited on finishing their undergraduate law program, via an examination for entry to the National Judicial School in Bordeaux.<sup>51</sup> Those successfully completing the two-year course and six-month internship take another examination the results of which determine initial appointments. Movement up through the career is slow and hinges on seniority, assessments and recommendations by the senior judge in the court to which

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<sup>49</sup> They are drawn from the elite administrative services and thus enter at a later stage in their careers. Garapon likens them to the English judges in this regard. Provine (in Jacob, p.203, note 41) notes that after recent changes, they may enjoy more security than ordinary judges.

<sup>50</sup> The system has evolved considerably over time; prior to the 1958 Constitution’s creation of the Judicial Council, selection and management of the career was by the Ministry of Justice which still controls that of prosecutors. Heraud and Maurin give a brief schematic history.

<sup>51</sup> There are also some provisions for lateral entry and for later entrance to the judicial school under an abbreviated program

the candidate is assigned, and willingness to relocate. The latter is an absolute prerequisite for advancement; judges who want to stay in one location forgo their chances to advance in rank. Appointments, promotions and transfers, once handled by the Ministry of Justice, are now controlled by the Council of the Judiciary.<sup>52</sup> The Council is headed by the National President, and otherwise composed of the Vice President, five judges, one prosecutor (magistrat du parquet), one member of the Council of State (maximum body of the administrative court system) and three additional members who can be neither judges nor members of parliament. Until 1994, the President appointed all members; membership is now determined by the judiciary, and as a result the Council has shown some willingness to override executive recommendations as to its decision.

As suggested by the titles of some of the works cited here (“Le chagrin des juges;” “Le Roi et ses juges”), after forty years in operation, the French career system is coming under fire, along with many other aspects of judicial performance. This is true not only of the ordinary courts; a recent parliamentary investigation (Montebourg and Colcombet) produced extremely critical findings<sup>53</sup> on the operations of the commercial courts, while others have questioned the objectivity of administrative courts staffed by high ranking career administrators.<sup>54</sup> However, more attention has gone to the ordinary judiciary, and the kinds of judges its career system produces. Those most relevant to this discussion have less to do with the objectivity of the initial selections, except insofar as they tend to favor certain social classes and backgrounds and because of early recruitment, encourage professional insularity.<sup>55</sup> The main concern has been the intrusion of political (i.e. governmental, not partisan) pressures in shaping the rest of the career trajectory and ultimately the decisions taken by judges. No one has suggested that French judges are exposed or susceptible to the kinds of external interference often criticized elsewhere, but as the system works, certain kinds of cases, especially those involving government interests, are suspected of getting special treatment because judges know, often without being told, that to do otherwise would hinder their chances of advancement. Wider recognition of this tendency has come late – and as usual, only as a few judges have attempted to challenge these informal understandings, often to their immediate detriment.<sup>56</sup>

Critics have identified several contributing elements including the relatively low salaries, small judicial budget, and lack of support staff which especially affect lower level judges; their large workloads (and those for investigating magistrates in particular) already force selective attention to cases and may make them more amenable to suggestions as to further delays or less than thorough investigations. The main focus, however, has been on the career system and its bureaucratized, but highly subjective and less than fully transparent evaluation processes. Key

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<sup>52</sup> Since 1992, there has also been a Promotion Commission, composed of 20 members, sixteen of them selected from within the judiciary. Heraud and Maurin, p. 96.

<sup>53</sup> The report cited corruption, misuse of funds, and inefficiency while also raising fundamental questions about entrusting commercial and ultimately economic policy to groups of local entrepreneurs.

<sup>54</sup> Here Kritzer (in Jacob) and Bell diverge, with the latter defending the objectivity of the administrative judges.

<sup>55</sup> Measures taken in the early 1990s to increase the opportunity for lateral or late entry respond to this criticism.

<sup>56</sup> Devedjian and Turcey discuss several examples from the early 1990s. See also public surveys cited in Turcey, p. 12 on citizen’s lack of confidence in judicial independence.

here are the role of the Judicial Council and judicial superiors (including prosecutors, still directly responsible to the Ministry of Justice) in recommending promotions and making such career-sensitive decisions as where a judge is assigned and what cases he or she sees.<sup>57</sup>

Prior to 1994, the Council appeared to work as little more than a rubber stamp for decisions made by the executive (President and Ministry of Justice). Further reforms changed that element, structurally and operationally, but have done little to affect the role of the judicial hierarchy in shaping judges' dossiers or otherwise affecting their chances of advancement. Evaluation is taken seriously in France and faces judges throughout their career, but managed only by superiors, without broader input or a more objective format, it ultimately gives judges two choices: either to resign themselves to a mid-level position with security and relative independence or to play the game fully, and second guess or comply with 'corporate' preferences. The judges themselves, via their professional organizations, have become the system's strongest critics, summed up in the expression "chaque minute passee a travailler dans une jurisdiction est une heure perdue pour l'avancement." (every minute spent working in a judicial office is an hour lost toward career advancement, Turvey, p. 147). Even if the government's direct influence has been reduced, the judges' complaint is of an oppressive bureaucracy ("une structure hierarchique parfois pesante," Turvey, p. 147), driven by its own vested interests (and indirectly those of the political powers) which crushes real professional development and independence, and encourages unequal treatment of users just as it distributes its internal rewards inequitably.

Over the past decade, discussion as to partial or total reform of France's judicial system (not limited to the career arrangements by any means<sup>58</sup>) have brought several changes, and more are in the offing. More open, later recruitment for entry level positions, more transparent and more open evaluations, and even changes to the famous Judicial School curriculum are all under consideration. Still despite the complaints, public and judicial discontent, and growing revelations of abusive handling of "sensitive cases," France's judicial career has a well merited reputation for producing professional, hardworking, and relatively independent judges.

Its underlying weaknesses are of more concern in Third World countries which have adopted the model without heeding the criticisms, especially as regards the opportunities for political influence. Several points are worth considering. First, while a French style selection system considerably reduces those opportunities for initial appointments (Mestitz and Pederzoli), that is not the only place of vulnerability. At the very least, subsequent career management requires equal attention, and exclusive reliance on evaluations by superiors has obvious drawbacks. Second, Judicial Councils while offering some advantages over executive selection and career management, are also susceptible to external manipulation, although they may be structured to reduce this. Third, executive intervention is not the only threat to judicial independence; the

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<sup>57</sup> France does have objective criteria for assigning cases in multi-judge jurisdictions, but insiders contend they are easily circumvented, most often by delaying submission of a request for action until the right investigating judge is on duty (Turvey). Judges may also be removed (dessaisi) from a case, an event frequently the focus of charges of manipulation.

<sup>58</sup> See Devise for a discussion of current reform proposals focusing on certain criminal procedures and the selection of prosecutors and the transfer of that responsibility from the Ministry of Justice to the Judicial Council

judiciary itself may curb the actions of its members and impose an institutional culture and values which do not serve the interests of justice. Finally, as many countries besides France are discovering, extremely early recruitment, lengthy, concentrated initial training, and frequent transfers<sup>59</sup> are excellent means of socializing judges into a common institutional identity, but with the disadvantage of creating a highly insular, bureaucratic corps with a very narrow perspective on its duties. If it is believed that French judges require more contact with their communities and more exposure to other perspectives and experiences, then the needs are probably far greater in countries with less homogeneous populations and cultural levels.

## **VII. Implications for Bank Programs**

Prior to reviewing specific recommendations for assistance agencies, a few general conclusions drawn from the preceding discussion merit emphasis:

1. Although the basic choices involved in setting up a judicial career are relatively few, their results are also conspicuously underevaluated. A brief comparison of regional and extra regional experience does suggest that impact may lie less in the overarching structural arrangements than in the details of implementation (and the interactions with the wider institutional environment).
2. Latin Americans have focused more on modifying structure than on designing content; the changes to date are generally positive, but they won't produce the desired improvements automatically. In fact, if the details of content are not attended, many of the longstanding vices are quite likely to creep back in, and in some cases are already doing so.
3. In the grand effort to introduce new principles of operation, there has been remarkably little attention to the specific design of programs for the initial selection, monitoring and evaluation, promotions, transfers, and discipline. Just calling something a merit system does not make it one, and there are clearly a variety of ways of defining and assessing fitness for office. Foreign assistance has provided little help here, partly because this is seen as a sensitive political issue, but also because assistance agencies may themselves overlook the need for more thorough study and evaluation of what is being tried and the potential utility of regional and extra-regional experience.
4. There has been a similar neglect as regards the purposes, form, and intended impact of training. Despite the considerable sums spent on training programs, the results have been disappointing, and emerging budgetary constraints indicate that future programs will have to do more with less, and thus focus on maximizing their impact.
5. Career systems are one area where the perfect tends to drive out the adequate, and where short term improvements will always require further tinkering. For most of the region's countries, the immediate goal of replacing an overtly political system with some kind of objective recruitment

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<sup>59</sup> The transfer policy was used for example by the Mobutu government in Zaire as a means of further reducing judicial independence. While it also may combat corruption, this was patently not Mobutu's aim.

and promotion mechanism is the most reasonable short term goal. However, evaluation, monitoring and discipline should be addressed early, even if in an equally simplistic fashion.

6. Extra-regional examples suggest that some of the assumptions guiding Latin American efforts deserve reexamination, if they are not to fall into the errors now being criticized in the U.S., France, England and other developed countries. Although Latin America's model of choice appears to be the French system, an unexamined adoption of a French style career might only aggravate some of their current shortcomings.

These general findings have evident implications for international assistance programs. The most obvious one is the need for greater attention to human resource management and to advancing the marked, but still inadequate emphasis on improving career systems. Assistance agencies believe they have been promoting positive reforms in judicial career systems. Like Latin Americans, they have tended to treat these themes overly superficially, too often assuming that declarations of reform are adequate to produce real change. Latin Americans themselves have been the first to note the flaws in this logic, but the real reformers (those who want to move beyond cosmetic change) will require more support, both from their countries' citizens and from external agencies, if they are to succeed in their efforts. Among the specific suggestions are the following:

1. The greatest immediate need for assistance is in the design of merit systems, both for selection to and movement within the career. Especially as regards criteria for evaluating candidates, models exist, and those developed by some state courts in the US may be extremely relevant.

2. Development of statistical systems is especially important as a means for monitoring and evaluation. They won't tell everything but they will help identify problems and avoid a total reliance on assessments by superiors. However, systems will have to be designed with this purpose in mind, and court authorities encouraged and taught to use them. Another tactic deserving wider consideration and already adopted in a few countries, is the use of itinerant teams for evaluation.

3. Assistance should also focus on the development of disciplinary systems, to make them more effective, fairer, and transparent. Here, exposure to operations in other countries may be helpful in increasing awareness of the alternatives and common problems. The first and most important step is to move complaints and discipline out of the hands of the immediate superior and set up an independent office to manage them. Given concerns about political manipulation, the office will probably have to be located within the judiciary or judicial council, but means to ensure its ability to operate independently, wherever located, should be explicitly explored. At this stage in the process, it may also be helpful to encourage the creation of multiple agencies to receive (but not process) complaints. A little friendly competition may keep disciplinary systems honest, and pressure the ultimately responsible agency to take its role seriously. Care of course must be taken to protect judges from frivolous or malicious attacks, but expanding the number of channels seems unlikely to aggravate this problem.

4. Despite resistance to their inclusion, external opinions and criticisms have an important place in all phases of the career system. Donors can help by exposing career planners to mechanisms which have been developed elsewhere and by financing public conferences and discussions on this theme. Such measures may be a way of overcoming the emerging obstacles to reform (both within and outside the judiciary) and the now recognized risk that what finally emerges will be responsive only to the interests of the judiciary or political elites.

5. The development of ethics codes and training is also vital. In the first area, the US has come furthest and offers a number of useful examples. Common law experience with training programs may also be helpful because of the widespread use of short courses. Until Latin American countries overcome their budgetary constraints, the continental reliance on long term entry level training will not provide a useful model. It also is worth noting that its disadvantages have produced growing concerns in countries like France where it is well established.

6. Research in two areas is critical: first, to further the understanding of the political economy of judicial behavior, in general and in specific systems, and second, on the impact of the career reforms already under way. Global studies relating different forms of career systems to the attainment of societal goals will probably be least helpful. What is most needed now is a better understanding of how specific mechanisms operate, their vulnerability to certain kinds of flaws, and the measures most likely to overcome them. National studies and cross-national comparisons of a select number of systems may be most useful, but especially in the latter case, external financing of Latin American researchers will be required.

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