

1988

Lawyers and the Rule of Law in the Western Hemisphere

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PERSPECTIVE

LAWYERS AND THE RULE OF LAW IN THE WESTERN HEMISPHERE

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Relations between the United States and Latin America are once again entering a historic phase. How the nations of the Americas handle issues such as the rule of law and the role of judges and lawyers in human rights, trade, immigration, narcotics traffic, security, and natural resources development will shape the future of nations in this hemisphere. Because all of these issues have strong legal content, attorneys in the United States and Latin America have a particular responsibility to address them cooperatively.

A history of conflict between north and south, widely varying intellectual and cultural traditions, and numerous differences between Anglo-American and Latin American legal systems, will test attorneys' abilities to work together. We hope in this article to point the way toward successful collaboration and to describe attorneys' unique role throughout the Americas.

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I. THE SHARED CONCERNS OF LAWYERS IN THE UNITED STATES AND LATIN AMERICA

It is extremely important to recognize the interdependent nature of relations between the United States and Latin American countries. Problems such as economic stagnation, narcotics production, breaches of the peace, demographic shifts, human rights violations, and environmental disruption are no longer, if they ever were, exclusively domestic matters. The international community has not yet developed mechanisms that successfully and effectively address these issues. Although human rights protection in several countries in Latin America has improved,¹ ideal international supervisory mechanisms have not been realized;² nor has the existing hemispheric machinery for peaceful resolution of conflicts and for collective security been successfully applied.³ International organi-

1. See INTER-AM. C.H.R. 137, OEA/ser. L./V/II.68, doc.8 rev. 1 (1985)[hereinafter INTER-AM. C.H.R. 1985] (observing improvements in human rights protections in Argentina and Uruguay). The report also observes some human rights improvements in El Salvador, Guatemala. *Id.* at 151, 158 & 165 respectively. See also INTER-AM. C.H.R., OEA/ser. L./V/II.74, doc.10 rev.1 (1988).

2. See Statute of the Inter-American Commission on Human Rights, *done* June 1960, *as amended* 1965, OEA/ser.L./V/II.26, doc.10 (1971) arts. 9, 9 (bis), and 10 (stating the Commission's functions and powers). The Commission is authorized to examine communications alleging human rights violations and to make recommendations to the appropriate states. *Id.* at art. 9 (bis). See also American Convention on Human Rights, *done* Nov. 22, 1969, O.A.S. T.S. No. 36, at 1, OEA/Ser. L./V/II.23, doc.21 rev.6, (1970), *reprinted in* 9 I.L.M. 673 (1970) (creating an enforcement relationship between the Inter-American Commission and the Inter-American Court of Human Rights); INTER-AM. C.H.R. 1985, *supra* note 1, at 6 (listing the states parties to the Convention as of 1985). *But see* Fox, *American Convention on Human Rights and Prospects for United States Ratification*, 3 HUM. RTS. 243, 272-74 (1973) (discussing the ratification problems and disputes concerning acceptance of compulsory jurisdiction of the Inter-American Court). See generally Grossman, *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, 1 AM. U.J. INT'L L. & POL. 35, 53-55 (1986) (recommending improved supervisory activities). Mechanisms to improve international supervision should include: (1) further studies by the Inter-American Commission addressing the human rights protections in all states members of the OAS; (2) providing model legislation to serve as guidelines to states; (3) systematization of the jurisprudence of the American Convention; (4) communication with governments and non-governmental organizations to get better access to information; and (5) strict monitoring of states through on-site visits. In addition, the General Assembly of the OAS should address specific situations of human rights violations, rather than simply address the human rights issues in a general fashion. *Id.* at 54-55.

3. See Puig, *Controlling Latin American Conflicts: Current Juridical Trends and Perspectives for the Future*, in CONTROLLING LATIN AMERICAN CONFLICTS: TEN APPROACHES 12-18 (Morris and Millan ed. 1983) (discussing existing law related to the resolution of conflicts among Latin American states); see *id.* at 16-17 (discussing the Inter-American Treaty on Reciprocal Assistance of 1947 and its function in checking aggression and imposing sanctions); see also Varas, *Controlling Conflict in South America: National Approaches*, *id.* at 71 (citing the 1981 conflict between Ecuador and Peru, and the 1982 Anglo-Argentine con-

zations have failed to address successfully such economic issues as regulation of multinational corporations, transfer of technology, foreign debt financing, protection of intellectual property, and free access to world markets.⁴ Environmental issues, such as deforestation and transborder air and water pollution, barely have been addressed.⁵

Attorneys in the United States and Latin America must face these pressing issues. Joint efforts would have the advantage of flexibility if initiated and conducted by lawyers. Lawyers are better able to debate the problems and not be hindered by protocol, publicity, or the posturing which often accompanies intergovernmental discussions. Above all, as influential persons in society in both the north and the south, lawyers can lay the foundation for a consensus that could elevate inter-American relations to new historic heights. Attorneys must be encouraged to join together to cooperate to solve common legal and social problems in the north and south and not be discouraged by complex legal jargon or cultural differences. Indeed, diversity may be the starting point for free exchange of novel approaches to old and vexing problems. We have much to learn from each other.

The first step towards achieving unrestrained cooperation is to initiate a dialogue between attorneys in the United States and Latin America. We must not assume that our shared respect for the rule of law and our professional concern for the rights and opportunities of our clients will somehow enable us to agree on what the problems are, much less their solutions. Our legal histories and political cultures are vastly different. While these differences can be overcome, we first must acknowledge them and realistically de-

flict as examples of the ineffectiveness of the existing dispute and conflict resolution mechanisms).

4. See SUPERVISORY MECHANISMS IN INTERNATIONAL ECONOMIC ORGANIZATIONS, (P. Van Dijk ed. 1984) (discussing the effectiveness of supervisory mechanisms for such organizations as the General Agreement on Tariffs and Trade (GATT), the United Nations Conference for Trade and Development (UNCTAD), the International Monetary Fund (IMF), and the World Bank).

5. See, e.g., Hague Academy of International Law, *Corpus of Principles and Rules Relative to the Protection of the Environment Against Transfrontier Pollution Established by the French-Speaking Section*, in TRANSFRONTIER POLLUTION & INTERNATIONAL LAW 27, 29 art. IV (1985) (listing the agreements of cooperation and the necessary measures to prevent transfrontier pollution) (original in French). See also Sand, *Environmental Law in the United Nations Environmental Programme*, in THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT 51-66 (Academie de Droit International 1984) (discussing the role of the United Nations Environmental Program (UNEP) in encouraging national legislation and administration of international pollution problems).

termine what they are. In short, we must educate one another before we can move in unison to attack common problems.

II. THE LEGAL SYSTEM AND JUDICIARY IN LATIN AMERICA

While there are differences among the Latin American legal systems,⁶ the United States lawyer views them as the product of the older, distinctively different civil law tradition.⁷ The most influential examples of this type of law are the 19th century French and German codes⁸ which ultimately owe their genius to Roman Emperor Justinian.⁹ In contrast, the Anglo-American legal tradition traces its origins to such Middle Age documents as the Domesday Book and Magna Carta.¹⁰

Latin American countries began to develop independent legal systems within the civil law tradition soon after their independence from Spain; this process continues today.¹¹ A comparative study of the many legal systems could occupy scholars for many years. A study of the legal systems of the Central American, South American, and English-speaking countries of the Caribbean would be time-consuming. The English-speaking Caribbean nations fall

6. H. CLAGETT, *ADMINISTRATION OF JUSTICE IN LATIN AMERICA* 11 (1952) (attributing the differences among the Latin American legal systems to internal factors in the individual countries). These factors include: degree of political freedom, particular problems affecting the country, the force of public opinion, and progressiveness in applying universal concepts to the domestic conditions. *Id.*

7. See J. MERRYMAN, *THE CIVIL LAW TRADITION* 1-2 (2d ed. 1985) (distinguishing between legal systems and traditions. Merryman defines "legal system[s]. . . as an operating set of legal institutions, procedures, and rules," while the legal tradition consists of "deeply rooted, historically conditioned attitudes about the nature of the law, about the role of the law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught.").

8. See *id.* at 29-34 (discussing the codification of law in the French and German legal systems).

9. M. GLENDON, M. GORDON, & C. OSAKWE, *COMPARATIVE LEGAL TRADITIONS* 40-42 (1985) [hereinafter *COMPARATIVE LEGAL TRADITIONS*] (tracing the sub-tradition of the Roman civil law from the Twelve Tables to the Emperor Justinian in the 6th century A.D.).

10. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 11-14, 22-25 (1948) (discussing the English tenurial revolution between 1066-1086 A.D. as evidenced by the Domesday Book and the origins of the Magna Carta, which was signed in 1215 A.D.).

11. See J. OPOLOT, *WORLD LEGAL TRADITIONS AND INSTITUTIONS* 14-15 (1981) (stating that by the time of emancipation, the civil law tradition was well-established in Latin America); see also R. SCHLESINGER, *COMPARATIVE LAW* 306-07 (1980) (noting that 19th and 20th century legal codes adopted in Latin American countries after emancipation continue the civil law tradition introduced by Spain and Portugal). But see *id.* at 307 (noting the influence that common law, as reflected in the United States Constitution, has had on Latin American legal systems).

more easily within the common law tradition, yet are certainly distinctive due to their varied customary underpinnings.¹²

Application of the law is more formal in civil law countries than it is under the United States system. Civil law judges tend to reach decisions by focusing more narrowly than their United States counterparts on whether the facts are covered by preexisting legal norms.¹³ This approach limits explicit resort to political, economic, or moral considerations which frequently figure in the decisions made by judges in the Anglo-American tradition. In short, law in civil law jurisdictions is seen as a deductive, self-contained science.¹⁴

The separation of powers doctrine has different overtones in civil law nations than it does in the United States constitutional scheme. The merging of legislative and executive functions in continental parliamentary and cabinet governments is well known in the United States. The judiciary in code-based systems, in theory, must not assume any law-making functions.¹⁵ The legislative branch prescribes the rules of law. Judges are expected to apply, rather than develop and interpret, the law.¹⁶ Still, as their colleagues in the United States, judges in Latin America can refuse to give effect to illegal acts of the executive or to certain unconstitutional laws.¹⁷ Latin American judges, however, are extremely reluc-

12. See J. OPOLOT, *supra* note 12, at 59 (crediting colonization with the transfer of the common law tradition to the English colonies of Jamaica, Bahamas, Barbados, and Trinidad); see also Patchett, *English Law in the West Indies*, in *LAW IN THE WEST INDIES* 3 (British Institute of International and Comparative Law Series 6th ed. 1966) (discussing the English common law tradition in the West Indies).

13. See COMPARATIVE LEGAL TRADITIONS, *supra* note 9, at 208 (stating that the civil law theory does not recognize the doctrine of *stare decisis*); J. MERRYMAN, *supra* note 7, at 37-38 (noting that the civil law judge's function in problem solving is to unite the facts with the corresponding legislative provisions).

14. See J. MERRYMAN, *supra* note 7, at 69 (stating that in an attempt at legal purity, legal scientists exclude data, insights, and social science theories as non-legal); see also *id.* at 70-71 (discussing the civil lawyer's reaction against the introduction into legal thought of considerations of concrete problems, intuition, application of non-legal materials, and the pursuit of socio-economic objectives).

15. See H. CLAGETT, *supra* note 6, at 11-20 (discussing the relation of the judiciary to other branches of the government, noting the fear of creating judge-made law); COMPARATIVE LEGAL TRADITIONS, *supra* note 9, at 193 (stating that the primary source of law in a code system is legislatively enacted law); *id.* at 208 (noting that the judiciary is often limited to deciding particular types of cases).

16. J. MERRYMAN, *supra* note 7, at 30. The denial of interpretive functions to the courts and deferral to the legislative branch resulted from an emphasis being placed on the separation of powers. *Id.* at 40.

17. H. CLAGETT, *supra* note 6, at 129-33. See generally Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785 (1974).

tant to enter into conflicts with the other branches of government in cases involving political elements.¹⁸ The Latin version of the political question doctrine is much stronger than it is in the United States.

Due to the restricted role of the civil law judge in the civil law tradition, Latin American judges are different from their United States counterparts. Judges generally are not identified by name in their decisions.¹⁹ In addition, dissenting opinions are usually not issued. This relative anonymity sometimes causes the public to view judges more as innominate bureaucrats than as creative legal actors. As a result, the best lawyers in the community are not necessarily drawn to careers in the judiciary. Salaries are quite low, far below those in private practice.²⁰ Generally, only the upper levels of the judiciary attain high social status and high figure salaries. To achieve this level of "success," one must give a lifetime commitment to the judiciary with no guarantees that those goals will be achieved. The pyramidal structure of the judiciary limits the number of high positions available.²¹

As in the United States, and for many of the same reasons, lawsuits in Latin America are lengthy and costly. The Latin American problem is perhaps exacerbated by economic underdevelopment in the region. Latin American adjudicatory systems cover a broad range of issues involving civil, penal, administrative, and commercial matters. The fact that large segments of the population are economically disadvantaged or socially stratified virtually precludes them from participation in dispute resolution through the legal system. Thus, Latin American citizens are in need of improved access to the justice system, much as the poor, lower mid-

18. See COMPARATIVE LEGAL TRADITIONS, *supra* note 9, at 64-65, 69, 108-12 (discussing the historical roots, processes, and developments of this approach); Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L.Q. 405, 420-42 (1975) (describing the relationship between the effectiveness of judicial review and the political systems in Latin American countries).

19. J. MERRYMAN, *supra* note 7, at 38.

20. See, e.g., D. LYNCH, LEGAL ROLES IN COLOMBIA 43 (1981) (reporting on the economic status of persons engaged in legal professions in Colombia). One 1973 survey shows that Supreme Court justices earned between US\$216 and U.S.\$800 monthly, while the average private practitioner earned US\$1,000 monthly. *Id.* at 55. The report also showed that, at the time of the survey, 55% of the participants were engaged in private practice, as opposed to 8% employed as a judge or prosecutor in the court system. *Id.* at 54 (Table XII).

21. See COMPARATIVE LEGAL TRADITIONS, *supra* note 9, at 156 (discussing the judiciary as a career in civil law countries).

dle class, and elderly citizens of the United States.²² Restricted access to legal remedies diminishes the status of law in society in both the north and south.

Political conflict has eroded further the position of the judiciary in many Latin American countries.²³ The turmoil could lead to governmental abridgment of the checks on power that the legal system imposes. United States history demonstrates a governmental tendency to abridge civil liberties, examples of which were the internment of Japanese-Americans during World War II and factors leading to the Civil War. While Latin American judges are not able to exert much influence over the executive branch compared with the power of the United States judiciary, the civil law tradition does provide due process requirements that check governmental action.²⁴ For example, public trials and the right to a lawyer are established safeguards in civil law systems. In order to circumvent these guarantees, the government in some instances has deprived the judiciary of the jurisdiction to adjudicate matters concerning state security.²⁵ Instead, these crimes often are tried in military courts where summary procedures abridge even minimal due process standards. The expanded jurisdiction of these military courts undermines the rule of law. Even the highest court of the land is precluded from supervising the military court's compliance with any law, whether substantive or procedural.²⁶

In Latin American nations, a state of emergency may be in

22. See Falsgraf, *Toward Swifter Justice*, 71 A.B.A. J. 8 (Nov. 1985) (discussing the problems occasioned by court delays). These problems include reduced judgments, deterioration of evidence, waste of court resources, increased lawyer fees, and creation of confusion and conflict in the allocation of the judge's time. *Id.* See also Falsgraf, *Responding to the Challenge of an Older America*, 72 A.B.A. J. 8 (Jan. 1986) (reviewing the legal problems facing the elderly in the United States). Some of the legal problems facing America's elderly include probate, social security benefits, nursing care and housing costs, and estate planning. *Id.*

23. See generally Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1 (1987). Involuntary transfers, lack of judicial immunity, formal abrogation of judicial independence by military regimes and the transference of jurisdiction from ordinary courts to military or special tribunals create an atmosphere of judicial vulnerability. *Id.* at 21-25.

24. See R. SCHLESINGER, *supra* note 12, at 307 (noting that Latin American legal systems have adopted the common law notions of due process and *habeas corpus*).

25. *Contra* H. CLAGETT, *supra* note 6, at 41. Special legislation vests the supreme courts in Latin American countries with the jurisdiction to hear cases concerning anti-communist laws or involving speculation in goods of prime necessity in times of war or emergencies. *Id.*

26. *Contra id.* at 80-81 (discussing military justice and its independence from the judicial power). In Mexico, for example, the Constitution excepts military tribunals from the general provision that no one may be tried by special courts. *Id.* at 80.

direct conflict with the principle of the rule of law (*estado de derecho*).²⁷ When established legal processes are suspended for long periods of time, an erosion of belief in the due process system is seen. While in the United States emergency measures have been adopted in times of crisis, no separate legal order exists that distinguishes between situations of peace or emergency. In contemporary Latin America, however, the state of emergency or suspension of civil government seems to be more the rule than the exception.²⁸

Latin American judges and lawyers have shown extraordinary courage in the face of private retaliatory actions, especially from drug traffickers.²⁹ In comparison to the harassment of some United States federal judges in the South for unpopular civil rights decisions in the 1960s or other occasional violence against United States judges,³⁰ Latin American problems seem far more serious. For example, in Colombia, as of 1986, 60 judges had been assassinated for their attempts to uphold the rule of law.³¹ Twelve jurists also were murdered in late 1985 when guerrillas stormed the Palace of Justice.³²

The most important legal actor in the civil law tradition, other than the legislator, is the law professor.³³ The prominence of the law professor may come as a surprise to those United States law-

27. See Grossman, *supra* note 2 (discussing the conflict between a state of emergency and observance of human rights). See also INTER-AM. C.H.R. 1985, *supra* note 1, at 162 (noting that the state of emergency instituted in Nicaragua has resulted in restrictions and suppressions of rights protected by the American Convention on Human Rights, to which Nicaragua is a party).

28. See Grossman, *supra* note 2, at 37 (observing the prevalence of the ruling minorities' use of states of emergency to safeguard their own threatened power).

29. See Montalbano, *Colombia's Drug War Is out of Control*, L.A. Times, Feb. 1, 1987, § 1, at 1, col. 1 (reporting that the Colombian justice system is "in shreds" and that law enforcement "exists only as words"); Bridges, *Colombian Judges Face Threats, Assassination*, Wash. Post, Nov. 22, 1986, at A24, col. 1 (reporting that drug traffickers are killing or threatening to kill judges that rule against them); Nares, *Colombian Guerrillas' Drug Connections Crystallize in Shoot-out*, Wall St. J., Nov. 15, 1985, at 31, col. 3 (linking the guerrillas who seized the Colombian Supreme Court and killed 12 justices to drug traffickers).

30. N.Y. Times, Aug. 8, 1979, at 1, col. 2. California Supreme Court Judge Harold J. Haley and three jurors were taken hostage during a courtroom trial in Marin County. Judge Haley was killed in the ensuing gun-battle.

31. See Bridges, *supra* note 30.

32. Wells, *Bogota Rebels 'Annihilated' In Assault on Justice Palace*, Wash. Post, Nov. 8, 1985, at 1, col. 1 (reporting the deaths of several justices including the chief justice); *Top Jurist, 41 Others Slain in Bogota*, L.A. Times, Nov. 7, 1985, § 1, at 1, col. 2 (reporting the deaths of top jurists and others after soldiers stormed Palace of Justice in Bogota, following a 2-day siege by guerrillas); *Colombian Rebels Seize Courthouse and Hold Judges*, N.Y. Times, Nov. 7, 1985, at 1, col. 6 (same).

33. J. MERRYMAN, *supra* note 7, at 59-60.

yers who view the judge as the most important legal actor in the common law tradition. Latin American law professors, however, are quite different from their United States counterparts. Typical Latin American law professors are also successful practitioners who teach courses in areas where they have proven their expertise through practice. The Anglo-American legal tradition eschews theoretical opinion based on hypothetical facts; however, civil law professor/practitioners frequently issue theoretical opinions on an assumed state of facts.³⁴ Their authorship and their views are widely publicized.³⁵ Furthermore, civil law professor/practitioners may incorporate social, political, and economic factors into their scholarship.³⁶ Their ability to issue such pronouncements transforms them into leaders in the profession and bestows upon them high social status in Latin American society.

Professor/practitioners may also be prominent figures in the bar associations. In many Latin American countries, bar associations speak authoritatively for the interests of the legal profession,³⁷ while enforcing important ethical standards.³⁸

Most Latin American lawyers are generalists who are knowledgeable about a wide array of matters, and, as their United States counterparts, "know how to get things done." In some Latin American countries, the ratio of lawyers to population is surprisingly high. If only the well-to-do urban populations are counted, the ratio is even higher. Lawyers are important because, as in the United States, few issues are devoid of legal content. Latin American lawyers are embracing specialties directly related to economic development.³⁹ This process has not advanced as far as it has in the United States and is restricted mainly to urban areas.

A subtle yet significant difference exists between United States and Latin American administrative agencies. Unlike the tradition of deferential judicial review in the United States, civil law traditionally relegates far more administrative decisionmaking to the executive branch. Separate supervisory administrative courts,

34. *Id.* at 63-64.

35. *Id.*

36. *Id.* at 63.

37. *See, e.g.,* D. LYNCH, *supra* note 21, at 89-92 (discussing the monopoly the bar associations have on the legal profession in Colombia).

38. *Id.*

39. *See* 1986 A.B.A. INTER-AM. LEGAL MATS. (reporting on the new legislation in developing areas). New legislation, in the areas of foreign investment, the oil industry, and industrial property, contributes to the growing specialties within domestic law.

entirely different in function, atmosphere, and staffing, may oversee agency behavior in civil law nations.⁴⁰ It is difficult for United States lawyers to comprehend a complete system of judicial review encompassed wholly within the executive branch, yet providing effective scrutiny of agency action. United States attorneys often are skeptical of the brevity of review opinions and of the paucity of established principles and doctrines.⁴¹ United States administrative lawyers could learn much from their Latin American counterparts. The problems our executive branch has had in implementing agency oversight mechanisms, such as the Office of Management and Budget's Quality of Life review (Nixon Administration), the Regulatory Analysis (Carter Administration), and then Vice-President Bush's Regulatory Analysis Review Group (Reagan Administration), serve as good examples of why a study of the Latin American system would be beneficial.

A final level of Latin American legal systems — law enforcement administration — co-exists with the judges, professors, practitioners, and civil servants. The United States and Latin America law enforcement apparatuses for drug law enforcement highlight the problems in this area.⁴² Law enforcement agencies both north and south are overburdened by this vexing problem. At an 1986 A.B.A. annual meeting luncheon, held specifically for Andean Bar Association representatives, attorneys from Colombia reported that an estimated 75 percent of Colombia's law enforcement administration budget is dedicated to drug traffic control, diverting funds from other pressing law enforcement needs. The President of

40. See Findley, *Ten Years of Land Reform in Colombia*, 1972 WIS. L. REV. 880, 888-97 (discussing the use of INCORA, the Colombian Land Reform Institute, as an administrative agency in the land reform process); Thome, *Expropriation in Chile Under the Frei Agrarian Reform*, 19 AM. J. COMP. L. 489, 497-507 (1971) (discussing the use of administrative agencies for land reform).

41. See, e.g., Thome, *supra* note 41, at 502 (explaining the expropriation procedure and the power of the Chilean land reform agency before the agrarian tribunals that review their decisions).

42. See Long, *Colombian Judicial System in Disarray*, Sun Sentinel, Feb. 13, 1989, §A, at 9, col. 1; Stockton, *Mexico's Drug Effort Will Also be Home Grown*, N.Y. Times, Aug. 17, 1986, § 4, at 2, col. 3; De Onis, *Cocaine Factory Destroyed in U.S.-Bolivia Raid*, L.A. Times, July 19, 1986, § 1, at col. 4 (reporting on the joint activities of the United States and Bolivian governments in attempting to control illegal drug trafficking). Not all Latin American countries battling illegal narcotics trafficking have accepted the military presence of the United States in their territory. Mexico, for example has been willing to cooperate with Drug Enforcement Administration (DEA) agents but has not consented to United States intervention to the same extent as Bolivia; Lowenstein, *Colombian Leader Battles Drug Dealers*, Wall St. J., Dec. 24, 1984, at 10, col. 2 (reporting on drug law enforcement efforts taken in Colombia and the need for United States cooperation).

Mexico's Federation of Law Offices, Bars, and Lawyers Associations (Federacion de Colegios, Barras, y Asociaciones de Abogados) also reports high levels of resource commitments to drug law enforcement. The United States has had its own problems with law enforcement. Some examples of these troubles are the Law Enforcement Assistance Administration and the federal revenue sharing. Selecting effective means to assist local governments in law enforcement efforts is generally the most difficult task.⁴³

A great many differences exist among American legal traditions. However, instead of preventing fruitful dialogue, these differences in approach actually create an environment ripe for a free exchange of ideas between the civil and common law traditions. An individual who attempts a comparative study of both systems must take care not to overemphasize the differences and neglect common ground. Both traditions share aspirations for inalienable rights,⁴⁴ popular sovereignty expressed through free and secret elections,⁴⁵ restrictions on the absolute power of the executive,⁴⁶ and above all, commitment to the rule of law.⁴⁷ In addition to the multiple economic, cultural, and political links currently existing in the hemisphere, the rule of law provides an essential common ground where, in the variety of all its expressions, lawyers can join together to promote order with justice.

Any individuals involved in such an exchange must be sensitive to the differences and be aware of the traditional reluctance in both North and Latin America to allow outside forces to interfere

43. Unpublished notes on the A.B.A. meeting, Fred Anderson, Chair, A.B.A. Commission on Inter-American Affairs (1986)(available in the offices of INTER-AM. L. REV.).

44. See, e.g., U.S. CONST. preamble (recognizing the inalienable rights of men); U.N. Declaration of Human Rights, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) (same).

45. See, e.g., U.S. CONST. amend. XII, XVII (providing for popular elections); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA art. 93 (same); U.N. Declaration of Human Rights, *supra* note 44, art. 21(3) (providing for free and secret elections); THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN, OAS Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser. L/V/II.23 doc. 21 rev. 2, at 15 art. XX (1975) (providing for free and secret popular elections).

46. See e.g., U.S. CONST. arts. 1-3 (establishing the powers of government in three separate and distinct branches and defining their respective duties); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE ECUADOR art. 59(e) (vesting the legislative branch with the duty to oversee executive organs and functions).

47. Report with Recommendations to the House of Delegates, 1986 A.B.A. Annual Meeting Report 121. See also M. BALL, THE OAS IN TRANSITION 46-47 (1969) (discussing the incorporation of the rule of law into the OAS Charter as one of the underlying principles of the inter-American system).

with social institution development. Still, United States and Latin American lawyers should be able to extract novel concepts from each others system, ideas which might seem mundane and settled to the lawyer who is familiar with the tradition, but possibly would provide solutions to problems in the opposite tradition. The dialogue should focus on concrete matters of interest in an effort to minimize the differences. This type of program would lend itself to a lively and exciting exchange.

III. AREAS FOR LAWYERS' COLLABORATION

There is a plethora of general topics which lawyers commonly could address. For example, techniques for expediting the administration of justice, means of bringing the costs of justice within the reach of more members of society, the role of law professors and practitioners in strengthening the independence of the judiciary, the structure of the judiciary and the role of legal opinions, the inquisitorial and common law approaches to penal justice, the role of bar associations in furthering the rule of law, the selection and training of judges, and the role of international legal norms in domestic courts, all provide fertile ground for mutual inquiry.

Beneath these overwhelming concerns lay a wealth of specific areas which deserve the attention of lawyers, particularly United States specialists. An open, frank dialogue could contribute to the search for realistic solutions to some of this hemisphere's most pressing problems.

A. *Trade and Finance*

Millions of economic transactions link the countries of the region. Lawyers are a crucial part of this complex network. They are involved in the drafting and interpreting of contracts, devising the instruments of payment, offering tax opinions, participating in the development of investment laws, solving jurisdictional problems, applying tax, commercial, and labor laws, and clearing the way for development projects.

The amount of experience and knowledge that lawyers have in this realm is impressive. That experience provides a rich framework for exchanges that would allow lawyers to further enhance their performance, particularly in fields undergoing rapid techno-

logical change.⁴⁸ Consequently, concrete achievements might be expected in expediting inter-American trade and financial transactions. In contrast to the ideological confrontation which sometimes exists between north and south, this pragmatic approach, involving lawyers from the United States with lawyers from their less-developed neighbors, could provide a model for productive cooperation. A successful implementation of such a program could lead to its use in United States-third world relations elsewhere in the world.

B. Peaceful Solution of Conflicts and Collective Security

The founders of the Organization of American States (OAS) visualized a system by which all disputes would be resolved through peaceful means,⁴⁹ where resort to force and intervention would be prohibited,⁵⁰ where an attack against one country would be an attack against all,⁵¹ and where hemispheric solidarity would deter or defeat aggression.⁵² In addition to the OAS Charter, The Inter-American Treaty of Reciprocal Assistance specifically provided for a collective defense system.⁵³ Many problems have hindered the activation of this type of system. The Treaty thus far has failed to be effective in minimizing breakdowns in hemispheric peace. The Malvinas conflict and the current Central American situation serve as good examples of the ineffectiveness of the Treaty in this area. Other dispute resolution systems have been used to handle territorial disruptions rather than the regional framework.⁵⁴

Although states properly dominate the search for peace in the hemisphere, private lawyers, too, can make a contribution by ex-

48. Two such areas undergoing rapid technological change are banking and computerization.

49. See OAS CHARTER art. 2(b)(stating pacific settlement of dispute as one of its primary purposes).

50. *Id.* at arts. 18-20.

51. *Id.* at arts. 2(c), 3(f), 27.

52. *Id.* at 2(b).

53. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3, 62 Stat. 1681, 1700, T.I.A.S. No. 1838, 21 U.N.T.S. 77, 95. See Acevedo, *The U.S. Measures Against Argentina Resulting from the Malvinas Conflict*, 78 AM. J. INT'L L. 323, 331-32 (discussing the Treaty of Reciprocal Assistance as a *de facto* instrument of hemispheric collective security).

54. See Varas, *supra* note 3, at 71 (discussing the failure of the existing dispute resolution mechanisms in settling Latin American disputes). In addition to disputes between Peru and Ecuador, the 1978 territorial dispute over the Beagle Channel between Chile and Argentina was not submitted to the OAS. *Id.* at 83. The dispute was submitted to Papal Arbitrage. See *Argentine-Chile: Agreement to Accept Papal Mediation of Dispute Involving the Beagle Channel Region* (Done at Montevideo, Jan. 8, 1979), 18 I.L.M. 1 (1979).

amining the existing regional peace and security machinery. Countries in the hemisphere have shown that it is possible, for example, to solve territorial disputes through peaceful mechanisms such as adjudication.

C. *Human Rights*

In the past decade, several countries have returned to a system of civilian government. The OAS Charter, the American Declaration of Human Rights, and the American Convention on Human Rights have established both substantive and supervisory mechanisms.⁵⁵ By adding international protection for human rights above and beyond those safeguards already existing under national law, actions taken under these international instruments do not violate the principle of non-intervention.⁵⁶ The rationale for this approach is the conviction that human rights violations, wherever they occur, are the concern of the entire hemisphere. In addition, widespread violations of human rights and denial of basic economic and social needs directly impact on the social fabric of other countries.⁵⁷

Lawyers could contribute to the improvement of human rights protection by examining the procedures used before the Inter-American Commission and the Court on Human Rights, the role of the inter-American system before domestic courts, the emergence of new rights prompted by technological progress, and the regional regime for refugees.⁵⁸

55. See OAS CHARTER, *supra* note 49, at art. 51 (listing the organs through which the OAS accomplishes its objectives). Among these entities is the Inter-American Commission on Human Rights. *Id.* at art. 512(e); see also M. BALL, *supra* note 47, at 373-80 (discussing the evolution, organization, procedure, and activities of the Inter-American Commission on Human Rights). Other specialized organs of the OAS which oversee the social and economic well being of citizens of member countries include the Inter-American Economic and Social Council (OAS CHARTER at arts. 93-98) (intended to accelerate economic and social developments), and the Inter-American Council for Education, Science, and Culture (*Id.* at arts. 99-104) (intended to promote inter-American relations through educational, scientific, and cultural cooperation); American Declaration of the Rights and Duties of Man, *supra* note 45 (creating substantive rights).

56. See OAS CHARTER, *supra* note 49, at art. 18 (declaring that no state has the right to intervene in the affairs of any other state).

57. One consequence of human rights violations and social and economic deprivations is the scores of refugees and immigrants these conditions generate.

58. See Statute of the Inter-American Commission on Human Rights, *supra* note 2, at art. 10 (establishing the Commission to work in conjunction with the Inter-American Court of Human Rights); American Convention on Human Rights, *supra* note 2, at art. 26 (1969) (stating that parties to the Convention will adopt domestic and international measures of

D. Natural Resources Development and Environmental Protection

Numerous natural resources development and environmental problems should concern lawyers of the Americas. Pollution of the seas and fisheries, the export of toxic wastes for disposal abroad, the protection of natural areas of great ecological value, deforestation, desertification, and transborder water and air pollution can be successfully halted only by combining resources and energy. International efforts to protect threatened and endangered species and to reduce traffic in products derived from such species also should receive attention. Natural resource depletion and failure to sustain the replacement rate for renewal resources (timber, fisheries, grains) could serve as a focus for discussions between attorneys from the United States and Latin America. Attorneys also are eminently qualified to determine the compensation to be awarded for extracted resources based on fair market value, the socio-economic impacts of mining, drilling, or milling, and the irrevocable loss of the commodity itself after extraction.

IV. THE LAWYER'S UNIQUE ROLE

The difficulties that are likely to be encountered by addressing these issues in the inter-governmental realm cannot be ignored. Often they are pursued in unnecessarily confrontational terms. But lawyers, acting independently or through their professional associations, could add a valuable perspective to inter-governmental deliberations. Existing legal practice provides a solid base for important professional contributions to future enhancement of the rule of law in the Americas. If a decision to tackle these issues in the future is made, lawyers of the United States and Latin America will be kept busy for some time to come.

V. THE A.B.A. COMMISSION ON INTER-AMERICAN AFFAIRS

The American Bar Association can do a great deal to facilitate a realistic dialogue. The Association created a Commission on Inter-American Affairs for the years 1986-88. Stated in broad terms,

economic and technical natures to achieve the realization of the rights implicit in the OAS Charter); Convention Relating to the Status of Refugees, July 28, 1951 No. 2524, 189 U.N.T.S. 137.

the Commission's purposes were to report on the broad array of law-related issues confronting the United States and Latin American nations, to launch a number of specific initiatives between lawyers in the hemisphere, and to explore with various Association entities how they might engage their counterparts in other countries in exchanges in particular fields of expertise.⁵⁹ The Commission met with over fifteen bar association representatives from eight Latin American nations and successfully sponsored a resolution before the House of Delegates at the 1986 Annual Meeting regarding use of hemispheric national and international dispute resolution mechanisms.⁶⁰

The most significant Commission activity was a fact-finding visit to Chile in April 1988, which resulted in a series of findings and recommendations to the A.B.A. House of Delegates and Board of Governors. They focused on human rights violations in Chile, the then-pending plebiscite on General Pinochet's continued rule and Chilean over-reliance on military courts to decide cases involving civilians.⁶¹

The Commission's activities supplement other A.B.A. activities. In December of 1985, the A.B.A. sponsored a conference on comparative constitutionalism in Brazil in conjunction with that country's effort to redraft its constitution.⁶² The Section of International Law created the Central American Technical Assistance Program to sponsor seminars dealing with the role of arbitration in commercial and labor disputes. The section of Economics and Law Practice has also been instrumental in translating three law office manuals from English to Spanish. These activities are evidence of efforts being made to steer the lawyers of both North and South America toward more effective functioning of their respective systems.⁶³

59. ABA COMM. ON INTER-AMERICAN AFFAIRS, REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, Report No. 121 (1986) (A.B.A. Annual Meeting (Aug. 11-13, 1986)).

60. *Id.*

61. *Chile at the Crossroads, A Report of the Delegation of the American Bar Association to Chile, April 18-22, 1988* (Sept. 1988).

62. See Bartlo, *Report on the Annual Meeting of the American Bar Association - New York City August 7-14, 1986*, 59 OHIO ST. BAR ASS'N REPORT 1476, 1477 (Sept. 29, 1986).

63. Falsgraf, *Estado de derecho: the rule of law*, 71 A.B.A. J. 8 (Dec. 1985).