

WORKING P A P E R S

**DO JUDICIAL
COUNCILS
FURTHER
JUDICIAL
REFORM?**

**Lessons from
Latin America**

Linn Hammergren

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of Law Project**

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FOREWORD

Central to judicial reform efforts all around the world are the goals of increasing judicial independence and improving the management of courts. One approach that has gained popularity in the past ten years for addressing these issues is creating independent judicial councils. These organizations take over responsibility from ministries of justice or the judicial power itself for selecting and promoting judges, as well as for administering the courts. The hope is that by moving these powers to a less politicized and less bureaucratic organization, real improvements on both judicial independence and court management can be made.

Latin America has engaged in substantial efforts along this line. Judicial councils were created in a sizeable number of Latin American countries in the last fifteen years, usually with the support, or even at the urging, of outside supporters of judicial reforms, including the U.S. government and various international institutions. These Latin American judicial councils have now accumulated substantial track records. Consequently they represent an important opportunity for learning about the utility of this approach to judicial reform, with great potential relevance to countries in other regions that may contemplate the creation of such institutions in Eastern Europe, the former Soviet Union, Asia, and elsewhere.

In this paper, Linn Hamnergren takes up the challenge of analyzing the record of experience with judicial councils in Latin America and extracting key lessons. She is extraordinarily well qualified for this task. Ms. Hamnergren has worked for over fifteen years on rule of law reform programs, first for the U.S. Agency for International Development and more recently for the World Bank. She has worked primarily in Latin America, including many years managing major judicial reform assistance projects in the region, but has also worked on rule of law reform in other parts of the world. Her work as an aid practitioner comes on top of a distinguished career as a political scientist. Through the combination of her writings on the subject and her experience as a practitioner, she has established herself as one of the leading experts on judicial reform and rule of law assistance. Although the analysis in this paper draws on her experience with USAID and World Bank projects, the opinions she expresses herein are her own and do not represent the official views of those organizations.

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JUDICIAL REFORM EFFORTS IN LATIN AMERICA, and by extension worldwide, seem to fall easily prey to magic bullets. In the past two decades, reformers in the region and aid providers from North America and Western Europe have seized upon a whole series of entry points for judicial reform—including model codes, accusatory criminal justice systems, court administration reforms, information technology, alternative dispute resolution, legal services, and constitutional courts. Sometime during the late 1980s, as the issue of judicial independence came to receive more serious attention, judicial councils joined the list, and nearly a dozen countries adopted them. It was not until the late 1990s that questions about their utility began to emerge. Although Latin America is beginning to reexamine its love affair with the councils, the model has been gaining ground in other regions. Western Europeans, who invented the mechanism, have been suffering their own doubts. This has not prevented their joining with U.S. reformers in recommending it to postcommunist nations in Eastern Europe and the former Soviet Union and in Africa, Asia, and the Middle East. The cautionary lessons from Latin America’s several-decade experiment with judicial councils have not yet been analyzed and disseminated. This essay is a start in that direction.

The purpose of this essay is not to discourage the adoption of councils or council-like mechanisms, but only to suggest that this purported remedy for a number of judicial ills is less automatic and more complicated than usually depicted. At a minimum, councils may be the least bad among the alternative solutions for a series of common problems. They can help break institutional bottlenecks and open the way to more innovative, nontraditional approaches to reform. In addressing more concrete reform tasks, they also offer certain structural advantages. However, in and of itself, the creation of a council is no guarantee that problems will be resolved. The greatest flaw of the council model is the expectation that the rest is automatic. It demonstrably is not, and where reformers believe otherwise, they are likely to be sorely disappointed.

This essay draws on my observations and those of other academics and practitioners regarding the evolution, operations, and achievements of councils throughout Latin America. It follows an empirical but not highly rigorous methodology, and it runs all the usual risks of a subjective approach. Though I am sure another researcher could find statistically relevant patterns where I have failed to identify them,¹ the most interesting and most policy-relevant questions would appear to lend themselves to a less structured treatment. The issue is not whether, in their relatively short lifetime, councils in Latin America have done better or worse than the alternatives. It is instead what their experience tells us about their potential real limitations, and the variations of detail that might maximize the former and downplay the latter. Given the enormous complexity even within the Latin

¹ However, this will depend on what is included in the category “council,” and, as I hope to make clear, that is not entirely obvious.

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American “model,” the variety of exogenous factors impinging on council and judicial performance, and the constant evolution of both, the most urgent need is to understand what has happened and the positive and negative roles that councils have played in the past and might play in the future.

JUDICIAL COUNCIL BASICS

The term “judicial council” covers an extremely broad territory. Like the Red Queen, creators of councils can make the word mean whatever they want. Still, behind the conceptual diversity and lending power to each creation is the term’s association with a very specific kind of entity arising first in postwar France and increasingly adopted in other European countries.² There are currently four principal European variations—in France, Italy, Portugal, and Spain—although other countries have since followed suit and some, like Germany,³ have been retroactively assimilated by the inclusion of dissimilar mechanisms performing council-like functions.

In the four prototype countries, the council is an independent entity adopted as a means to increase judicial independence by removing power over judicial appointments from the executive (usually the Ministry of Justice) and placing it in a body composed of judges and representatives of other branches of government and professional associations.⁴ The precise composition of, means of appointment to, and terms of service on the councils vary from country to country and over time in each one. Two major issues occasioning this continuing evolution have been the proportion of judicial and nonjudicial membership on each council and the manner by which all members will be selected. The debate is hardly resolved, and further changes seem likely. Despite their obvious relationship to another set of discussions over the councils’ governance role vis-à-vis the judiciary, proposals to expand their functions have been less central. European councils have assumed policy-making roles by virtue of their supervision of the judicial career, but none exercise the administrative responsibilities for the entire judiciary in the way that several Latin American councils do.

Although the judicial council is a civil law invention, it has been likened to similar bodies in operation in common law countries—for example, the U.S. Federal Judicial Conference or the judicial service boards and commissions found in Commonwealth nations. It would be risky to push the parallels. The U.S. Judicial Conference is a policy-making and administrative supervisory body that has no part in judicial appointments. Although judicial service boards are used to vet and select candidates, they generally lack the political independence, or aspirations to broader governing powers, associated with civil law councils. Like the civil service boards on which they are modeled, they serve as adjuncts to the body (usually the Ministry or Department of Justice) that makes judicial appointments; and despite their often prestigious composition (at least as regards their key members),

² Actually France (as well as the other countries) often claims an earlier provenance, going back for decades or even centuries. See Renoux (1999) for a discussion of the European variations. See also UNAM (2001) for more historical background.

³ See Renoux (1999) for a discussion. See Open Society Institute (2001) for a discussion of the councils in Eastern Europe, pp. 42–45 and passim.

⁴ European councils may also participate in the selection of prosecutors (members of the Public Ministry). Although they are not discussed here, it is worth noting that this poses additional problems. The nature of prosecutorial independence is different from that of the bench, and there is far less agreement as to how autonomous the Public Ministry and its members should be.

they can be regarded as more bureaucratic or administrative in outlook. To my knowledge, no one has ever suggested they be considered the judicial governing body.

The Continental European experience has itself demonstrated several persistent problems:

- Although one aim of the council model was to depoliticize the appointment process (reducing partisan inputs), this has been easier said than done. Some councils (for example, that of Spain) are notorious for their internal political factions.
- To the extent that control of the councils has been vested in judges or judgelike members, the specter of excessive judicial independence (or a lack of accountability to political society) has been raised.⁵
- It has been suggested that independent councils may impinge on the independence of individual judges, creating pressures to conform to certain corporative values that themselves are not consistent with the fair administration of justice.⁶

Although no European country that has adopted the council model has seriously considered abandoning it, the constant changes in the councils' composition suggest continuing concerns with how they have worked out in practice. These problems were visible almost from the beginning. Latin American proponents of the mechanisms were apparently oblivious to them. Adoption of the councils, like many of the other silver bullets in the world of judicial reform, was presumed to be an undeniable step forward and one behind which all reformers were unanimously united.

THE SPREAD OF JUDICIAL COUNCILS IN LATIN AMERICA

The first Latin American judicial council consciously modeled on European trends was established constitutionally in Venezuela in 1961 (although not actually formed until 1969). It was created to manage judicial appointments. It received responsibility for judicial administration in 1988, and continued with those two functions until its elimination in 2000.⁷ The second example was the Peruvian judicial council, created in 1969 under the 1968–1980 military government. In Peru, appointments of all judges, except those on the Supreme Court, had been managed by the Ministry of Justice. When the military eliminated the latter body (which was only reinstated in 1980),⁸ it created the council to fill the gap. Peru has retained the council model since that time, although the powers, composition, and method of appointment have varied considerably. None of Peru's councils have been responsible for judicial administration; this remained firmly in the hands of the Supreme

⁵ See Di Federico (1995), who has been one of the strongest critics of this effect in Italy.

⁶ This has been a particular complaint in France; see Turcey (1997) and Matray (1997). French critics are also promoting the inclusion of more outsiders because of an allegedly overly corporative bias in the current council.

⁷ From its inception, Venezuela's council was characterized by its politicized membership. It has been blamed for continuing problems of judicial corruption, channeled through clientilistic networks of judges and lawyers (called legal tribes). See Ungar (2002), pp. 169–186. Ungar is more favorable toward the council's achievement in the late 1990s. However, this may reflect the views of his primary informants, the council members.

⁸ Its elimination apparently had nothing to do with its appointment powers. It is in fact rumored that the principal reason was to even out the number of ministries so that they could be allocated among the three branches of the armed forces participating in the military regime.

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Court, or during the reforms under Alberto Fujimori (1990–2000),⁹ with a separate reform body. Under the 1993 Constitution, the council's official role expanded from that of vetting candidates to the lower level judiciary (for subsequent executive appointment) to evaluating candidates to all judicial positions, and making the final selections of all but Supreme Court justices. Its responsibility was also extended to the selection of prosecutors (in the Public Ministry), and it was charged with conducting the periodic ratifications to be made of all judges and prosecutors.

The examples of Venezuela and Peru were not followed in the rest of the region until the late 1980s and early 1990s.¹⁰ At that point, with judicial reforms under way in a majority of countries, the council model became a popular addition to the programs, heralded as a means of depoliticizing appointments, guaranteeing the selection of better judges, and advancing judicial independence. By the end of the 1990s, a majority of Latin American countries had adopted some kind of council (see table 1 below and appendixes for further details). In the region's three federal republics (Argentina, Brazil, and Mexico), councils have also been adopted by some provinces and states; in fact, in Argentina several provinces introduced councils before the adoption at the federal level. Of the adopters, only Venezuela and Uruguay subsequently abolished their councils, the former in 2000, after three decades of existence, and the latter, far earlier, in reaction to the military government's creation and use of a council to circumscribe judicial independence.

There are also a number of notorious holdouts. Chile has strenuously resisted proposals to instate a council. In Guatemala,¹¹ Honduras, and Nicaragua, their adoption has been caught up in broader arguments about overall judicial reform. Brazil might be added to the list. Its internal council has been criticized as too corporatist. For the past decade, constitutional amendments to alter its composition and expand its powers have been under discussion in the congress.¹² The displeasure of the judiciary or political elites with the performance of their councils has begun to encourage proposals for their elimination. The trend could conceivably convince nonadopters that they have chosen the right route.

It bears mentioning that despite the reliance on the European model, the status quo ante was quite different in Latin America, as were the specific problems the councils were intended to resolve. For the most part, unlike in Europe, the councils assumed powers formerly exercised by supreme courts. Only in Argentina and Colombia had the Ministry of Justice been responsible for judicial administration, and in both countries, the supreme court had already succeeded in reversing that practice. Only in Argentina and Peru did the ministry manage judicial appointments. Elsewhere

⁹ See Hammergren (1998, 2000); Lawyers Committee for Human Rights (2000).

¹⁰ As is documented in Table 1, there are instances of earlier council-like bodies, but they usually exercised very limited powers, or, as in Peru, were introduced by military governments to take on appointment powers formerly held by entities the governments had eliminated.

¹¹ Guatemala's efforts to introduce an external council were defeated by a popular referendum held in 1999. It is hard to say how the public felt about the council because it was only one of numerous proposals for judicial reform included as a bloc. Since that time, the Guatemalan Court has introduced an internal council. The council's role is largely advisory, although it does evaluate judicial performance and selects the head of the training unit. The unit in turn has a critical role in selecting new judges. Ungar (2002, p. 172) also makes reference to a Council of the Judicial Career, created in Honduras in 1980. If the council ever existed in fact, it has disappeared without a trace.

¹² The proposal would transfer to the new council the control over appointments and the rest of the judicial career currently held by a series of decentralized committees or "councils" organized within and by the state and federal appellate courts. In Brazil, unlike in the rest of the region, councils are often portrayed as means of curbing judicial independence and increasing accountability.

in Latin America, the supreme court has traditionally exercised the role of governing body for the judiciary as well as that of court of last resort. It commonly had the ability to select all lower level judges (as well as all administrative staff).¹³ In some cases, it also selected its own members (Colombia's system of *cooptación*, in effect after 1957) or, as in Chile, it made the preselection of candidates to its ranks, from which the executive and legislature would choose the final appointees. On the whole, Latin America's ministries of justice have been so weak that they have disappeared in a number of countries (Bolivia,¹⁴ Mexico, Nicaragua, and Panama). Their active role in managing judicial administration or appointments has been the exception, not the rule.

Ironically, this greater formal independence, often accompanied by constitutionally guaranteed "immobility" or permanent tenure in office, did not protect Latin America's judiciaries from considerable interference by the executive, legislature, and political parties. Political actors (usually from the party in control of the executive, but sometimes from a variety of legislative parties) hand selected their supreme court, frequently violating constitutional provisions as to term lengths or immobility in office, and either relied on the justices to select friendly lower level judges or intervened directly. In a few countries, this produced the near-total renewal of the bench with every change of national administration;¹⁵ in others, clientilistic networks of like-minded judges persisted over time, and appointments and promotions were wholly dependent on external and internal patrons. Thus, despite a legal tradition emphasizing a politically neutral, professional career, many Latin American judiciaries came to be staffed by politically compliant judges of dubious substantive competence and still more questionable ethical proclivities. The situation arguably worsened in the last decades of the twentieth century as redemocratization increased the reliance on courts to make politically sensitive decisions and augmented the political parties' interest in finding patronage slots for their followers.¹⁶

In a minority of systems (Brazil, Chile, Colombia, Costa Rica, and Uruguay), politicians reached agreements to restrain their partisan intrusions, and the Supreme Court, as long as it did not become involved in political issues (exercising a sort of political restraint and making sure lower level judges did so as well), was left to manage its own selection process. This is generally acknowledged to have encouraged higher levels of judicial professionalism and more predictable judicial careers. It has also been criticized for encouraging judicial formalism (a defensive reliance on form over substance in making judgments); isolation from changes in the surrounding political, social, and economic environment; and a tendency for lower level judges to shape their decisions to please their immediate superiors.

¹³ An alternative de jure arrangement whereby intermediate courts select lower level judges and staff is a wider de facto practice. Most Latin American supreme courts simply do not keep close enough track of events in outlying districts to avoid relying on the recommendations of their superior courts. Many councils have encountered the same problem, which is why some have introduced district councils to help with recruitment and personnel management outside the capital city.

¹⁴ Bolivia reintroduced the ministry as part of a reform package that included the creation of a council. The ministry was established almost immediately; the council's formation was delayed for several years because of the court's resistance and conflicts among the political parties over the selection of the council's members.

¹⁵ Honduras is the classic example here. Bolivia's irregular replacement of its judiciary (sixteen purges from 1936 to 1982) sets what may be another record.

¹⁶ In the 1980s, a majority of Latin American countries emerged from several decades of de facto governments, often controlled by the military. In many, mass-based parties and elections were another novelty, because suffrage had been severely restricted during the prior "democratic" periods.

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The adoption of councils was also stimulated by widespread dissatisfaction with court management of administrative matters. In most countries, judicial budgets and salaries had failed to keep up with increasing demand, and performance thus had lagged for decades. However, courts were also notoriously poor managers of their budgets, first because they resisted spending money to attract good administrative staff or upgrade administrative systems, and second because they were usually entirely bereft of the most basic administrative skills. Judges, often operating en banc in the Supreme Court, imposed a sort of ineffective micromanagement. This gave them control over myriad inconsequential decisions (vacations for administrative staff, appointments of the lowest level support personnel) and left them entirely ignorant of the big picture.

It is likely that unscrupulous administrators managed to pocket large quantities of judicial funds, leaving outlying courts lacking even the most basic equipment. Dishonest administrators might in fact manage their judicial superiors by either sharing the profits with them or facilitating funds for special services and favors—a nice car, a trip, or the employment of a friend or relative. The honest ones were undoubtedly frustrated by having to deal with judges who could not read a budget, had no idea of costs of any items, and lacked the slightest familiarity with good contracting procedures or even with the formal rules. Supreme court justices in turn found that they were spending increasing amounts of time on ineffectual supervision efforts and were coming under growing criticism for neglecting their own work, as well as for the overall chaotic state of the system.

A third factor spurring the move to councils was the broader judicial reform movement, which had begun in the region in the 1980s. Here councils were hardly the only innovation. Their introduction was thus not made in the context of a fairly stable system, but rather one undergoing a substantial transformation, motivated by an extraordinarily high level of criticism of judicial performance as a whole. The goal was to strengthen the judiciary. It was usually not to strengthen the current incumbents, who were frequently depicted as largely responsible for the problems. Judges themselves were rarely active reform proponents.¹⁷ Most of the content of the reforms was instead set by a smaller group of prestigious jurists, many with international ties; by a few politicians and leaders of civic groups; and in many cases, by external assistance agencies and their international advisers. The proposed creation of a council—forwarded to enhance independence, improve the overall quality of the bench, and, occasionally, to eliminate administrative mismanagement or free up the judges to focus on their principal jobs—was rarely actively debated. It often came as part of a reform package with many far more controversial elements. No one doubted the existence of the problems it was intended to resolve, but no one examined very closely its chances of doing so.

To expand on a point raised above, although Latin Americans adopted what they thought was a European model, the situations they confronted were considerably different from those in Europe. Even similar wordings did not have the same referent. When Europeans discussed judicial independence, they were talking about control over the entire institution as exercised primarily through executive control of appointments and other elements of the judicial career. At stake was an issue of separation of powers, not partisan colonization (which was either a nonissue or, as in Spain, a presumably inevitable lesser evil¹⁸), inadequate judicial performance, or the selection of incompetent

¹⁷ Vargas, Peña, and Correa (2001, 75).

¹⁸ In an article written for the World Bank, the vice president of the Spanish council, Luis López Guerra (2001), thus discusses the debate over the relative (un)desirability of letting legislative factions choose the council or opening the elections to factions within the judiciary. He seems to regard the former as preferable because it is less institutionally divisive.

judges. Latin Americans were concerned about a dysfunctional judiciary, one delivering services that were predictable only in their poor quality and inadequate quantity. Insufficient independence in this case referred to the individual judges' presumed susceptibility to the influence of the variety of actors involved in their initial appointments, promotions, or retention of their positions. Although the party in control of the executive had the upper hand here, this was less a battle of institutions than an effort to reduce institutional permeability to the disruptive impact of factions and clientilism. Latin Americans thought external interference produced bad judges who performed even more poorly. In a few countries, the formulation changed—effective, as opposed to formal, delegation of appointment authority to the judiciary produced more technically competent judges, who were excessively influenced by internal and internally mediated pressures. Interestingly, this anticipates some European complaints about the results of their own councils.

Europeans had expressed no concern about the control of judicial administration—it lay with the Ministry of Justice and no one suggested this interfered with judicial performance or independence. Although some European councils (most notably that of Spain) exercise an ability to set institutional policy, this tends to be more related to the jurisdictional function (how judges do their jobs) than to budgetary and administrative matters. Latin Americans, conversely, saw budgetary control and other “housekeeping functions” as critical to both performance and independence, although the principal complaint was an inadequate budget. Mismanagement and misuse by the Supreme Court was secondary,¹⁹ and the worst abusers were not necessarily those losing their administrative powers to councils. Why the budgetary issues became so linked to the Latin American debate over councils, and why this happened in some countries and not in others, defy simple explanation. Here as in the other areas, Latin American circumstances and Latin American interpretations of their situation produced different goals for and thus different formulations of the judicial council equation. The movement to adopt councils was justified by their success in Europe; both their success and its relevance for the Latin American context were vastly exaggerated.

VARIATIONS IN POWERS AND COMPOSITION OF LATIN AMERICAN JUDICIAL COUNCILS

Latin Americans' lack of familiarity with the European experience was not limited to the problems encountered there; it is also apparent in the design of the councils themselves. European councils are large bodies, averaging more than 20 members,²⁰ and as noted they are largely restricted to managing appointments and the judicial career. Latin American councils are considerably smaller, ranging from the 5-member Bolivian body to the 20 members of the Argentine federal council. They show far more variation in their functional responsibilities—ranging from the purely consultative

¹⁹ Although it was frequently alleged that budgetary control by the executive or the court was used to constrain judicial independence, concrete examples are hard to find. Neither body appeared to use the budget punitively, and that may have been unnecessary given the far greater leverage provided by control over appointments, transfers, and promotions. Backers of the El Salvador reforms do place more emphasis on the court's use of funds to control the judges, although more to reward supporters than to punish judicial mavericks. See Popkin (2000), pp. 208–10.

²⁰ The smallest, the French Council has 12 members; Italy's council has 33; Spain's, 21; and Portugal's, 17. Although the greater size generally corresponds to the larger judiciaries in these countries (as compared with Latin America), it only partially justifies the variations within this group, for example, why France with five times as many judges as Portugal has the smallest council.

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(Panama); to those that only nominate Supreme Court members or preselect all judges; to those that do nominations and career management for the entire judiciary (and sometimes more than one court system), run disciplinary systems and training programs, and manage all budgetary and administrative matters (including the selection of administrative staff). Table 1 offers a schematic overview of the current situation and the major changes over time. (See also the appendixes for additional details on four countries.)

Formal powers do not always match real ones—El Salvador’s council, as recreated under the 1992 Peace Accords, was intended to manage administration as well as appointments, but has never assumed the former responsibilities. Peru’s judicial council, as empowered under the 1993 Constitution, was not created until 1995, and for most of its subsequent existence it has been effectively precluded from exercising its full appointment powers. Argentina’s and Mexico’s councils have been slow to assume their appointive powers, and when they did, breached many of the formalities established in their operating rules. Both councils have been criticized for selecting judges without the legally mandated full examination process—and in both cases, the immediate reason for this lapse was the long delays in making any appointments at all. Bolivia’s council has been criticized for administrative mismanagement, for delaying the preselection process, and for irregularities in its elaboration of lists for presentation to the Supreme Court. It has in turn criticized the court for the selections it made from the council’s lists.²¹

Councils vary not only in size and formal and real powers, but also in their composition, method of selection, and conditions of appointment. Members often represent or are selected by a variety of agencies, including the judiciary, other sector institutions, other branches of government, and private professional associations. They may be chosen by the institution they represent or by another body (usually the legislature) from a list provided by the former or from all eligible candidates. In many cases, they cannot be members of the nominating organization. This provision is subject to varying interpretations, but it often means that even judicial representatives will not have been judges. No councils have permanent members. Instead, they set fixed terms, which may or may not be renewable; members chosen by virtue of their primary office (for example, chief justice) will of course be limited by that office’s term. Except for these *ex officio* positions, internal councils, or those with very limited powers, membership tends to be full time.

²¹ Ungar (2002, pp. 182–184) again offers a more favorable vision of the council’s work, but it is truly a minority opinion. Most Bolivians and external observers believe it has been a disaster.

Table 1. Latin American Judicial Councils

COUNTRY	MEMBERS	HOW SELECTED	TERMS	POWERS
Argentina Date Created (in Fact) ^a 1994 (1998)	20 members: chief justice, 4 judges, 8 congressional representatives, 4 lawyers, 1 representative from the executive, and 2 academics	Judges selected by their peers. Legislators appointed by president of each chamber. Lawyers and academics chosen by professional associations. Executive chooses own representative.	4 years, with one reelection	Preselection (for executive and legislative final choice), discipline (but not removal), ^b and training of first instance and appeals judges. Enactment of organizational rules, preparation of budget, appointment of executive administrator, and administration of judicial resources. However, Supreme Court of Justice (SCJ) and appeals courts retain control of more routine operations of their own and lower courts. Ministry of Justice has also retained ability to transfer judges, although this is legally debatable.
Bolivia 1994 (1998)	5 members: chief justice and 4 other councillors	Councillors selected by super majority of Assembly.	10 years; reelection permitted	Proposes lists to Congress from which justices are selected. Proposes lists to SCJ for selection of appellate judges and to appellate courts for trial judges, notaries, and property registrars. Prepares and administers budget, as well as other management duties. Runs judicial school, disciplinary action for infractions (but not crimes).
Brazil ^c 1977–1988 1988	Early council: 7 members of Tribunal Superior (TSJ, Federal Superior Court) Currently, 5 members: president, vice president, and 3 other members of TSJ	Elected by TSJ members.	According to terms of primary offices	Early council: investigative and disciplinary functions; decided on retirements and pensions. Currently: administration and budgetary supervision of federal court system.

NOTE: For the most part, the contents of the table reflect the current status. Where changes have been so great as to comprise different bodies, these are also listed.

- a Because many councils were created legally long before they existed in fact, the first date represents that of legal creation; the date in parentheses represents, as far as can be determined, the date that the council actually was formed.
- b Removal of judges is accomplished by a separate Impeachment Tribunal (*Jurado de Enjuiciamiento*) composed of 3 judges, 3 legislators, and 3 lawyers.
- c Brazil's Congress is currently reviewing a law that would create a council more in line with those of its neighbors, with representatives from outside the judiciary, and with responsibility for nominating or selecting candidates, managing the judicial career, and handling administrative matters.

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COUNTRY	MEMBERS	HOW SELECTED	TERMS	POWERS
Colombia 1991	13 members, divided into 6 administrative and 7 disciplinary	Administrative Chamber: 2 elected by SCJ, 1 by Constitutional Court, and 3 by Council of State. Disciplinary Chamber: 7 elected by Congress from lists submitted by executive.	8 years, nonrenewable; full-time appointments, may not be active concurrently in bodies they represent	Administrative Chamber manages judicial career, proposing to Council of State and SCJ candidates for own vacancies and those in district courts, and to district courts, those for lower ranking judge. Oversees recruitment and selection of all administrative staff (roughly 14,000). Administrative Chamber does planning and budgeting, makes decision on placement of courts, writes internal regulations, and proposes new laws. Disciplinary Chamber examines and sanctions faults in conduct.
Costa Rica 1989, Superior Council	Superior Council: 5 members, including chief justice (presides), 2 judges, 1 administrator, and 1 outside lawyer	Supreme Court designates (administrator selected from list provided by employees' organization).	6 years; no reelection unless three-fourths of members of SCJ agree	Superior Council responsible for administration and policy making; selection and appointment of judges and administrative staff.
1993, Judicial Council	Judicial Council: 5 members, including 1 justice (presides), 1 member of Superior Council, 1 member of Judicial School board, and 2 appellate judges	Named by SCJ.	2 years, renewable	Judicial Council designs and runs process for qualifying judicial candidates for final selection by Superior Council; makes recommendations to Judicial School on courses.
Dominican Republic 1994 (1997)	7 members: president of Republic, presidents of Senate, Chamber of Deputies, and SCJ, 1 judge, 1 senator, and 1 deputy	Serve by virtue of their position, except for members elected by Senate, House, and Supreme Court.	For length of term in primary office	Designates Supreme Court.

COUNTRY	MEMBERS	HOW SELECTED	TERMS	POWERS
Ecuador 1993 (1997)	8 members: president of SCJ; 3 members appointed by SCJ; and 1 representative each from law schools, bar associations, superior courts, and judicial associations	Nominated by their respective institutions, chosen by SCJ. All must be lawyers, but except for the SCJ president, they may not be active judges or officials of the nominating entities.	6 years, with unlimited reelections	Selects candidates for judgeships (to be appointed by SCJ and lower level courts); other human resource planning (evaluation, training, discipline). Plans, organizes, and controls use of judicial resources; sets court fees; defines internal administrative and financial procedures; and approves all procurement contracts.
El Salvador 1983 (1989)	Since 1999, 6 members: 3 lawyers, 1 law professor from public universities and 1 from private universities, and 1 representative of Public Ministry	Chosen by Assembly, (two-thirds majority) from slates provided by nominating institutions.	3 years, full time; not immediately renewable	Provides lists of candidates to SCJ for legislative selection; and of lower level judges for SCJ selection. Runs judicial school, evaluates judges.
Guatemala 2000	5 members: president of SCJ, head of Human Resources Unit, head of Training Unit, representative of judges, representative of magistrates	Serve by virtue of their position, except for last two, who are elected by peers.	For terms of principal offices	Advises Congress to convene committees for selection of SCJ and Appellate Court members, announces competitions for entry into judicial career, names and removes head of Training Unit and defines unit's policies, and evaluates judges and magistrates.
Mexico 1994 (1995)	7 members: president of court, 2 appellate, 1 district judge, 2 representatives of Senate, 1 representative of federal executive	All chosen by respective institutions. Since 1999, all judges chosen by SCJ.	5 years, with no reelection; terms do not coincide, so replacement is gradual	Selection, appointment, evaluation, ratification of lower level judges; other management of judicial career. Runs training program. Sanctions and removal of same. Manages budget (except SCJ). Decides on creation and placement of courts, and regulates and supervises administrative procedures.
Panama 1984	8 members: president of Supreme Court, presidents of SCJ Chambers, procurador general, procurador de administracion, president of national bar	Automatic, by virtue of principal office held.	For length of term in primary office	Consultative body; provides opinions on selection processes for judges and prosecutors, and reviews and makes recommendations on proposed laws, court administrative practices, and placement of offices.

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COUNTRY	MEMBERS	HOW SELECTED	TERMS	POWERS
Paraguay Date Created (in Fact) ^a 1992 (1994)	8 members: 1 from SCJ, executive, 1 senator, 1 deputy, 2 lawyers, and 1 law professor from national university and 1 from private law schools	Designated (first two) or elected by the bodies they represent.	3 years, with one immediate, or subsequent reelection	Proposes lists of candidates for SCJ and Superior Tribunal to Senate. Proposes lists to SCJ for lower level judges.
Peru 1969–1980 1982–1992 1993 (1995)	Currently, 7 members: 1 selected by SCJ, 1 chosen by Public Ministry, 1 lawyer, 1 law professor from national university and 1 from private law school, 2 representatives from other professional associations	Elected by the bodies they represent.	5 years, with no immediate reelection	Currently selects all judges and prosecutors, provides candidates for highest court, does periodic ratifications, and shares evaluation with SCJ and Public Ministry.
Uruguay 1981–1989	7 members: minister of justice (presides); president of SCJ, president of Administrative Tribunal, 1 legislator, procurador general, administrative procurador del estado, Appellate Court judge with most time in service	Served by virtue of their position, except for legislator, who was appointed by Congress.	By length of term in initial position	Supervision, discipline of judges and court staff; designation (for congressional approval) of appellate judges; direct appointment of lower judges; formulates judicial budget.
Venezuela 1961 (1969) – 2000	Initially, 9 members After 1988, 5 members: 3 from SCJ, 1 from Congress, and 1 from the executive After 1998, 8 members: 4 from SCJ, 2 from Congress, 2 nominated by the President	Court members designated by en banc SCJ; others designated by entities represented.	6 years; may be reelected	Initially, only named and supervised judges and public defenders. After 1988, powers were amplified to include placement, number of courts, and administrative and budgetary management of judiciary. After 1998, divided into administrative and disciplinary chambers

Latin American councils include several internal or court-created bodies. Given their similarity to simple internal commissions or committees, one could argue against their inclusion here. However, the choice of the term “council” was often intended to signify something more. The best examples are two internal councils created by the Costa Rican Supreme Court to prequalify judicial candidates (Judicial Council), and to select judges, set policy, and manage administrative

matters (Superior Council). Both are small and are chosen entirely by the Supreme Court. The Superior Council includes a member from the private bar and a judicial administrator (chosen from candidates nominated by the employees' association). Unlike the judicial committees that preceded them, the councils were intended to be more transparent (especially in the selection process) and encourage those involved to pay more systematic, professional attention to problems confronting the judiciary as an organization. It bears mentioning that the Costa Rican judiciary encompasses the Public Ministry, public defenders, and the investigative police, and that the councils also handle the appointments of prosecutors and defenders.

The two Brazilian councils (established under the military government and the 1988 Constitution), Uruguay's military-era council, Guatemala's largely advisory internal body, and Panama's consultative council of sector leaders might also be excluded because of their judicial domination and fairly restricted functions. However, like the Costa Rican example, they demonstrate an apparent desire to formalize certain policy- and decision-making processes previously conducted in an extremely ad hoc manner. The specification of members and responsibilities and the frequent inclusion of outside parties (even if usually in minority status) suggest an effort to respond to several long-standing criticisms of judicial governance—its lack of transparency, informality, unsystematic focus, and consequent vulnerability to external and internal manipulation.

With the exception of Brazil, Costa Rica, and Guatemala, Latin American councils are always legally independent of the courts. Their real relationship with the courts is far more variable. The Mexican seven-member council is presided over by the chief justice; its four judges thus outweigh the external members. Until 1999, the Supreme Court's control was less complete because the three judicial members (in addition to the court president) were selected by lottery (*insaculación*). Now the court, presumably its president, chooses them directly. The Mexican council now resembles an internal body (albeit with a minority of external members), which responds directly to the court president.

Like Mexico's, El Salvador's council was for a time court dominated. After a series of organizational modifications, it now excludes judges or representatives of the judiciary. Members are selected by the legislature from lists provided by the entities or groups represented. External councils that control administrative affairs (Argentina, Bolivia, Colombia, Ecuador, Mexico, and formerly Venezuela) as well as appointments usually aspire to a governing role that places them above the Supreme Court (and whatever other sector institutions they manage)—although this is usually not clearly set out in the constitutional provisions. In Colombia, the council manages all judicial affairs, except that of the Supreme Court and Council of State²² (which choose their own members from lists supplied by the council and manage their own budgets). In Bolivia, the Supreme Court president presides but hardly controls the council, and the two bodies are still fighting out their respective powers and relationships.

External councils limited to appointive functions generally enjoy a coequal status—neither under the courts nor subservient to them. This is certainly true of El Salvador and Peru and is further cemented by the elimination (El Salvador) or minority status (Peru) of judicial representatives. In

²² Colombia's Council of State heads a small (149 judges) administrative court system. Colombia is the only Latin American country to use the French model of administrative courts. In other countries, administrative tribunals look more like the U.S. system—courtlike bodies attached to executive agencies. Collectively, they did not constitute a single system, and because they were not part of the ordinary judiciary, they were not affected by the adoption of councils.

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both countries, there are continuing debates over the area of judicial monitoring and discipline, with each party having some pretensions to exercising both. These gray areas are clearly the result of hastily drafted legislation, the authors of which rarely took into account the existence of other bodies (judicial inspection units and the like) or powers already legally belonging to the supreme court.

Even during their short life, many councils have undergone changes in their composition and powers. It is likely that they will continue to do so. Table 1, though attempting to reflect the current situation, is a mere snapshot. It would take a far more complicated format to capture the past changes, and an improbable amount of foresight to anticipate what is likely to occur. It is probably fair to say that (except for the Costa Rican anomaly) no country and no judiciary has been entirely satisfied with the mechanism it has created and that further changes are predictable for many.

The actors' reasons for their displeasure are of course not the same. What disturbs judiciaries about these new mechanisms is rarely what disturbs outsiders. Outsiders often see the solution as lying in increasing the council's powers; judiciaries, in reducing or even eliminating them. Judiciaries tend to be least displeased with the nominating role; they are most unhappy with further management of the judicial career and the administrative functions. The public is probably oblivious to flaws in administrative management. It frequently criticizes a nominating and disciplinary system that is still nontransparent and has not noticeably improved either the quality or the performance of the bench. As is discussed further below, although disputes over the councils may postpone efforts to resolve these fundamental problems, the council format usually cannot be blamed for creating them.

Because a discussion of further differences in council composition, powers, and selection is likely to produce only more confusion, readers are referred to table 1 for additional details. Nonetheless, a few general observations are in order, most of them reemphasizing the difficulty of making any generalizations:

- Even as regards the few structural and functional characteristics listed, there is enormous variation among the Latin American councils.
- Although there are some obvious ways of grouping councils (by size, level of judicial dominance, and functions), the groupings do not tend to coincide—larger councils are neither more nor less likely to have more functions; though all judicially dominated councils are small, not all small councils are judicially dominated.
- There is also no obvious relationship between these characteristics and other contextual variables—age of council; size of judiciary; or as we shall see, success in carrying out its functions. Argentina's 20-member Federal Judicial Council, the largest of the group, manages the nominations and some administrative functions for fewer than 1,000 judges. Colombia's 13-member council selects judicial candidates and oversees all administrative matters for the administrative and ordinary courts with a total of more than 4,000 judges and almost 15,000 employees. Although Bolivia's 5-member council serves a far smaller judiciary (about 600 judges²³), it is smaller than councils limited only to preselecting or appointing judiciaries of comparable size.

²³ As of 1999, there were 587 judges. Current figures are not available. For an overview, see World Bank (2000), vol. II, p. 48.

- As is indicated by the frequent lapse between the legal and actual creation of a council, resistance and conflicts have not been limited to just enacting the constitutional provision and enabling law. A frequent source of delays involves the selection of members by the legislature, where this is mandated. In the Dominican Republic, the choice of the two members selected by the Senate and lower house is usually credited for the three-year delay.
- None of the councils appears to follow a clear European model, and even councils presumed to imitate other Latin American examples can hardly be said to have done so.
- There is also no evident common explanation for the countries (Chile, Honduras, Nicaragua, and as regards the more ambitious proposals, Guatemala and Brazil) that have not adopted the council model. The two (Uruguay and Venezuela) that abolished their councils also did so for very different reasons.

ASSESSING THE RESULTS

The only clearly stated objective behind the Latin American councils was that of augmenting judicial independence. Accompanying discussions and the functions assigned to the councils suggest two secondary goals: improving judicial performance and administrative management. One enormous initial problem is the lack of clarity as to how the councils were supposed to achieve any of this. As we will see, that problem has continued to obstruct their delivery of the desired results.

Strengthening Judicial Independence

How effective have the councils been in increasing individual and institutional independence? Whether they have been or not, are there other unanticipated, negative consequences? Before answering these questions, two observations merit exploration. In the European case, the adoption of the council model as a means of enhancing judicial independence is easily explained. In Latin America, however, it might seem illogical that reformers sought to enhance judicial independence by taking powers away from their supreme courts and giving them to a separate body. It might seem even odder that courts did not more effectively resist the proposals, inasmuch as they entailed losses of real powers and in no case represented real gains.

The second observation is more easily dealt with than the first. Courts rarely if ever backed these proposals and in many cases resisted them strongly. The courts' initial resistance was not successful because of their limited institutional power and their generally poor public image. They have not necessarily given up the battle, and in cases like Mexico after 1999, and very briefly in El Salvador, succeeded in shaping the councils to their own advantage. In some countries (Argentina, Bolivia, Ecuador), the poor performance of the councils may strengthen the courts' hand in the long run, possibly leading to the councils' abolition or a substantial modification of their composition and powers. Where courts did not resist more strongly, or where other actors acquiesced despite the evident threats to their own power, lack of foresight is another explanation. These were often true stealth reforms. In many cases, even their proponents seemed not to anticipate the likely consequences. In a region where the judiciary has been characterized as the orphan branch of government, such peripheral tinkering with its organization (like many other of the reform proposals) was mistakenly seen as a technical improvement, not a major political move.

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As for why reformers pursued a strategy of increasing judicial independence by taking power away from their supreme courts, the explanation lies in the types of problems Latin Americans associated with the general complaint about inadequate “judicial independence.” These include failings that might as easily be attributed to excessive independence or to a judiciary not bound by any formal institutional rules. The key, as in Europe, was believed to lie in the appointment system, but the mechanics and consequences of its application were entirely different. In the most common Latin American scenario, external manipulation of appointments lessened organizational control over individual employees, resulting in unpredictable decisions made by poorly trained and ethically questionable judges, an enormous amount of discretion exercised by both professional and support staff, an incentive system based on pleasing internal and external patrons, and a tendency for personnel at all levels (from the chief justice to the lowest clerk) to use their positions opportunistically before they lost them for equally unpredictable reasons. Opportunism might mean soliciting bribes, but it could take other forms—forging ties with local and national elites, or with judicial leaders to ensure another posting within or outside the judiciary; building relationships with other patrons or clients that would be useful in subsequent private practice; or just not making too many waves so that in the next round of replacements one might hold onto a judgeship for which there was not much competition.²⁴

In the minority of countries with less outrageously irregular appointment systems and with more job security, a greater degree of institutional control often existed at the cost of individual autonomy. In Brazil, Chile, Colombia, Costa Rica, Mexico, Panama, and Uruguay, more stable supreme courts (self-renewing, holding permanent appointments, or replaced individually after long terms) were able to shape a bench more congruent with their own preferences. The process was anything but transparent and did not preclude a good measure of internal patronage, some of it partisan and the rest more personalized. In Mexico’s federal courts²⁵ and in several other countries, supreme courts were said to divide lower level appointments among their members, creating their own internal client networks (not unlike the legal tribes created by Venezuela’s council). In these countries, judges without patrons could expect to remain on the bench (unless they had antagonized the higher-ups), but a promotion or transfer to a choicer spot was far less likely.²⁶

The degree and nature of collusion with political elites, another focus of complaints, also varied. Colombia’s self-renewing Supreme Court would eventually prove so inconveniently autonomous that the 1991 reforms can actually be seen as the politicians’ effort to curb judicial independence by dividing the court’s powers among a number of separate bodies (most notably a council and a constitutional court). In Panama, conversely, court support of government interests (as well as those of prestigious independent lawyers and economic elites) seemed more a matter of mutual convenience. In Brazil, Chile, Costa Rica, and Uruguay, the courts until recently also tended to

²⁴ In a series of interviews with Bolivian judges in 2000, it was striking how many spoke of their uncertainty about remaining after their four-year terms expired because “they didn’t have a godfather.”

²⁵ See Cossío Díaz (1996) for a discussion of the Mexican courts. Cossío, who participated in the group designing the 1994 reforms, does not mention another rumored concern—that some of the internal networks had connections with drug traffickers.

²⁶ A periodic ratification process, run by the Supreme Court, was one way of weeding out the unsuitable in Peru and Costa Rica. Most judges survived the process, but there were always exceptions, among them both the incompetent or corrupt, and those who had defied authority. In one famous case in Costa Rica in the early 1990s, an entire Superior Court panel was removed when it applied a law nullified by the Supreme Court. The panel, in an excess of formalism, believed it should apply the law in question, because it had not received official notification of the nullification.

reflect views more consistent with those of political elites; in fact, in the first three, complaints about insufficient independence have tended to be directed against the judicial hierarchy and are often raised by the judges themselves.

In effect, even in countries not enjoying this degree of formal institutional independence and stability, the situation during the past few decades frequently approximated the bounded autonomy enjoyed by the Chilean courts—a considerable vulnerability to external influences on issues that matter, but a large degree of freedom for the upper levels to manage their own house. Lacking the Chilean judiciary's greater cohesion, most countries' courts relied on multiple patronage networks to effect internal control, which as a consequence was sporadic, inconsistent, and highly informal. Although insiders often noted that administrative management helped to feed these networks,²⁷ it was rarely a concern for anyone else. The central issue for external critics was the likelihood that the judge who saw their case or one of interest to them would be more influenced by some kind of external or internal pressure rather than the dictates of the law.

This can be—and has been described as—a problem of judicial independence, but it is more accurately treated as one of insufficient or perverse institutionalization. Though the term is rarely used by Latin Americans, it appears more consistent with their aims. A more institutionalized²⁸ judiciary would be less permeable to external intervention of all types and more capable of enforcing certain common rules of conduct among its members. These rules would also constrain leaders' ability to exert irregular influences on subordinates, thereby creating a different kind of independence for the latter. Although in this scenario there is still a tension between institutional and individual independence, the former zero-sum game disappears. Control of appointments and human resource management is still key. But the entrance of other issues, like budgetary administration, becomes more logical as a means of further strengthening the institution.

The choice of a council as the vehicle for introducing these reforms is also logical given supreme court justices' central role in both variations of the preexisting system, either as temporary and thus fairly ineffectual occupants of their positions of "leadership" or as governing powers with some capacity to bargain with outside elites on the basis of their ability to force compliance from lower ranking judges. The overriding problem was thus less a lack of independence and more a lack of a suitable institution in which it could be vested. In fact, in purely legal terms, most Latin American judiciaries had an extraordinary amount of independence. But without a coherent institutional structure, they had little reason or ability to use it responsibly. This is clearly a far more complicated situation than the one defined by Europeans, and it requires far more complex answers to the two initial questions. Unlike in Europe, the simple elimination of outside influences in Latin America will not be sufficient; the real challenge will be to strengthen and modify the institutional norms shaping judges' behavior.

In Latin America as in Europe, the composition of the council has been seen as the key to its impact. However, Latin America's disputes over council membership and functions have less to do

²⁷ One notorious case is that of El Salvador, where the chief justice controlled a personal fund, the use of which he was not required to report. At least one justice had used this fund to campaign for his reelection—providing vehicles and hosting special events for the judges and private lawyers who would vote on the lists to be formulated by the council.

²⁸ The term is used in the sense introduced by Huntington (1969), meaning (inter alia) an organization with effective internal norms and a clear separation from its external environment so that members perform differently by virtue of their identification with it.

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with balancing institutional powers. They are more directly related to neutralizing the social and political groups formerly enjoying privileged access to court operations. The old vested interests were hardly prepared to accept this goal, and the result has been a continuing jockeying for position. Latin Americans may be less sophisticated than Europeans in their treatment of institutionalization, but in a region where institutions (ranging from political parties to major branches of government) are both weak and fluid, it is more realistic to lay claim to resources wherever they are located, and to shift their locations out of tactical rather than institutional concerns. This contextual realism has been a major impediment to the councils' fulfillment of their mandates. For groups formerly controlling the courts directly, it was a short jump to controlling the council.

Political parties are often active here, but because of their historically negative role (and frequent constitutional prohibitions of judicial partisanship) must participate in some other guise. It did not take the parties long to understand that if they wanted to keep control of "their judges," they needed to ensure they had their representatives on the council. The Venezuelan council was created with this end in mind, and for all of its existence continued to function in this fashion. Several other councils had a partisan composition from the beginning—the Bolivian legislative parties, which had imposed quotas on judicial appointments, simply moved to impose them on council membership. In El Salvador, the small Christian Democratic Party assumed control of the council before the other parties even recognized the opportunity. Thus a part of the series of changes in the council's composition and manner of appointment aimed at removing party domination (as well as that of the Supreme Court, another early opportunist). For anyone familiar with the European experience and especially that of Spain, these developments should have come as no surprise. The only surprising aspect is that they did not occur more frequently.

Most Latin American councils did not in fact suffer partisan colonization, either because the parties were not the principal vested interests or because they were too slow to recognize the potential. The problem has instead been that those holding seats on the council are no more institutional in their perspectives than were the members of the supreme courts. Seats on councils, like judgeships, have become a means of advancing positions—often, those of individual members; less frequently, those of the groups they presumably represent. The immediate consequence has been the proliferation of two kinds of conflicts: those internal to the council and those between the council and the judiciary. Argentina's federal council is thus divided by factions internal to the judiciary, with no apparent tie to outside politics.²⁹ These internal divisions have slowed its progress in its primary goal of selecting judges. Although Bolivia's far smaller council has a partisan composition, the lines of division are fluid and many of its problems seem to originate in personal battles for power among its members. Conflicts with courts are more frequent, and especially so when the council has administrative as well as personnel responsibilities. In fact, except for internal councils (Brazil, Costa Rica) or those with extremely limited functions (Dominican Republic, Panama), there is not a council that has not come into conflict with the Supreme Court. Two issues predominate: the question of how responsibilities will be divided or assigned within the gray area of judicial monitoring and discipline; and where it exercises it, the council's control of the judicial budget.

²⁹ Insiders refer to them as the "white" and the "blue" factions. According to Ungar (2002, p. 129), the whites favor a weak council and the blues a stronger one. No one I interviewed in Argentina was able to provide even this coherent an explanation.

Aside from their disruptive influences, and the delays caused in the councils' moving ahead with their clearly designated responsibilities, the two issues have obvious implications for both institutional and individual independence. In the area of monitoring, evaluation, and discipline, a function never performed well by either body may now be performed poorly by both. Judges, unsure as to who is in control, may either take the opportunity to behave as they please or adopt a defensive, formalistic posture. Neither reaction advances institutional or individual independence, except in the most negative sense. As is discussed below, these functions are essential, not only to improving performance but also to advancing institutional cohesion. However, the councils' disruptive influence should not be exaggerated; they are only continuing a traditional lack of attention to these issues.

Where administrative management has provoked conflicts, these have not had positive effects on judicial independence in either sense. Councils that battle with courts will not serve either's interest well, and the first-line loser is the individual judge who will not be adequately supported in the execution of his or her duties. Such conflicts have diverted funds that might have been put to better uses and have further delayed the introduction of many needed innovations. They have sometimes found their only solution in letting the Supreme Court manage its own budget and leaving that of the rest of the judiciary to the council. Whether councils could do a better job of managing judicial administration is another issue, one addressed in more detail below.

Returning to the two initial questions, as regards enhancing institutional and individual independence, the results have been sparse but have hardly exhausted the model's potential. Even the worst of councils have short-circuited some of the most egregious examples of external interference by eliminating practices like the party quotas on judicial appointments (Bolivia,³⁰ El Salvador) and, if to a lesser extent, the internal patronage mafias. (Venezuela is the exception to the rule, and an important one for councils wishing to ensure their survival.)

To the extent either type of independence can be defined by the removal of outside influences, then both have been advanced by these changes. Individual judges have probably benefited most in that more transparent, systematic selection systems have partially eliminated the need for patrons within or outside the judiciary. One would have to be terribly naïve to believe patrons no longer count, but for many countries and for many appointments they have become less critical and thus less powerful. Several independent changes (that is, not part of the council model itself) have enhanced this effect—higher salaries, training programs (especially when linked to promotions or initial selections), the introduction of permanent tenure or longer fixed terms, and even an increase in the number of judges (which may put some of the appointments outside the reach or interest of the normal would-be patrons). The professionalization of administrative staff (who frequently were another channel for external pressures) is another positive factor.

The real and potential effects on institutional independence are less clear. An independent institution can hardly be equated with a collection of freely acting individuals. At the very least, it requires its own leadership and values with which members identify, spontaneously or because of some power of enforcement. The real question here is whether the council will assume that role, or whether its exercise of other functions will allow and encourage the Supreme Court to do so. In a rather perverse turn of events, by taking the judicial selection system outside of the

³⁰ Although Bolivia's council was itself a product of quotas, subsequent internal conflicts have downplayed quotas as an element in judicial appointments; see World Bank (2000), vol. II, p. 48. According to a recent evaluation (Cóppola, 2002, pp. 86–88), Paraguay's council has not done as well, and political quotas are still the principal criteria for selecting candidates.

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formal (if not always effective) control of the court, the external councils have created a space for these developments. Criticism of and efforts to modify the selection mechanisms will no longer be perceived as a direct or indirect attack on how the court conducts its business, just as demands for still greater transparency will not be interpreted as undermining judicial autonomy. The same might also be said of other council functions—monitoring and discipline, or administrative management—although here, as is further discussed below, there may be additional, less desirable effects on the judiciary's ability to operate effectively.

In the short run, the effects on individual independence have been greatest; the truly difficult choices lie ahead. Depending on who controls the council, and how the additional responsibilities are divided between it and the supreme court, the source and nature of the threats to individual independence will vary, but they will inevitably be present. These issues are also critical to the (re)construction of an institution capable of exercising its own independence in a responsible manner. Latin Americans' obsession with how judges are first selected is understandable given the abuses of the recent past. Nonetheless, it is no more important as regards ensuring an adequate degree of individual autonomy and a vastly improved level of institutional cohesion than is the issue of how the system treats judges once they are on the bench. There is still more to be said on selection systems, however, and thus in the next section I examine those details as well as the broader issue of ensuring that more carefully selected judges actually perform better.

Effects on the Quality of Judges and Judicial Performance

In Europe, councils were rarely introduced as a means of improving the quality or performance of judges. This was a primary consideration in Latin America. It may well be the most disappointing aspect of the experience with councils. (Improvement of court administration was no better, but it was not attempted as often.) This is not all that surprising given the many other issues distracting their attention. It is also indicative of a far broader problem and thus one not limited to systems using councils. In the modern world, no one is any longer certain as to how to identify good judicial candidates. Traditional criteria—mastery of the law and the support of recognized jurists or community notables—are increasingly recognized as inadequate, but additional qualities are both disputed and far harder to document.³¹ Thus councils, almost universally, rather than inventing new systems, tend at most to make peripheral improvements in whatever was used before. The subsequent issue of encouraging good performance has enjoyed even less attention, despite its potentially greater importance.

Latin American councils have been forced to work improvements in one area: that of transparency in the selection process. The definitive assignment of the responsibility to one organization has visibly eliminated many of the under-the-table machinations that went before. Councils have to announce vacancies, hold some sort of competition, and publicize the results. They can still manipulate the outcomes, but the formality of the process makes this more evident and thus more difficult. Even for well-meaning councils, the rest of the process is remarkably unimaginative and of arguable relevance for what they are supposed to achieve. It usually consists of a comparison of curricula (the *concurso de méritos*) and then a written and possibly an oral examination (the *concurso de oposición*). Commonly,

³¹ See Oxner (2001) for an excellent discussion of potential criteria and how they might be identified.

both written and oral tests are on knowledge of the law. As one critic noted,³² that is what codes and law books are for; a judge can always look up what he does not know, but the real test is how he or she reasons and reacts to the elements of a case. Unfortunately, these skills have yet to be incorporated in any entry-level or promotional examination for any Latin American judiciary.

Also conspicuous by their absence are rigorous background checks and solicitation of comments from prior clients or employers. Admittedly, this might be difficult, given the preference for hiring newly graduated lawyers. In a few countries, it has now been suggested that candidates should have several years of prior professional experience, in part to allow a chance to see how they operate in practice (and in part because clients often object to having their case decided by a 24-year-old judge). There has also been some movement toward promoting lateral entry, offering the advantage of choosing among candidates with a well-established track record. Still, because this is a career system, opportunities for appointments outside the career are usually limited (often by setting a percentage for external appointees or by alternating between closed and open competitions for positions), and the predominant arguments in their favor are others: “fairness” (a chance for outsiders to compete) and an effort to combat institutional insularity. Supreme Court appointments have traditionally been more open, even in systems with well-established internal career programs.

Because of the councils’ brief existence, the numerous extraneous problems and conflicts, and the frequent modifications to their organization, it may be too early to evaluate their success in identifying better candidates. However, additional aspects of personnel management—training, monitoring, evaluation, and discipline—may have still greater effects on the quality of judicial performance. Here, the councils’ progress has been still less impressive, in part because of lingering uncertainties as to how they will divide these functions with the supreme courts. The legal ambiguities have not been entirely negative. Courts, fearing that they may lose whatever powers have not been transferred to the councils, have in some cases begun to exercise them more energetically. This is visibly the case in El Salvador, where faced with a council that had begun its own evaluation program, the court finally took seriously its responsibility to investigate complaints about judicial abuses. There are signs that, confronted with a highly dysfunctional council, the Bolivian Supreme Court may be attempting to expand its role here as well.

The most significant impediment, however, is the traditional lack of attention to proactive personnel management. In past decades, many supreme courts created training programs, and some (notably in Brazil, Chile, Costa Rica, and Mexico) began to develop mechanisms for monitoring and evaluating judges. But for the most part, Latin American judiciaries have been oblivious to their potential for systematically molding judicial behavior. The usual incentive for “good” performance remains linked to the promotion and transfer system. This was managed much like the initial selection process—and if anything with still less transparency and rigor. When vacancies came open, judges could apply for them, basing their applications on the usual collection of recommendations (from higher level judges or politicians), occasionally augmented by training certificates, an examination, and a performance evaluation supplied by their immediate superiors. Where councils now control the process, as with entry-level selection, it has often become more formal and transparent but generally has not improved in any other sense.

³² Luis Pásara, then with MINUGUA (UN Observer Mission to Guatemala), in a personal interview (July 1996).

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Councils' participation may help break clientele networks, but this is not automatic,³³ and also may simply substitute another type of clientilism. A promotion-oriented evaluation system is clearly incomplete; when combined with immobility (a right to remain in one's immediate post), it suffers the disadvantages of all tenure systems. The lazy or less ambitious can stay where they are and never worry about improving their performance. Those who want to move ahead will shape their behavior and often time their improvements to influence those in charge of promotions. Separate monitoring, evaluation, and disciplinary mechanisms are thus critical, as is the creation of a more complex set of incentives to encourage improvements in day-to-day performance, and not only among those who seek to rise in the system. To be effective, they require several elements, which so far are conspicuous by their near absence from the region:

- a clear definition of what is meant by good performance and thus of the behavioral changes being sought,
- a means of measuring the various dimensions incorporated in the definition (unfortunately, many of them are hard to measure, and there is a real danger of relying only on what can be quantified—usually delays, number of cases decided, and so on³⁴),
- a monitoring system to track these dimensions and an entity with the ability to use it and the authority to demand or encourage improvements,
- linkage to training and other programs to help individuals improve flaws identified in their performance, and
- a separate body that can respond to and investigate individual complaints about abuses and that can either undertake disciplinary action on its own or pass the results of its investigations on to another entity, empowered and willing to do so.

Aside from the sheer logistical issues (setting up the information systems and procedures for using them), there are critical questions as to where all these powers ought to be located—in an external council or in the judiciary itself. This question will be explored further in the final sections below. For now, the important point is that in many countries, the legislation creating the councils has not been sufficiently explicit on this issue. At best (El Salvador), this has inspired an at least temporarily beneficial competition between the two logical candidates—the Supreme Court and the council. More often, progress by either has been impeded by the conflicts between the two. The legislative oversight is indicative of a regionwide lack of attention to the wider determinants of good performance, to the exclusive obsession with the issue of who selects the judges, and possibly to a notion of independence that finds performance monitoring a threat to both its individual and institutional variations. Quite probably, until these traditional views change, no one, either the court or the council, will make much progress in further improving judicial performance. That is thus not a question of who is in charge, but rather how performance and its improvement are conceptualized.

³³ French judges in fact complain that their council now relies excessively on the evaluations by superiors and that this strengthens the weight of the internal establishment, working against judges who brook the majority views.

³⁴ See Magaloni and Negrete (n.d.) for a discussion of the impact of the Mexican Supreme Court's imposition of an evaluation scheme based on the number of cases decided. The danger of using a narrow range of quantitative indicators is no novelty—30 or 40 years ago, observers had noted the problems of evaluating police performance on the basis of tickets issued. Apparently, in the case of police and courts, as well as a number of other public services, the recent enthusiasm for results-based management was not informed by these earlier lessons.

Effects on Management of the Judiciary

Judicial councils, even those charged only with personnel functions, have also incurred criticisms for their creation of an additional, expensive bureaucracy to support their actions. This criticism is more common for those taking on administrative management. To be fair, in most cases they have adopted administrative structures created by the courts, although they have inevitably enlarged them and built their own personal bureaucracies as well. Size is not the only issue. Councils have simply been no better at administration than whatever body they supplanted. This is not surprising, given their composition. Judgelike members and representatives from other branches of government or civil society organizations are skilled administrators only by accident. This never is a criterion for their selection. Though most councils seem less inclined to the more outrageous abuses sometimes committed by their predecessors, their failure to manage more proactively will undercut their advances in other areas. The fact is that a poorly administered system is not going to give judges much of a chance to exercise their independence effectively.

Effective organizations need professional, well-organized, and well-equipped administrative offices regardless of who ultimately supervises them. They also need a supervisory body with management skills. To date, most courts and councils have ignored both sets of requirements. There does remain the question of whether administration should be overseen by an entirely external body that does not directly suffer the consequences of its decisions. In the abstract this seems like a bad idea, but many court systems have been served far better by a ministry of justice than has any Latin American court left to its own devices or put in the hands of a new judicial council. This is arguably an area where results matter far more than principles, and where even if principles dictate the initial choice, much greater attention should go to producing the desirable results. It is the second-order, more mundane principles that make the difference—a well-staffed, well-organized administrative apparatus, controlled by a body or individual well versed in administration, with constant monitoring of its own results and of the satisfaction of its ultimate client, the individual judge and courtroom administrator. In the arguments over who should oversee the administrative apparatus, the quality of the apparatus itself has unfortunately tended to be overlooked.

Of the eight councils (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, and Venezuela) that have assumed administrative functions, only Costa Rica's and Colombia's seem to be attempting to exercise them any more energetically. For Costa Rica, this is part of a long-term process that began four decades ago—and it is also a process controlled by a Supreme Court that has taken a unique interest in upgrading its own performance. Even could the situation be duplicated, it is doubtful that any country wants to wait 40 years for comparable results. In the case of Colombia, this is a very recent phenomenon—under the first council, administrative management was a shambles, and the results were arguably worse than under the court.

Because Mexico's council is now dominated by the Supreme Court (and in turn by its president), it operates more like the internal administrative council created by the Costa Ricans. Whatever administrative problems or advances have been encountered thus cannot be counted as a test of the council's control. Much the same holds for Brazil's internal council. In Venezuela, where, with the elimination of the council, the test runs in the other direction, it is still too soon to evaluate the results. In Bolivia, chaotic, corrupt, inefficient mismanagement under the Supreme Court's direction has been transferred to the council. The current arrangements may be even worse than the status quo ante, but that hardly argues for a return to the prior system. Argentina's and Ecuador's councils

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appear to be doing no better and no worse than their judicial predecessors. A few of Ecuador's councillors have devised innovative approaches to their job, but for the most part, these novelties have been effectively obstructed by their colleagues and the court.

Despite these unimpressive results, there are still proponents of transferring all judicial management to an external council. They must be relying on faith, because even outside the region, there are no good examples of such a system having worked. As regards housekeeping functions, the most effective external management has been by a ministry of justice, a frequent pattern in industrial nations (as in the United States until 1939). As hierarchical organizations, ministries may be better suited to the task. Outside Latin America, where they operate in this fashion, there has been little consideration of transferring the responsibilities to the councils. In the common law world, it is more frequent, but still not usual, to recommend changes like that effected in the United States in 1939, a passage of budgetary and administrative management to the judiciary itself. The rationale is increased independence, not efficiency. However, as one Canadian expert recently noted,³⁵ although such arguments have been raised in her country, the judges themselves have shown little interest. It can be safely assumed that, at least in Canada, budgetary management is not used to control the judiciary.

The most dramatic examples of improved administrative management have often come under a sort of benevolent judicial despotism. This model, hardly to be recommended for its other consequences, is apparently the most effective way of breaking the deadlock of collegial decision making by nonadministrators characterizing both council and supreme court leadership. In its least disruptive form, this occurs through the happy coincidence of a powerful court president taking an interest in improving court administration. Costa Rica's current and former chief justices are good examples. There are indications that the Colombian judicial council is moving in this direction, after an initial eight years of few advances. Colombia's administrative section of the council is still collegial, but it may more easily delegate responsibilities to a few key members. Also, like the Costa Rican chief justice, the councillors enjoy a lengthy term of office—coincidentally, eight years in both countries. Collegially based benevolent despotism is not impossible, just unlikely. The Superior Tribunal of the Province of Córdoba, Argentina, also reached a collective decision (among its five members) to crack down on inefficiency, including that of judicial delay in deciding on cases.

Occasionally, governments frustrated by judicial inertia have accelerated the process by placing their own administratively oriented leader. One extraregional example is Singapore,³⁶ where a former banker with a management background was installed as chief justice to carry out reform. The Peruvian government's placement of a former naval officer as head of its Judicial Reform Commission is a second example.³⁷ Several Mexican state governors have apparently taken similar tacks in their effort to increase court efficiency.³⁸ As the examples suggest, the strategy has abundant negative costs, especially as regards transparency and the effects on both types of judicial independence.

³⁵ Sandra Oxner, speaking at the Second World Bank Global Conference on Judicial Reform, Saint Petersburg, Russia, July 6, 2001.

³⁶ Malik (2001).

³⁷ Hammergren (1998, 2000).

³⁸ In a recent interview, the president of the Tabasco state courts thus noted that he was an outside appointee who identified himself as an administrator rather than a career judge.

It also raises questions as to how far a judiciary should go in adopting an organization, internal procedures, and incentive systems modeled on private corporations or ordinary public bureaucracies. In Singapore, Peru, and even Costa Rica, critics have suggested that the emphasis on efficiency has distorted the judicial mission and displaced other core values still more central to the judicial role. These criticisms focus less on visible improvements on the administrative side alone than on the tendency for gradual movement into the “jurisdictional” function. Managers who first concentrate on improving budgeting, procurement, and oversight of support personnel soon shift to telling judges how they will do their work. Of course, councils holding both personnel and administrative responsibilities may well be intending (or intended) to make that leap. Still, as the inclusion of Costa Rica indicates, the issue is less one of the location than of the content of judicial governance and of the preferred model for managing service delivery.

The recognition that the judiciary provides a public service (and not just some quality called justice) constitutes an important advance. Nonetheless, it threatens an exaggerated emphasis on sheer quantitative performance measures. This may be true of the entire public sector, but in the case of the courts, there is an evident need for more thorough consideration of the nature of the services provided and of more sophisticated approaches to assessing quality than a mere count of cases processed. This is true at the individual level, where the emphasis may threaten traditional notions of judicial independence and the value that confers to their decisions. It is also valid for collective output, which, as contemporary theorists have argued,³⁹ is most important for its cumulative impact on the future actions of external parties—a slightly different way of defining the function of norm enforcement. The public part of the judicial service or good thus lies more in the pattern than in the quantity of decisions delivered and so cannot be assessed in terms of efficiency alone.

A REINTERPRETATION OF THE GOALS AND CHALLENGES FACING JUDICIAL COUNCILS

Latin American governments adopted judicial councils in the pursuit of multiple objectives, all relating to the underlying values of ensuring a more institutionally and individually independent judiciary with the ability and will to perform its functions well. Yet councils were proposed as a solution before these objectives were adequately defined. Several years into the experiment—not only with councils, but also with broader judicial reforms—the interpretation of what was wrong and what was needed has altered. Independence has not dropped out of sight, but has now been subsumed as a part of a larger program of institutional strengthening. The latter has in turn been broadened to include a focus on the determinants of organizational behavior—as opposed to a former emphasis on technical and technological modernization. In this context, three functions, which might be performed by councils, have received a new emphasis, although not quite in the way they were initially conceived:

- judicial selection to ensure qualified, motivated, and politically independent candidates;
- management of the rest of the judicial career to ensure that the good candidates continue to perform impartially, honestly, and to the best of their abilities; and

³⁹ See the essays in Zuckerman (1999) and Vargas, Peña, and Correa (2001) for related arguments.

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- policy making and implementation for the judicial organization to enhance its capability to respond to changing societal demands, ensure that its own resources are used in the most efficient and effective manner, and represent its institutional needs before other political actors.

Any of these functions could be performed by a council. The argument advanced here is that the characteristics required for each differ greatly. Hence, trying to create one entity to perform all three functions may not permit the optimization of any of them.

Judicial Selection

As in the European example, the independent council model may be the most appropriate for ensuring the selection of qualified, inherently impartial judges. The goal here is not only the selection of intellectually prepared individuals, but also those who in some sense match or personify broader social and institutional values. This suggests that the selection cannot be made only by judges (because of the risk of creating an isolated, corporative identity) nor be dominated by one party, branch of government, or social group. It should instead incorporate (either physically or through outside consultations) a broad range of perspectives.

The designers of the various Latin American councils seem to recognize this principle, but their response has been more politically than analytically driven. The composition of the councils has been the product of political negotiations, not of any explicit effort to define the values and interests that ought to be represented. Although politics will in the end drive the answer, a little more up-front analysis might not be a bad idea. The aim is not to approximate a popular election, but only to ensure that judges not be selected by some narrowly defined group. Still, one does want council members who are capable of evaluating professional qualifications and not just a randomly selected group of citizens. The views of ordinary citizens might be better acknowledged by increasing transparency, publishing lists of applicants and results, and soliciting comments on candidates. Party or associational representation is a question of contextual priorities; groups believing they should be represented probably will have to be.

Moreover, though judges probably should not dominate council membership, their views must be accorded considerable weight. No organization can be expected to operate effectively if it cannot choose its members and is also presented with candidates who in no way match its preferred profile. Apart from including judges within the council, there are many ways of meeting this condition: from the common practice of having the council preselect and the judiciary make the final determinations to letting the judiciary define the basic requirements and help draw up examinations and evaluation criteria.

As concerns its role in the selection process, the council's size is not an issue. Five members, as in Bolivia, might well be too few, unless they are bent on doing extensive outside consultations. Except for extremely small councils or unless the members decide to do all the preparatory work (making announcements, drawing up and conducting examinations, processing applications, conducting outside consultations), council membership will not require full-time dedication, a fact that makes larger councils more feasible.

One difference between small and large councils will be the nature of the decision-making process. Small councils can at least aspire to consensual decision making; larger ones will have to vote. Alternatively, either type may adopt an objective scoring system, which leaves the results up to the numbers. One caveat here is that quantification can introduce its own biases, especially when the basic criteria are poorly chosen or inappropriately weighted.⁴⁰ In any case, how each of these systems affects the quality of the final decisions is a matter for empirical testing. Finally, there is the question of whether the council should undertake the entire selection process or split it with another body—one proposes candidates, and the other makes the final decisions. The choice, like most of the others here, is likely to be politically determined. Given the many technical and political uncertainties, a split process is not a bad option.

In summary, for the initial selection process (and, by extension, promotions⁴¹), an external, moderately sized body, informed but not controlled by the judiciary, seems like the logical choice. Its members should be capable of evaluating technical qualifications but also represent (either by physical inclusion or by broad consultations) a wide range of citizen interests. They should themselves be selected through a transparent process, serve limited terms⁴² (although longer than those of a single administration), and most of all be required to document and explain their decisions. Because they are essentially an electoral or reviewing body, they will have to be supported by a technical staff, which advertises vacancies, processes applications, and organizes the examination process. Such a council might serve full time, although that only seems warranted for a very large judiciary. Conceivably, membership might also be split between a small, full-time core group and a larger body that convenes only for the periodic selection process.

Improving Performance on the Bench—Training, Evaluation, Monitoring, and Discipline

In the areas of training, evaluation, monitoring, and discipline—which are critical to shaping the quality of performance—the requirements change. Whereas one might exclude judges from the nominating or selection group (ensuring that candidates’ professional qualifications were vetted either by associated technical staff or by members with the necessary background), it is hard to conceive of a training, evaluation, and disciplinary process that did not include a large proportion of judges. Court systems can and have functioned without control over appointments; they find it harder to do so well when they cannot monitor and exercise some control over performance on the bench. The industrialized, common law countries may be an exception to the second rule, but they do have the advantage of getting members relatively late in their careers. Though judicial immobility and immunity limit removal powers, court leadership still does a pretty good job of following individuals’

⁴⁰ There are numerous horror stories to illustrate this point—for example, the use of numbers of publications or hours of training with no effort to determine the relevance or quality of either. The use of psychometric examinations, many of them purporting to detect judicial vocation, is another example. One suspects many otherwise well-qualified judges might have trouble passing them.

⁴¹ There is an intrinsic conflict here with career systems. However, because most of them seem to guarantee permanence in position, lateral and vertical movements within the system are already subject to a repetition of the selection process. In this sense, the “up-or-out” conditionality of many ordinary civil service systems has rarely been applied to the judicial career.

⁴² This would ensure that they did not in themselves become an isolated selection board with no further accountability for their actions. Term renewal is another question for which there is no single, logical response.

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performance.⁴³ Moreover, the late selection of candidates reduces the time one has to live with a bad decision.

For judiciaries that select their judges early, the ability to shape their performance on the bench is more critical. The two obvious alternative mechanisms are either to have a council dominated by judges (France and Italy) or to leave the functions with the courts (Brazil, Chile, Costa Rica, the Dominican Republic, and, at least partially, El Salvador). If the council option is taken, the requirements for performing this role are quite different from those for a council that only selects judges. The precise composition is still a subject for debate. It may further differ as regards training, monitoring, and evaluation as opposed to investigation and discipline. The former are the friendly functions. They are not intended to punish the subject, but rather to help improve performance. Investigation and discipline are punitive; they look for more serious infractions already committed and penalize the perpetrator. It is a basic management principle, although one too often honored in the breach, that the two roles should be separated. For this reason, the friendly functions are often seen as intrinsic to the institution, whereas the punitive ones, it is suggested, might be managed or at least aided by outsiders.⁴⁴

The separation does not mean that the investigative and disciplinary role is more inherently one of an external council. If it is, this council would still not look like the selection body. Discipline, like the rest of post-entry personnel management, requires a much greater familiarity with internal operations. This is essential for understanding when infractions have occurred, as well as for knowing when apparent breaches of the rules have some justification. A council performing any of these personnel functions would require detailed knowledge of judicial operations, as well as some grounding in investigative and monitoring techniques. Its members would have to understand the rules of legal (for investigation) and scientific (for monitoring) evidence, comprehend the limits of judicial responsibility and privileges, and be able to interpret management statistics. In short, the well-meaning generalists who might staff a selection committee would likely be at sea if forced to determine whether the judges they had selected had performed adequately or to design programs to improve their behavior. Conceivably, good evaluators (and investigators) might be better as selectors, but that also means basing selection on other criteria, and requires a highly technical rather than a highly representative group.

Instinctively, one might prefer that the training, monitoring, evaluation, and disciplinary functions remain with the judiciary itself, because they are more critical to its performance than even the selection of the initial candidates. However, they will also have to be placed outside the normal organization and staffed by institutional members with their own special profile. These individuals should combine ample judicial experience with an ability to think in terms of systemic needs. They should be backed by a highly technical support staff, one that also can manage statistics and legal and scientific evidence—and even, if required, mount sting operations. They may also require, as in the case of training, their own administrative and physical infrastructure. In short, these two sets

⁴³ There is also some indication that even in common law countries, judiciaries are seeking more control over their members' performance. This has become necessary because of a number of factors—ranging from citizen demands for accountability to sheer increases in the number of judges. See Malleon (1999) for a discussion of trends in the United Kingdom. U.S. judiciaries at the state and federal levels are also taking individual performance and malperformance more into account and finding ways to encourage abusers to mend their ways or leave the bench.

⁴⁴ There is a lengthy argument over internal and external control of investigative bodies as regards police performance; see Perez (1994). Despite the differences in the institutional mandates, much of it seems relevant for judiciaries as well.

of functions have no inherently logical placement, but they do have fairly specific requirements as regards those who execute them. If they are lodged in an external council, this must be a council with a strong identification with the institutional role; if they are inside the judiciary, they must, to the contrary, harbor a heavy dose of distance from the ordinary workings of the institution.⁴⁵

Size and level of effort are also considerations. Unlike selection, these additional functions are full-time, continuous tasks. They should not, as is often the case, be abandoned during the periodic selection processes, and though they can be supplemented with part-time advisers, they require a core group that is always there. In fact, they require several core groups, each with its own expertise—those who oversee and possibly run the training programs, the evaluators, and the judicial investigation unit. Members can (and probably should) be rotated into and out of these bodies, but their service on them should be full time.

It would appear that Latin American reformers have given little thought to these issues. Where a council exists, it often divides or even shares the functions with the Supreme Court. The initial distribution is usually arbitrary. Further rearrangements frequently result from institutional and political struggles, not an analysis of who does (or would do) what best. Where one organization holds multiple functions, it has an apparent leg up on coordination, but the advantage is often lost through the necessity of sequential attention to the various tasks. As a consequence, the potential for improving judicial performance has been largely unrealized.

Any escape from this situation is really dependent on a third, more critical function, one that has been the least adequately treated in the Latin American debate: that of overall organizational leadership or governance. The oversight is not so much the absence of the term—Latin Americans do talk about governance bodies or *órganos de gobierno*—but rather in the tendency to equate it with simple administrative management or occasionally with a political role in lobbying for judicial privileges and rights. That was probably an adequate definition for an old-style judiciary and polity. In the current era, judicial governance requires something much more dynamic.

Judicial Policy Making and System Oversight

When Latin Americans talk about judicial administration, they are normally referring to the performance of the normal housekeeping functions to ensure that institutional members have the resources to support their performance. The oversight body—whether a supreme court, council, or ministry—was expected to ensure that the resources flowed as intended. It also handled myriad decisions of detail—vacation hours, how to fill temporary vacancies, or where cuts or surpluses in the annual budget should lie. This in fact is how all judiciaries have traditionally conceived of this area, and it is another reason why they have accorded it so little importance. Were this all that was needed, the question of who should perform it would require the simplest of answers. The fundamental work must lie with professional administrators; the only remaining question is to whom

⁴⁵ In this context, Brazil is an interesting example. Its federal and state judiciaries use internal bodies (separate from the administrative council) to manage appointments and discipline. A few outside lawyers participate with selection processes, but discipline is an entirely internal matter. Monitoring and evaluation are for all intents and purposes ignored. The problem, as even judges admit, is that judges do not like to find fault with judges. As one state court judge noted, it is usually preferable to encourage a bad apple to leave the ranks as opposed to taking legal action against him. Unfortunately, not all bad apples take the encouragement, and as the public becomes aware of these problems, the judiciary's image is bound to suffer. The problem is hardly unique to the judiciary. It has long been noted in the context of self-policing by doctors and lawyers and more recently by auditors and the Catholic Church.

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they should report. Here it is hard to argue that this should be anyone but the judiciary itself. Where even supreme court management has been criticized for being too far removed from the day-to-day concerns of judges, it is hard to imagine that a body composed of nonjudges could do a better job. The ideal might be an internal council, like that of Costa Rica, or the U.S. Judicial Conference, one that can most directly represent the judges' needs and demands to the administrative staff. Judicial management of its own administrative affairs does not mean a lack of external oversight. Much as judges (or councils) may resist it, the judiciary should be subject to the same accounting, auditing, and other responsibilities as any other public office.

There is another aspect of administration, which has become more important for all judiciaries in the current era. Contrary to conventional expectations, these are not stable systems. The traditional role of the judiciary is increasingly being questioned, and even when courts hew to it, the conditions under which it is exercised are themselves changing rapidly. Given the changes in the quantity and quality of the demand for its services, business as usual is no longer a practical goal. Judiciaries are being called upon to anticipate new requirements and to reorganize their internal processes and even their traditional responsibilities in the context of rapidly evolving societal needs. Many of the decisions are political ones and will require the consent and cooperation of other actors. However, if the judiciary does not take the lead, it may find itself tasked with an impossible mandate.

To take this lead requires skills and perspectives normally not associated with courts, or for that matter with ministries of justice, and certainly not contemplated in the usual vision of the councils' role. They are, however, the crux of institutional leadership in the present era. Whichever entity assumes them will require both an understanding of the judicial perspective and an ability to place it within a larger context. What we are talking about is judicial governance, not in the sense of simply administering a static system but rather of planning and shaping its responses to a rapidly changing external environment. Whatever body holds this role should also set the standards for human resource management. It may not carry out the functions directly, but defining basic policy in this area is as much a part of governance as deciding on service distribution or budgetary allocations. In fact, for an organization so dependent on its human capital, it may be more important.

On a worldwide basis, few judicial systems have adopted this new stance. Thus it is hardly surprising that most Latin American supreme courts and councils have not done so either. Despite the introduction of reform programs with generous national and international funding, most are still in the housekeeping mode of administration, allocating the new monies to cover a shopping list of needs without much thought as to how this will affect the quality of their performance. Expenditures may be justified as performance enhancing, but it is evident that little analysis lies behind the equation. In some instances, the new emphasis on independence is itself a disincentive, interpreted as reducing requirements for extra-institutional consultation and accountability. The following examples are suggestive of the situation. Although they single out a few countries, comparable evidence could be presented for all the others:

- The El Salvadoran judiciary has proposed a major information technology investment as a means of reducing backlogs and delays. Court statistics indicate an average annual workload of roughly 200 new and 400 pending cases per trial judge—though computerizing the courts may serve many purposes, this hardly seems justified by the level of work alone.

- Peru recently doubled the salaries of its judges, claiming this was needed to attract good candidates. A market survey (which was not done) would reveal, inter alia, a large number of lawyers either without work or holding other jobs that pay far less. Peru's Judicial Council is also preparing to replace 1,800 "provisional" judges and prosecutors (the roughly 80 percent of the professional staff hired under irregular procedures during the "reform" period). However, because many provisional appointees occupy positions defined as temporary or provisional, there is no indication that all need to be replaced.
- Argentina's National (that is, federal) Courts in Buenos Aires have for years been near physical collapse because of the quantity of case files stored in the judicial offices. This has led to a series of proposals for the construction of new courts or a "judicial city." An alternative idea, which has not been explored, is the enlargement of the judicial archives and the possible creation of another set of archives for inactive, but not retired, cases. It would be less costly, facilitate the processing of active cases, and also allow reductions in the small army of staff required to manage the thousands of case files stored in each courtroom.
- Mexico's federal courts have invested heavily in automation but still retain the traditional 30-person courtroom staffing. Though admitting that computerization has made their presence less necessary, the administrative officers are looking for "other useful things they might do in the courtrooms."

As these examples suggest, judicial governance as strategic planning and agenda setting remains a highly underdeveloped skill in Latin America, irrespective of where it is formally exercised. A critical step, as in the case of ordinary administrative housekeeping, will be the addition of technical staff to support it. Without this specialized expertise, no governing body will be up to the task. The ad hoc quality of the proposals listed above can be most directly blamed on an inadequate diagnosis of problems and a very limited search for solutions. A Salvadoran judge might not be expected to know that 200 cases is not an unreasonable workload; an expert in judicial planning with some comparative experience would already be looking for additional explanations as to why the judges cannot process them in a timely fashion.

Still, the technical staff is there to analyze, diagnose, and provide alternative remedies for another body that must make the ultimate decisions. The bigger question is how that body itself should be composed and where it should be located. Here the answer lies not just in managerial competence—which, as noted above, can be inserted in some of the most irregular fashions—but also in the degree of independence and accountability a society wishes to see embodied in its judicial organization. Even within Latin America, the final decisions may vary considerably. Given their histories, it is unlikely that any of the region's countries will opt for a larger role for a ministry of justice or another executive agency. Peru's failed experiment with its executive-dominated reform commission provides further evidence of the dangers of that route.⁴⁶ As regards placement, the current options are again the Supreme Court itself or an external council, but once more with some further qualifications. A council largely composed of external members (for example, Argentina, Peru, Bolivia, Ecuador, or El Salvador) hardly seems appropriate, both because of its lack of familiarity with the judicial situation and the difficulty of the judiciary's accepting its leadership. One with a large judicial component, or with members representing the judiciary (even if not actively serving in it) might have more chance

⁴⁶ Hammergren (2000); Lawyers Committee for Human Rights (2000).

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of success on both counts. However, where judicial members predominate (Brazil, Costa Rica, Mexico), there is also a danger of a guild approach—policies intended to please judges but not aimed at improving services to society writ large.

A more practical answer may lie outside the apparently dichotomous alternatives. The European solution has been to split the responsibilities among several bodies. In Spain, they include a ministry, central council, regional councils, and the courts themselves. As one Spanish observer notes,⁴⁷ the arrangement has distinct drawbacks as regards its ability to produce efficient operations and coordinated policy. With its origins in macro-institutional battles (complicated in Spain by the issue of regionalism), it also threatens to leave the ordinary judge and the citizen-user out of the equation. Latin American countries that have split functions between a council and the courts have attracted similar complaints. These vertical divisions may incorporate more diverse views and combat some forms of insularity. They do not resolve the underlying problem of producing unified policy while adequately reconciling the interests of organizational leadership, ordinary members, and clients.

Fortunately, there are ways to recognize a diversity of interests short of dividing the policy-making function. For example, an internal council or judicially dominated body might be advised by a citizen board or subject to citizen review of its policies and achievements. Still more effective, where it is possible (still not the case in Latin America), is monitoring by nongovernmental organizations, research institutions, and professional associations with an interest in judicial performance. This latter alternative can have far greater effects than the often symbolic addition of a few external representatives to an internal governance body or a council entirely composed of nonjudges. The problem, in short, goes beyond the composition of the governance body to the attitudes and interests it embodies. Councils and courts can be equally insular in their outlooks, and membership is only part of the remedy.

There is another aspect of governance often overlooked in this quest for the perfect central body. This is the tendency for an excess of central control, which serves neither judicial nor citizen interests well. Ideally, the central organ should set high-level policy but let decentralized courts or judicially dominated councils do more of the implementation (as in Argentina and Colombia). More detailed oversight of certain common functions (like administrative housekeeping or training, evaluation, and monitoring) could also be delegated to judicial commissions or committees staffed by judges from different geographic units and levels in the hierarchy. Latin America's supreme courts and councils have both been criticized for absorbing too many of these mundane decisions, thereby complicating their own work and reducing intrasystem flexibility. A situation like that in Peru would appear undesirable. Here a central administrative office, accountable to the Supreme Court, draws up and executes a single, systemwide budget, sets personnel levels, and even contracts administrative staff and services for the entire judiciary. Functions like evaluation and discipline, where flexibility might be abused, would be less appropriate for decentralized execution, but might lend themselves to implementation by a representative central committee.

Governance is thus complicated. To the extent that policy making and certain standardized activities can be separated from those where adjustment to local circumstances seems best, even an external council may be able to provide leadership. However, supreme courts and many councils as currently organized appear uniquely unsuited for this role because of their size, collegial decision-

⁴⁷ López Guerra (1997, 31).

making style, and lack of managerial outlook. The creation of a smaller policy-making body as part of either one might resolve the first two problems, and, depending on how the members are selected, might also take care of the third—Costa Rica’s internal council or Colombia’s administrative section of its judicial council are two examples. Of course, if the parent body has no members with managerial skills, the third problem remains. Like the selection body, a governance council is a political creation, but its ideal technical profile is different. The former must embody the interests a society deems relevant for selecting judges; the latter must be more identifiable as a judicial leader and, at the same time, include a very specific set of management skills.

This said, one external council that has made a positive difference is that of Colombia, which oversees both selection and administration. It has taken the Colombian council years to get this far, however, and its administrative councillors are elected by and are often former members of the judicial bodies they oversee. Colombia’s council, if it continues to develop in this direction, may eventually have the real as well as titular leadership of the sector. In this sense, it may have far more claim to the title of governing body for the judiciary than any one of the European councils. Its success also draws on Colombians’ far greater tolerance for judicial self-sufficiency. The administrative section of Colombia’s council is a body for the most part chosen and run by judges. For various reasons, many of Colombia’s neighbors would not find this a satisfactory formula. Perhaps the other saving grace for Colombia is that the same reforms that created the council also transferred judicial review powers outside the ordinary court system. Because those powers created the most frequent clashes with political society, their placement in the separate Constitutional Court may give the ordinary judiciary more time to develop its own institutional identity.

Nevertheless, the most important virtue of Colombia’s council—and a common thread among the other successful examples—is its members’ apparent identification with a common institutional role emphasizing proactive management and an ability to reconcile judicial interests with wider societal demands. As good managers, members have been able to focus on high-level policy and delegate a good deal of day-to-day implementation to the court districts. They have also been increasingly willing to address policy to resolve societal complaints, rather than just exercising their authority or augmenting judicial benefits. During its early years, Colombia’s council was markedly less successful in both areas. It remains to be seen whether its current performance is merely fortuitous or represents a permanent change in institutional outlook.

In remarks to a recent seminar jointly sponsored by the World Bank and the U.S. Agency for International Development, a consultant working in another region⁴⁸ noted that most judiciaries in the developing world still have not experienced the management revolution—the shift to a recognition of leadership’s role in shaping overall judicial performance. Until whoever is responsible for judicial governance makes that shift, their organizational location will make little difference. The final question is thus how to encourage this change, for though there is no obvious answer, it really lies at the heart of successful institutional reform.

⁴⁸ John Blackton, formerly of Amideast, speaking of his experience with a project financed by the U.S. Agency for International Development in Egypt (World Bank, September 20, 2001).

TOWARD A MANAGEABLE MANDATE

The above comments are directed at the councils' potential role in performing three necessary functions. As must be clear to the reader, many councils have run into problems of a more mundane type:

- They are beset by disruptive internal battles.
- They are sidetracked by conflicts with the Supreme Court.
- They simply do not seem able to organize themselves to do their assigned tasks.

An improved design as regards composition, means of selection, and choice of functions might avoid some of these setbacks. The fact that they are so widespread, and apparently fairly independent of the council's size, membership, or other organizational details, suggests a need for more direct action. It does appear that conflicts are most common in councils holding more functions. That is logical as regards relations with the Supreme Court and may also give members more to fight over internally. However, inactivity seems independent even of the breadth of mandate, and where a broader mandate is desirable, the risks of conflicts or inactivity cannot be permitted to foreclose that option. In short, if the councils are to perform their functions well, they must first recognize that their value lies in their performance. Institutions matter, but results matter even more.

Whatever the relationship among breadth of mandate, internal conflicts, and organizational inertia, it might be wiser to start with a less ambitious set of tasks—the selection process and training as opposed to evaluation, discipline, policy making, or administration. Although training might logically lie with the other evaluation and monitoring functions, the additional requirements for running a school or program also argue for its placement outside the court system. In any case, that is where it has often been located, apparently with no additional negative effects.⁴⁹ Selection and training are easier to organize and more completely under the council's control. In other areas, the conflicts are not always initiated by the council. An uncooperative court can be a very effective hindrance to the council's advancing its work.

Once the council is guaranteed a manageable mandate, it would also be advisable to add further assurances that it will fulfill the mandate. Here countries may want to reconsider giving the council the same kinds of immunity and independence enjoyed by the ordinary judiciary. In other words, councils that do not perform should be subject to recall—failure to perform, measured against their success in setting up and implementing a selection process, as well as following procedures dictated in their enabling laws, should be easily determined. There should be prior agreement on reasonable time limits, but there is also no reason for tolerating (as has happened in several cases) delays of several years in producing a list of candidates or appointments. Nor should a last-minute delivery of a list produced in an irregular fashion be permitted.

This does raise obvious problems for councils chaired by a chief justice or dominated by the judiciary. It is pretty hard to fire a supreme court president or even an ordinary judge, albeit from a secondary position. However, their presence on a nominating council, at least as more than an

⁴⁹ The most frequent problem with training is its irrelevance, but that vice is common to both court- and council-run programs. Conceivably a council, with little else on its plate, might have more time to grapple with this issue. It will have to coordinate with the judiciary to ensure it serves a useful role, but to date, even training programs run by the courts have done fairly poorly on that count.

observer or nonvoting member, is far less necessary (in some cases less desirable) than is their presence on councils with additional functions. Thus, the Salvadoran model (another example of a modest success) is worth considering. A council that only qualifies candidates and runs a training program does not need active judicial membership. In fact, there are convincing arguments for excluding it.

It is somewhat perplexing that the two best examples of councils in action are so different in their composition and mandates—but to the extent form should follow function, this is not all that illogical. It also is indicative of the different starting points for the two councils and their respective judiciaries. Colombia, for all its problems, had a fairly respected, professional judiciary, especially—and unusually—at the higher levels. It also had a long history of demands for more rational judicial organization and operations. It was used to having judges selected by judges, and thus what it really needed, and may finally be getting, was a group of judicial leaders who understood planning and administration. El Salvador, conversely, has had a judiciary hardly distinguished by its professionalism and more known for its politicization and venality. Things are changing, but Salvadorans are still unlikely to let the judges, even ex-judges, choose their own colleagues. Still, given a relatively low level of management skills in the public sector, it may only be asking for trouble to let the council take on administrative functions as well. Returning to the final theme addressed in the preceding section—the introduction of a managerial outlook—we can at least be certain that it cannot be inserted by fiat.

CONCLUSIONS: THE IMPORTANCE OF JUDICIAL INSTITUTIONALIZATION AND GOVERNANCE

Judicial councils are another tool in the reformer's repertoire. They come in many shapes and sizes, and their utility depends on how well they are selected and organized for the tasks and the situation at hand. The main advantage of the council is that it alters the political landscape; this may also be the advantage for the Venezuelans in eliminating their council 30 years after its creation. The addition (or elimination) of a council shakes up vested interests obstructing change and may give reformers a small opportunity to alter some other basic equations. However, councils' success in the end depends on the same things on which all other reforms depend:

- a good diagnosis of the problems to be resolved,
- the selection of appropriate solutions, and
- skill in implementing and overcoming opposition to change.

Where councils have proved disappointing, it is usually because they have not been used appropriately for the last condition, and because the first two were missing. One common feature throughout the region is the failure to admit that the underlying problem is inadequate judicial institutionalization, not too little independence. Councils can be used to address both problems, but they do this in different ways. In this regard, the Latin American experience probably holds more lessons for other developing regions than does that of Europe. Europeans believed they had satisfactory judiciaries, but had decided they wanted courts with more independence from the other branches of government. Their continued tinkering with their councils remains a question of getting that balance right. Latin American courts were either too little or too perversely institutionalized to

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make greater independence a feasible or desirable goal. This has not reduced rhetorical calls for more autonomy. However, the reliance on councils suggests that, on some level, Latin Americans really did not want their courts as currently constructed to be more independent. The challenge here is to shape the judicial institution itself, and thus the functions allocated to the councils have been far more varied.

Of the three critical tasks—judicial selection, overseeing judicial performance, and overall policy making and implementation—the first is most naturally suited for an external council. This does not eliminate further debates over the interests and groups to be represented on that body, but these are inherently political issues and probably best treated as such. By insisting on transparent standards for judicial selection, political society can reduce, but not eliminate, the effects of partisan and vested interests. They can demand competent judges first and let the additional criteria enter only at the second level. Obviously, as in Colombia, Costa Rica, and Mexico (or France and Italy), a judicially dominated group can play this role. However, the acceptability of this formulation really depends on a society's tolerance for judicial corporativism and also on the judiciary's ability to recognize other interests. When judicially dominated selection becomes too inward looking, it can provoke an internal (France) or external (Italy) backlash.

The other two functions present more complex dilemmas. They encompass short- and long-term choices about the judiciary's placement within the broader political system and specifically as regards the ideal levels of judicial independence and accountability, individually and collectively. At present, Latin American judiciaries fall short on all counts, but largely because of incomplete and imperfect institutionalization. Logically, one might equate the delegation of functions to a council with an accountability-based strategy and delegation to supreme courts with a preference for increased independence as the shortcut to improved institutionalization. However, this presumes the designers had their goals clearly in mind and picked their strategies accordingly. As we have seen, there are reasons to question that assumption. Courts remained in control where they were strong enough, or the opposition sufficiently disorganized, to impede the shift to a council. Councils were preferred by reformers because they were different, modern, and “had worked” in Europe.

Real life is not always logical, and the emerging contrasts among Mexico, Costa Rica, Colombia, and Bolivia, to cite just a few examples, suggest that generalizations about outcomes will be hard to reach. Mexico's council may be among the most efficient, but it bases policy on a very narrow perspective and one that seems to privilege judicial interests above any others. Costa Rica's internal councils face some of the same criticisms, but their members, and the judiciary as a whole, seem more attuned to the need to address external demands. In Colombia, for whatever reason and despite its strong judicial identification, the council appears to have taken a broader view and to be attempting to respond to some very strong social criticisms. However, Bolivia's less judicially oriented council has been a disaster, from the standpoint of both society and the judiciary itself. At this moment, Bolivians who are aware of the problem would probably opt for a return to Supreme Court performance of all council duties. Ironically, the Bolivians thought they were modeling their council on the Colombian example, but its operations have deviated even more than its form from the latter.

Latin Americans have privileged judicial selection as the key to improving institutional performance. In their current situation, the approach seems incomplete, and the reliance on the council model thus extremely shortsighted. As has been discussed here, there are a number of more important issues to be resolved, for which a council may not be the best remedy. The council model

does appear to offer advantages in choosing judges, although it is hardly a fail-safe mechanism. The development of a better governance mechanism and a means of overseeing judicial performance, and their embodiment in the Supreme Court or the council, are more complicated and hinge first on more basic decisions as to what societies expect of their judiciaries. Here efficacy depends less on where the functions are lodged than how they are defined, how success in their exercise will be determined, and what kinds of accountability will be required. It also depends on effective external pressures, as exercised by other governmental and societal groups. The real difference between a Colombia and a Bolivia, or a Mexico and a Costa Rica, may lie as much in what occurs outside the governing body as what takes place within it. However, that is a much bigger challenge for judicial reformers.

The answers become particularly difficult when the judiciary itself is in a process of change. Possibly, under these conditions, it is wiser to let governance remain wherever it has been traditionally located in the hopes that the reform process itself will engender new ideas and outlooks among the public and among the judges. If the current location actively obstructs reform, some transfer may have to be effected. But, as Bolivia's case shows, a transfer can change the protagonists without resolving the conflicts. Where a modern notion of judicial governance—as the proactive management of judicial services to meet society's changing demands while protecting the institution's independent identity—does not yet exist, the ultimate question is how to develop it.

Creating a judicial council offers no shortcut to this considerably more difficult task. The real danger is that it could provide an illusory solution or provoke additional conflicts that might further delay giving attention to the more critical issues. Here the European and Latin American experiences coincide on one essential point: the role of the modern judiciary and its insertion into the surrounding political system still constitute an unresolved conundrum. How judges will be selected is only a part of the problem. The larger issues—those of internal and external independence and accountability or, broadly speaking, judicial governance—are far more complicated, and the alternative solutions are less adequately defined and understood. Once a society reaches some initial determinations here, an appropriately designed council may be a logical means of implementing them. A council designed and introduced without these preliminary decisions may postpone or even distort their eventual resolution.

APPENDIX A: THE SALVADORAN JUDICIAL COUNCIL

The Salvadoran judicial council dates back to 1983 and has undergone substantial changes since it was introduced. It was not actually created until 1989, by which time the Supreme Court had successfully lobbied for modifications to guarantee that it would dominate the body. Court domination meant that the selection of judges continued much as it had occurred under direct court management—partisan and personal criteria reigned. Judicial performance was also unchanged, leading to escalating complaints of incompetence, bias, and corruption. The worst problems involved the justices of the peace, whose main function seemed to be getting out the vote for national elections. It can be argued that the Supreme Court justices, along with the justices of the peace, were the two most critical judicial actors in the mechanisms for party competition—at the upper level they assured friendly judgments, and at the lower they mobilized voters.

When the Peace Accords were signed in 1992, general displeasure with the old system motivated a series of changes. These were also inspired by opinions issued by the Truth Commission, which went so far as to recommend the removal of the entire Supreme Court. This recommendation was not heeded, but the reshaping of the council can be seen as a response to curtailed court power. The new council had a minority of judicial members. Its eleven members included two lawyers (not judges) proposed by the court, three practicing lawyers chosen by the bar associations, one law professor from the public universities, two law professors from private universities, one appellate judge, one first instance judge, and one representative from the Public Ministry. The various bodies represented (including the Supreme Court) submitted lists to the Assembly, which made the final selections. The new council took office in 1993 and continued to function in this form until 1999, when the Assembly again changed its composition, to six members, none of them representing the judiciary.

The council's main work under all three schemes has been the preselection of judges (for final selection by the Assembly or the Supreme Court), the running of a judicial school, and the evaluation of judicial performance. Disciplinary and dismissal powers remained with the court. Under the court-dominated council, many of the problems of the past remained untouched—especially as regards the partisan selection of candidates. The second council did far better, although its merit criteria and evaluation programs left much to be desired. There were also internal problems—questions as to the use of funds to purchase buildings for the school, patronage in the selection of staff, and a certain tendency to inertia. Councillors, who had full-time appointments, seemed to spend a good part of that time on outside work.

The 1999 reforms were partly a reaction to these flaws, but they also had a partisan cast. The old council was simply seen as too cozy with a court dominated by members associated with the conservative parties and the old establishment. Nonetheless, under the second and third versions, the council has advanced in its principal responsibilities. It has vetted and provided the lists of candidates to the Assembly and the court in a timely fashion and according to the legally mandated rules, and it has managed to maintain—albeit with considerable outside help—a massive training program. If the accomplishments have been largely logistical, they still merit recognition in a country whose entire judicial system used to operate in the most informal and irregular fashion.

To say the council has been successful in its work is not to imply that further improvements are not needed both in its operations and those of the judiciary. Modifications in the sectors' legal and organizational framework, the council's improvements in appointments and training, the enhanced

judicial budget, and massive donor investments in institutional strengthening and modernization have created a capacity for improved performance. However, the sector remains both inefficient and ineffective, and public opinion polls continue to demonstrate a lack of faith in its honesty and fairness.

APPENDIX B: THE PERUVIAN JUDICIAL COUNCIL

As one of the earliest Latin American councils, the Peruvian Judicial Council has undergone the most complex development. The first council (the Consejo Nacional de Justicia) was established by the military government, which took control of the country in 1968. When the military found that the justices would not endorse its policies, it sacked them and installed a council to select judges, run the judicial career, and carry out a judicial reform. To help in the process, the military also introduced decentralized councils, which were to carry out these tasks within Peru's 24 judicial districts.

Under the 1979 Constitution, the council was renamed (Consejo Nacional de la Magistratura), and its powers were reduced to preselection of candidates to the Supreme and Superior courts for final selection by the Ministry of Justice (subject to legislative ratification for the Supreme Court). District councils preselected trial judges. With the creation of an independent Public Ministry (for prosecution), the council's powers were also extended to preselection of its officials. Under this second formulation, the National Council was presided by the Fiscal de la Nación (head of the Public Ministry) and included two representatives from the court, one each from the Lima and national bar associations, and two from the nation's law schools. Members were elected every three years by the organizations they represented. The district councils had a similar composition, headed by the senior *fiscal* (member of the Public Ministry) in each district and including the two most senior judges and two representatives from the local bar.

When President Alberto Fujimori staged his *auto-golpe* (institutional coup) in 1992, he shut down the council. A subsequent purge of judges and *fiscales* was thus conducted by a newly selected Supreme Court and the upper levels of the Public Ministry. The 1993 Constitution reintroduced the body, this time composed of one representative each elected by the court, the Public Ministry, the bar associations, and the public and private universities, and two representatives of other professional associations. The way was left open for the addition of representatives from business and labor associations. District councils disappeared, and national members serve for five years. The council was not created until 1995 and did not begin its activities until 1996. A clash with the executive-dominated judicial reform commission brought the curtailment of its powers and the resignation of most of its members. The council only resumed its full functions in 2001, after the fall of the Fujimori government.

The procedures used by the various councils to select their lists of candidates have varied over time. The only constant factor has been a general public dissatisfaction with the results. Until 1991 (with the issuance of a new Organic Law for the Judiciary), all that was stipulated was a *concurso de méritos*, in effect a comparison of curricula, and a personal evaluation. The results of the process suggest it left substantial room for personal connections and recommendations, especially from the executive. After 1991, written and oral examinations were added, and after 1993, an entry-level course conducted by the Judicial School (which was not under the council or the court's direction,

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but retained a semiautonomous status) was required. However, from 1997 to 2001, the executive reformers circumvented the council and made their own provisional and temporary appointments. The current council, like its predecessors, is also responsible for periodic (every seven years) ratifications of the seated bench. Though its criteria remain unclear, it has been active in removing those judges and fiscales believed to have indulged in abuses of office under the Fujimori regime. This is the first time since its introduction that the formal ratification process has been conducted so energetically.ⁱ

Aside from their own weaknesses, Peru's councils have also been impeded by the Supreme Court's imperfect exercise of its own responsibilities for judicial governance. The council fills the positions the judiciary requires. The judiciary so far lacks any ability for or interest in more proactive human resource planning. Its solution for all problems is the traditional higher budgets to allow larger salaries and more judges. The current council has shown some interest in gathering public input on candidates and seated judges, but otherwise its criteria for selection and ratification remain highly academic. Many observers also believe it has become highly politicized and that partisan identification now figures among its selection criteria.

The independent status of the Judicial School is also problematic. It responds neither to the Supreme Court nor the council in defining the content of its programs or its criteria for evaluating participants. As currently constituted, none of the three bodies shows much aptitude for proactive management or for taking a new look at judicial performance. Relations among and within them appear to be cordial. But given the high level of popular discontent with the judiciary and other sector institutions, one might almost welcome more discord as a first step toward a radical departure from an unsatisfactory status quo.

APPENDIX C: THE MEXICAN JUDICIAL COUNCIL

The Mexican Federal Council is a product of the 1994 reforms, which simultaneously reduced the size of the Supreme Court, replaced all its members, and eliminated their permanent appointments in favor of fifteen-year terms (with staggered replacement). The council's size and composition (the Supreme Court president, three other judges, and three outside members) has remained constant. However, constitutional reforms promoted by the chief justice and entering into effect in 1999 have given him more control over its workings. This is because it is now the court, and in effect the president, who chooses the judicial members. Formerly they were chosen by lottery (*insaculación*) from among all judges. This has in effect turned the council into a court-dominated body, with the added benefit of some outside views.

The Mexican council is among the most powerful of the region's bodies. Like the Argentine, Bolivian, Colombian, and Ecuadorian councils, it manages systemwide affairs, but it does so with a minimum of formal and informal delegation to lower level courts. This is possible because of the small size of the Mexican federal judiciary (less than 1,000 judges); its greater uniformity (the great variations in Mexico are at the state-court level); and its generous budget, which has allowed it to invest in information and communication equipment to track systemwide events. The Mexican

ⁱ Both the civilian government entering in 1980, and the post-*auto-golpe* Fujimori administration conducted "special" ratifications. These removed a large number of judges, but most observers conclude that political criteria played too large a role.

council is responsible for selecting lower level judges and all support staff; for training, performance, evaluation, and discipline; and for all financial and administrative management and policy. Its domination by the Supreme Court, and the latter's enhanced judicial review powers, also give it enormous political clout. With the opening of the political system and the elimination of the Party of the Institutionalized Revolution's (PRI's)ⁱⁱ monopolistic control, governments increasingly must turn to the courts to resolve conflicts. Because the current Supreme Court was selected by the last PRI administration, it owes no favors to the new government, and in any case it seems quite willing to take its own stands on cases brought before it.

The 1994 reforms also introduced a true judicial career at the federal level. Judges are to be chosen by competitive examination, and once they pass a probationary period, they receive permanent tenure. They still rely on the council for their postings and any promotions. The council has been slow to install the new mechanisms and was recently criticized for appointing 40 judges without benefit of examinations. It and the Supreme Court, under its current president, nonetheless have an expansionary vision for the federal judiciary, attempting to introduce a constitutionally reserved earmark of 4 percent of the national budget, and to alter the amparo law (their major source of business, a review of governmental decisions allegedly violating constitutional rights, and extended to a review of state court rulings). It has also spent funds, and is seeking more, to increase the number of judges, add modern technology, and build infrastructure.

The Mexican council is without doubt the leader of the federal judiciary. It has also been criticized for its corporatist outlook, its isolation from new political trends, and its possible infringement on the independence of individual judges. Observers question its expansionary policies, its infringement on state court autonomy (via efforts to expand the use of amparos), and the sheer costs it poses for the nation. Because so much depends on the character of the chief justice, and the willingness of the rest of the Supreme Court to comply with his wishes, things might change once his term ends in two years.

APPENDIX D: THE COLOMBIAN JUDICIAL COUNCIL

The present Colombian council, the Consejo Superior de la Judicatura, was created as part of a broader judicial reform enacted under the 1991 Constitution. The reform was intended to resolve long-standing complaints about Colombia's justice system, most notably its inability to deal with escalating criminal and political violence. However, the reform in some sense was also the politicians' chance to tame a judicial branch that had stymied prior efforts to enact these and other reforms. The Supreme Court, exercising its judicial review powers, again and again had declared such efforts unconstitutional and had nearly prevented the calling of a Constituent Assembly as well.

Thus, in an apparent effort to curb the Supreme Court's autonomous powers, the Assembly divided its functions among several bodies. Criminal investigation went to a new Fiscalía as part of a shift to more accusatory proceedings, much of the judicial review function went to a separate

ⁱⁱ The PRI held effective control of all branches of government in Mexico for 70 years. The current president, Vicente Fox Quesada, is the first non-PRI head of state since the party's creation in 1929, but he also governs without a legislative majority. This means Mexico's former practice of resolving legal problems with a constitutional amendment (there have been more than 300 since 1917) will no longer be so easy, and the Supreme Court's political role will consequently be enhanced.

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Constitutional Tribunal (the members of which no longer enjoyed permanent tenure or the ability to select their replacements), and governing powers, only recently wrested from the Ministry of Justice, were given to a separate, newly created Judicial Council. Although the judiciary (Supreme Court and district courts) retained “*cooptación*,” the ability to name their own members and lower ranking judges, they were now to be bound by lists created by the council, which also controls the rest of the personnel system (including the prequalification of the massive—14,000-member—administrative staff, and the direct appointment of those in the central administrative system).

The council comprises two divisions, a six-member administrative panel that manages the preselection of judges and administrative staff, sets general policy, supervises the judicial school, approves the budget, and supervises its execution; and a seven-member disciplinary panel. Both bodies handle these functions for the ordinary court system and for the small body of administrative judges (headed by their own Council of State). Appointments are for eight years and are nonrenewable. Though members may not serve concurrently on the bodies they represent, many of them are former judges. This is especially true of the administrative panel, whose members are chosen by the Supreme Court (2 members), Constitutional Court (1), and Council of State (3). Members of the disciplinary panel are chosen by the Congress from lists submitted by the executive.

The functions and organization of the council have not varied since its creation, but it has taken its members considerable time to work into them. During the first eight years, the council made little significant progress in any of the areas. Judges complained that appointments and promotions continued to be nontransparent and politically motivated. The judicial school, which united a school run by the courts with another run by the Ministry of Justice, was still without a coherent curriculum; the administrative system was criticized for its enormous size and inefficiency; and most important, there was no notable change in the judiciary’s ability to keep up with its enormous caseload and backlog.

By the ends of their terms, the first councillors were beginning to consider policies to fight delay and court congestion, but it is only after 2000 that the council’s role in making institutional policy appears to have been assumed. It remains to be seen whether this change for the better is linked only to the current incumbents or whether they can transfer their vision to whoever follows them in office. Colombia has the advantage of nearly two decades of policy-oriented research on judicial performance, a management culture that appears to be infiltrating the judiciary, and a judicial cognizance of public displeasure with its actions. However, councillors are still chosen for their judgeliike qualities; hence, much depends on whether those choosing them also look for managerial skills and outlooks. In addition, continuing conflicts with the Supreme Court have kept alive proposals that the council be eliminated.

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