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**COLLECTED
ESSAYS ON
EXPANDING
ACCESS TO
JUSTICE**



Access to Justice in Latin America: A Changing Legal Landscape

Joan Vermeulen¹

Many of the countries of Latin America emerged into the 1980s, 1990s and 2000s from authoritarian governments or civil wars that had substantially curtailed fundamental human rights, due process and rule of law. Argentina, Uruguay, Chile, Brazil and Bolivia had military governments that undertook the extrajudicial suppression of political opinion through disappearances, imprisonment, torture and murder. El Salvador, Guatemala, Nicaragua and Peru went through bloody civil wars that resulted in numerous massacres, sexual violence, land seizures, and forced displacement. Colombia experienced what would become more than fifty years of civil war between various governments, right-wing paramilitaries and left-wing guerillas that is only now coming to a conclusion.

Throughout the period of the dictatorships and the civil wars, lawyers sought to respond to the abuses of government, seeking to free the imprisoned; locate those who had disappeared; protect those in rural areas who were being killed and forced from their lands; and support civil society organizations with similar objectives. Initially these lawyers came from the same political groupings as those under assault. Their undertakings grew out of their politics and not a belief in the ethical obligation of the legal profession to protect fundamental human rights and due process. In most cases, bar associations in these countries did not challenge the actions of government.

Today, Latin America has a strong tradition of human rights that grew out of this work. With financial support from outside the region organizations such as Centro de Estudios Legales y Sociales (CELS) in Argentina, Comisión Colombiana de Juristas and Dejusticia in Colombia, Conectas in Brazil, and Fundar in Mexico are global leaders in addressing human rights violations and have made the transition from challenging state-sponsored violations of human rights to addressing other broad issues of human rights, including socioeconomic, environmental and gender rights.

The end of military rule and civil wars opened up the societal space to look at the conditions in the legal structures that had allowed human rights violations to flourish. Martin Bohmer, a leader in the movement to reform legal education in Latin America has described the post military rule period in the Southern Cone as going through three stages. In the first, society had to come to terms with the past through the trials of human rights violators and truth commissions. The second stage was marked by the realization that human rights violations were linked to institutional failures and required constitutional and judicial measures to prevent future recurrences. Throughout Latin America new constitutions were written that sought to institutionalize measures to guarantee fundamental rights and rule of law. The final stage was marked by the recognition that constitutions, laws and international treaties with strong guarantees of social and human rights were not sufficient without enforcement. The idea of enforcement, which Bohmer says does not easily translate into Spanish², is critical because Latin America has historically had an uneven rule

¹ Founding Director, Vance Center for International Justice.

² There is no single word in Spanish for "enforcement." Several phrases get at the idea but lack the clarity and strength of the English word. Another word for which there is no single Spanish word is "accountability."

of law. As a result, in the 1990s lawyers in Latin America began to explore the possible utility of public interest law to advance justice and fundamental rights in the region.³

The practice of public interest law in Latin America was partly an outgrowth of the flow of young Latin American lawyers to the United States for further study. In addition to gaining an awareness of public interest litigation, these lawyers were introduced to clinical legal education and the Law and Development movement, a joint project of the U.S. Agency for International Development (USAID), the Ford Foundation, and professors from leading U.S. law schools, which posited the view that law reform could lead to social change; that law was in fact the prime engine of social change.⁴ Their return to Latin America was the start of a movement to transform legal education, incorporating constitutional interpretation, the case method, public interest law and clinical education into a curriculum that had for decades been focused solely on analysis of legal codes. New law schools were opened and law school faculties were increasingly composed of younger lawyers with training outside the region, taking the place of a generation of lawyers lost to the dictatorships. Early projects undertaken by the clinics involved issues such as consumer matters and the language rights of indigenous communities. The work done by legal service programs in the United States to address poverty both systemically and through individual representation was not part of the reform agenda in Latin America.

In the early 2000s there was a growing recognition by lawyers at non-governmental organizations (NGOs) and law school clinics of the need for more lawyers to engage in public interest and human rights matters. Lawyers in small and solo practices who had previously taken up human rights cases were not taking on individual representations to effectuate newly recognized rights or to provide assistance to the disadvantaged. Demand was way ahead of supply. Though many of the new constitutions recognized a right to counsel in both civil and criminal matters, implementation of this right was generally limited to criminal representation through public defender systems.

Given the history of the region, access to justice was seen as a critical component to support democratic government. It was understood to incorporate public confidence in the fairness, transparency and efficiency of the judicial system and the legal profession; in government policies that addressed social needs; and in public understanding of legal rights. Enforcement of rights guaranteed by statute and the constitution was necessary to sustain the larger democratic exercise.

Lawyers in Argentina and Chile were the first to take an interest in pro bono as a means of expanding the pool of available lawyers. Although corporate law firms in Latin America are concentrated in the capital cities and are smaller than their U.S. counterparts -- twenty to one hundred lawyer firms in most countries, with Brazil being the exception with five hundred lawyer firms -- they nonetheless provided a reservoir of potential recruits. Pro bono also offered the opportunity to encourage the idea of the legal profession's ethical responsibility to promote access to justice, and a way to engage bar associations in the reform of the legal structure. Over a five-year period interest in pro bono spread from the countries of the Southern Cone to Brazil, Colombia, Mexico and to a lesser extent other countries in the region.

³ Email from Martin Bohmer, Global Professor of Law, NYU Law in Buenos Aires to Joan Vermeulen, Director, Vance Center for International Justice (Nov. 1, 2000).

⁴ *Law and Development Movement*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAW/JUSTINST/0,,contentMDK:23103515~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html> (last visited May 15, 2016).

Overall pro bono has proved to be of limited value with regard to addressing the individual legal needs of the poor. Part of the problem lies in the political divisions of the previous century. Law firms were generally comfortable with the dictatorships; some had partners who held positions in the military governments. Non-governmental organizations were populated with staff and board members who had opposed the dictatorships. Although most bar associations as well as some of the larger NGOs in the region have established various types of pro bono programs, these have not had much of an impact in expanding the legal representation available to lower income people. Perhaps the most successful of these programs is Fundacion Pro Bono in Chile, a free standing NGO, which created a network of law firms, NGOs and government agencies to train volunteer lawyers to assist victims of domestic violence, locating clients through government agencies that provide social services to victims.

By contrast, in Brazil lawyers have been prohibited by the bar association which controls licensing of attorneys from engaging in pro bono work. The Brazilian constitution guarantees a right to counsel to all citizens which the state has realized through a “judicare” system under which the government pays lawyers a small stipend for legal assistance provided to the indigent. Brazil has thousands of solo practitioners whose livelihoods are dependent on these payments. As a result, pro bono is seen as creating unfair competition. Low-income clients are thus relegated to these lawyers many of whom are poorly trained and provide questionable assistance.

To address the unmet needs of low income individuals, countries throughout the region have relied increasingly on governments and law schools to provide this assistance. Law schools, having played a major role in interpreting the new constitutions, promoting public interest litigation, and developing clinical legal education, have been an important force for expanding access to justice.

In Colombia, law students are required to participate in the law schools’ legal aid clinics as part of the requirements for graduation. Before graduation, a year of working at legal aid is mandatory for admission to the bar. Students represent clients in minor cases of criminal, civil, labor, constitutional and administrative law.

Law schools in other countries, such as Argentina and Mexico, have set up clinical programs that offer counsel, although they are not part of the requirements for graduation. There are also collaborative networks between law school clinics and NGOs in Argentina such as those between CELS, a human rights organization, and the University of Buenos Aires Law School, and Asociación Civil por la Igualdad y la Justicia (ACIJ), a public interest NGO, and the University of Palermo Law School. Although these programs are small, they are nonetheless important steps in recognizing the role of law schools in addressing unmet legal need and preparing their graduates to handle these matters after graduation.

All governments in South America have public defender and legal aid programs but many are inadequately funded and none are able to meet existing need. Certain areas of need, particularly domestic violence, have received designated government funding to address previously neglected social problems. In Argentina, the Gender Unit at the National Public Defender Office receives government funding for thirty lawyers to work exclusively on providing legal representation to victims of gender violence. Recent legislation on Gender Violence and Access to Justice passed by the Federal Congress will expand these services significantly beginning in 2016. This program, which is in its fourth year of operation, is an outgrowth of an earlier initiative of the Argentine Supreme Court that began in 2004 to provide advice and referrals to victims of domestic violence.

Better recognition of the scale of the problem by the judiciary led to the establishment of direct representation by the Public Defender Office. Colombia has had a similar experience. In 2004, the country's Office of the Attorney General created a unit for intrafamily violence (Centro de Atención a Víctimas de Violencia Intrafamiliar) known as CAVIF.

Other instances of government programs are more scattered and localized. For example, in Buenos Aires both the Public Defender Office and the Public Ombudsman Office often intervene in cases of mass evictions and those of poor people occupying private or state-owned land. Both agencies also seek to raise awareness of tenants' rights.

If Latin American countries have generally given lower priority to providing access to justice for low income and indigent people, this is in some measure due to their recent history. Coming out of dictatorships and civil wars, the establishment of democracy and democratic institutions required changes in constitutions, and the judicial and the legal systems; the prosecution of human rights cases; and the dismantling of the remnants of authoritarianism.

What meaning we give to access to justice comes into play here. Is it primarily the provision of individual representation for the poor; or does it incorporate representation of NGOs, civil society organizations and individuals to advance the democratization of society, human rights and the reform of government institutions? In Latin America it has for the most part been the latter, done in large measure by legal NGOs.

All efforts to reform the legal systems in Latin America have been led from outside of the legal profession. The missing link in the reform effort and the key to addressing the access to justice needs broadly is the private bar and the bar associations.

Generally speaking, lawyers have a high degree of social standing in most Latin American countries, higher than that of most governments. Their engagement in legal reform and acceptance of their responsibility to promote access to justice could have a major impact on progress in these areas.

Pro bono was seen by those working on reform as a means to bring lawyers and bar associations into these efforts and to impress upon them their professional responsibility to improve the legal and judicial systems and expand access to justice.

In Peru, for example, lawyers are important social actors. Private lawyers there have used a special provision in the law to be special prosecutors, undertaking anti-corruption and public interest matters on behalf of NGOs. Given this background it was thought that pro bono could be promoted as a way to expand access to justice to incorporate the legal needs of the poor, but this did not prove to be the case.

Over the fifteen years that it has been developing in Latin America, pro bono has become linked with access to justice. Yet there is no clear idea either regionally or in individual countries as to how it should be integrated into existing legal aid, NGO, or law school clinical programs, and no clear commitment to addressing the legal needs of the poor and disadvantaged.

Pro bono has the potential to enable the private bar and bar associations to develop a sense of responsibility for expanding access to justice and establishing the relationships and entities needed to carry this out. The judiciary, the law schools and NGOs throughout the region have taken important steps, but the needs remain great and are not near to being met.

The interests of law firms continue to be in the area of political reform through litigation. Given the political divisions, both historical and current, throughout the region, this interest is often seen as suspect by NGOs. Lacking strong civil legal services programs in the region, the impetus to address the unmet legal needs of the poor is weak. The situation is not all that different from that in the United States before the 1970s, following which a collaboration between government and bar leaders led to a renewed focus on pro bono as an unused resource for addressing unmet legal needs. A similar change is possible in Latin America.

Leadership needs to come from the private bar working with government and the judiciary to acknowledge the societal need for greater access to justice; to encourage increased efforts by all parties to address this problem, particularly the need for individual representation; and to develop the relationships and mechanisms necessary for successful pro bono programs. Whether they are up to the challenge remains to be seen. •