

Aportes DPLF

The Due Process of Law Foundation (DPLF) Newsletter



DPLF's Board meeting held in Washington DC on November 30, 2009

In this Issue



Judicial Discipline within a Framework of Transparency and Accountability

Luis Paulino Mora, President of the Supreme Court of Justice of Costa Rica [p3](#)

Shedding Light on the Judiciary: The Right to Information and the Courts

Molly Moore, Ropes & Gray, L.L.P. [p6](#)

Public Access to Judicial Information in the United States

David A. Schulz, Levine Sullivan Koch & Schulz, L.L.P. [p8](#)

The Judicial System in the New Bolivian Constitutional Order

Eduardo Rodríguez Veltzé, Former President of Bolivia [p13](#)

The Election of Judges

Anthony Champagne, Professor of Political Science, University of Texas at Dallas [p15](#)

Judicial Elections: A Personal View

Robert H. Alsdorf, Judge (ret.), Professor at Seattle University School of Law [p17](#)

The Real Cost of Pre-trial Detention in Latin America

Denise Tomasini-Joshi, Associate Legal Officer, Open Society Justice Initiative [p20](#)

Oral proceedings and pre-trial detention in Ecuador

Diego Zalamea, Consultant [p22](#)

Envisioning Justice in Latin America

Katya Salazar

Executive Director

Over the three years that the Due Process of Law Foundation has published a Spanish language quarterly newsletter on justice issues in Latin America, we have received a number of requests for an English version. While our organization is not able, at the present time, to publish the newsletter in the two languages, we figured we could do the next best thing: issue one English language edition of the newsletter that would provide an overview of the type of articles that have appeared in the newsletter over the years. On a regular basis, *AportesDPLF*, includes articles that address such issues as judicial transparency and accountability and analyses of how various systems have, or could, put such principles into practice, both on a national as well as a (regional) comparative level, issues regarding access to justice in the region, international justice, and certain specific developments within the judicial sector in countries in the Western Hemisphere, all written by prominent experts in these fields.

Thus, in this our first English issue of *AportesDPLF* we have included an article about the *role of the judge in a democratic society* written by Luis Paulino Mora, President of the Supreme Court of Costa Rica. This piece is followed by two articles on the *right to access to judicial information* that were commissioned by the Open Society Justice Initiative. Molly Moore, of Ropes & Gray LLP, a leading global law firm with a strong commitment to public service, shares the results of a study completed by her firm, in which the practices of access to judicial information in 15 countries and the European Union are compared. Also offering a perspective is David Schulz, professor of law at Columbia University and partner in Levine Sullivan Koch & Schulz LLP, a renowned firm based in New York City specializing in media law, First Amendment and intellectual property litigation, addresses the right of access to judicial information and sets out the source and scope of this principle under American constitutional and common law.

In 2009 *AportesDPLF* focused special attention on countries that have recently implemented *constitutional changes that affect the judicial system*; Venezuela, Bolivia and Ecuador. As an example of the articles that appeared in these issues, we have included one that addressed the changes taking place in Bolivia. Eduardo Rodríguez, former President of Bolivia and former President of the Bolivian Supreme Court, provides a clear and concise overview of the implications of these changes for the Judiciary. Because an important new figure in Bolivia's constitution is the election of the highest judicial authorities by popular vote, we invited two American academics to share how the practice of voting for judges works in the United States. Anthony Champagne is a professor of law at the University of Texas at Dallas, who provides an overview of the different types



¿Would you like to receive *AportesDPLF*?
Send us an e-mail at aportes@dplf.org

Continues

Editorial

of elections in various states and discusses the pros and cons of these practices. He is followed by Robert Alsdorf, professor of law at Seattle University and a former judge, who shares his personal experiences of running in these elections.

AportesDPLF has also addressed the important issue of *pre-trial detention in Latin America*. Denise Tomasini-Joshi of the Open Society Justice Initiative, shares the alarming results of an investigation performed by her institution in Chile, Argentina and Mexico that calculates the real costs and consequences of pre-trial detention in Latin America. On a slightly more posi-

tive note, Diego Zalamea, an Ecuadorian expert in judicial systems, discusses the criminal procedure reform that has taken place in Ecuador and its implications for pre-trial detention in that country. He provides an interesting example of the reduction of pre-trial detention in the city of Cuenca, as a result of these reforms.

We hope that this first ever English edition of *AportesDPLF* responds in some way to those requests we have received over the years, and we hope to be able to do more in the near future. We welcome your comments and observations. ■

Overview of DPLF's Publications



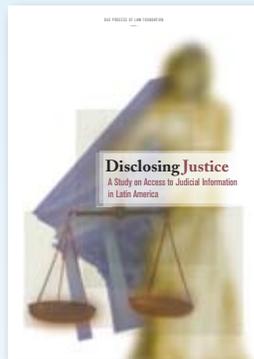
Digest on Latin American Jurisprudence on International Crimes

(Available in Spanish. English version available March 2010)



Evaluation of Judicial Corruption in Central America and Panama and the Mechanisms to Combat It

(Also available in Spanish)

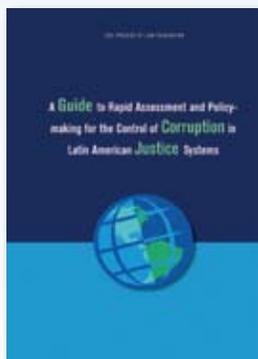


Disclosing Justice: A Study on Access to Judicial Information in Latin America



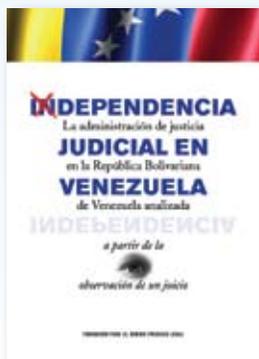
Comparando Transparencia: Un estudio sobre acceso a la información en el Poder Judicial

(Available in Spanish)



A Guide to Rapid Assessment and Policy-making for the Control of Corruption in Latin American Justice Systems

(Also available in Spanish)



Independencia Judicial en Venezuela: La administración de justicia en la República Bolivariana de Venezuela analizada a partir de la observación de un juicio

(Available in Spanish)



Las Reformas a la Administración de Justicia en Honduras y Bolivia: Razones que han obstaculizado su éxito y como enfrentarlas

(Executive Summary available in English)



Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America

(Also available in Spanish)



Judicial Discipline within a Framework of Transparency and Accountability

Luis Paulino Mora Mora

President of the Supreme Court of Justice of Costa Rica



One of the issues that has aroused the greatest degree of resistance during my time as President of the Supreme Court of Justice of Costa Rica has been getting the issue of judicial independence—otherwise very consolidated in the country—to be understood within the context of a democracy; that is, coexisting with principles that are of equal relevance, such as transparency and accountability.

The apparent dilemma arises when a democratic administration of justice system is put into practice, founded on the concept of public service justice that considers the human being—not the judge—as the central actor. Certainly, a focus on service—and not on power—forces us to adjust all of our work around the human being; that is, attempting to incorporate standards of ethics, accountability, and quality, among others. On the other hand, it is common to affirm that the idea of the independent judge is a concept which is indissolubly linked to a democratic understanding of the rule of law, and all attempts to distort its foundation have been branded as authoritarianism, verticalism, or corruption.

We thus find ourselves between two poles that at first glance appear to be opposites, but that in fact are not. In an attempt to provide an answer, I believe it is necessary that judicial independence and other related ideas be dealt with not as ends in and of themselves, as professional achievements that favor judges, but rather as instruments for attaining a good justice system, which is nothing more than one that, in addition to being efficient and effective, is also transparent to the citizenry and acts according to its needs.

A consequence of this unifying perspective is the understanding that in a democracy, the only sovereign power is that held by the people: any other power is delegated and subject to accountability. Thus, there is no public authority, nor branch of government, that is exempt from control (Article 11 of the Political Constitution of Costa Rica). Such a privilege is not enjoyed by anyone, not even the Parliament; at the end of the day, the people are not only the one sovereign power, but also the financial support for our work through their payment of taxes, and as such, they deserve an honest answer about how their money is used.

From a democratic point of view, the independence of judges should exist in accordance with and as a guarantee for

the people such that there will be no doubt that the justice system has been honest and transparent. Independence should be exercised as a guarantee for the citizenry rather than as a professional privilege. In that sense, discipline and control over the performance of judges must be viewed as essential tools of a democratic justice system, and not as attempts to infringe on judicial independence.

The tangible unique characteristics that result from adopting this focus should be noticeable in all judicial actions. However, further on in this article, I will address two ways to demand accountability and transparency in my country: discipline and the evaluation of judges' work.

In Costa Rica, the disciplinary system for judges has a long history: for many decades, the system functioned based on a division of disciplinary roles between the Supreme Court of Justice and the direct hierarchy of the judges. This posed, I believe, a great danger to the independent exercise of a judgeship. "Incorrect" performances that occurred outside legal proceedings were corrected by the Court, while disciplining and correcting actions that occurred within the judicial process fell under the responsibility of the judges' supervisor. When judges can be disciplined by their superiors—due to differences in criteria used to interpret the law or the probationary framework—or by the person who appointed them, they lose independence, inasmuch as such judges might make decisions in the interest in keeping their position and not in the interest of achieving justice according to their own convictions in relation to the issue at hand.

In the mid-1970s, the system was redesigned with the creation of a tribunal for Court appointments which took on the traditional Judicial Inspector responsibilities. The tribunal also serves as a professional association for the disciplining of judges in the first instance, thereby leaving out, at least in theory, any issue related to the appropriate or inappropriate interpretation of legal norms (see Article 199 of the Organic Law on Judicial Power [*Ley Orgánica del Poder Judicial*]).¹

This is the basic outline of the disciplinary system that exists to this day, with certain variations in form and a profound adjustment to which I will refer below due to its importance. Thus, for example, while the system allows for a more active participation of the plaintiff in a case, it also imposes respect for the principles of due process that are regulated by the Politi-

cal Constitution. Similarly, the review of actions taken by the Inspection Tribunal was left mainly² in the hands of a Superior Council with a representative composition from the various levels of the agency created in 1994 to assume much of the Judicial Branch’s administrative work. This latter element substantially influences the independence of the judges, although to a lesser degree than in the previous system, since the principle applied should be: the one who appoints does not discipline.³

Nevertheless, in 1998, along with such guarantees, it was established that the Full Court can sanction and remove judges “in cases of delays or grave and unjustifiable errors committed in the administration of justice” as a normative expression of constitutional jurisprudence (Article 199 of the Organic Law on Judicial Power).⁴ And so a controversy began that—to use an expression employed in an earlier editorial that appeared in this same newsletter—“should raise a few eyebrows” regarding the relationship between quality, accountability, and independence.

In any event, what has developed in my country is a reaction by the professional judges’ association that views this mechanism—permitting judges to be investigated for some of their actions within legal proceedings and evaluated as to their aptitude for carrying out of their responsibilities—as a way to impose on their real independence.

There continue to be profound doubts as to the degree to which this is possible, not only with regard to the necessary recognition of judicial independence and the possibility to affect it with such investigations and evaluations, but also the difficulty in establishing when influence is being brought to bear in a specific case by simply mentioning these possibilities. For the moment, I think that in the framework of democratic justice, it is clear that that judges are not authorized to act arbitrarily or without legal backing, employing just their own will; when that transpires, they can be subject to a disciplinary system.

Additionally, from the outset it must be accepted that the law should suppress the actions of judges who, knowingly and willingly, resolve cases in opposition to that which the law sets out and on which it is based, and issue their rulings based on untruths. Finally, the clarity manifested in the formerly mentioned case is not found with the same intensity in a case involving so-called clumsiness or ineptitude of a judge, where the situation is less likely to yield irrefutable conclusions.

The conduct that we view today as clumsy might be ac-

cepted tomorrow as being correct. The interpretation that does not receive the approval of superiors can later be recommended by doctrine and accepted by those who had previously rejected it. Examples abound regarding this point. But will that lead us to accept that there is no possibility to review the clumsy performance of judges because that would impact their independence? I, for my part, believe not, and that it is only necessary to denote clear limits to such investigations.⁵

First of all, the analysis of the application of the law should not cover a specific case, since that corresponds only to the court with the competence to hear the case by way of appeals. Secondly, the investigation should be carried out with an absolute respect for the rights deriving from due process.

Now, as if it were a minor issue, to the above we add the element of the performance of the judges in their work and the evaluation of their efficiency as public officials. To my mind, the good judges should—taking into consideration that they are public servants and that they owe their positions to their community—value their jobs and establish annual programs of goals and objectives, setting parameters such that they can be evaluated in terms of the degree to which they fulfill that which was planned. The judges’ right to initially evaluate the degree to which they reach their objectives should be recognized; however, at the same time, entities having a plural composition should be legitimated, in which the system’s users have significant representation, in order to participate in that evaluation for the purposes of establishing the degree of the courts’ efficiency in the performance of their mission.

It is also possible to evaluate the degree of efficacy in the performance of judges’ work, but similar to the evaluation mentioned above, it should not have as its principal purpose the application of the disciplinary system, but rather the correction of illegal or retrograde practices, in order to ensure that the work is carried out in compliance with the norms that regulate it and that it results in an efficacious administration of justice.

Unfortunately, in our context, and here I am referring in general to Latin America, we do not have reliable statistics on how the administration of justice is carried out, nor scientific criteria for its interpretation.⁶ However, it should be noted that in the meetings of the Presidents of the Court and Judicial Councils that are currently held, there have been important efforts to overcome that weakness. Currently, EUROsocial’s goal

¹ Article 199—All complaints that refer exclusively to problems of interpretation of legal norms will be fully rejected.
² I say mainly, because the Supreme Court still maintains disciplinary functions in the second instance, when dealing with judges of a superior rank that that Court appoints, be they from Member Tribunals or higher courts.
³ It is expected that this principle will be applied in a reform drawn up regarding the Organic Law on Judicial Power that to date recognizes the Supreme Court of Justice, in which discipline in its totality is conferred on the Disciplinary Tribunal along with the naming of the Judiciary Council, the latter being the entity that supervises the legal profession, set out in that reform.
⁴ The second paragraph of Article 199 states: “However, in cases of delays or grave and unjustifiable errors committed in the administration of justice, the Judicial Inspection Tribunal should make the facts known to the Full Court without taking further steps, so that the latter can resolve to maintain, suspend, or remove the official in question once the investigation of the case is complete.”
⁵ I do not believe that in a democratic system of justice, the citizenry is obliged to tolerate “grave and unjustified errors” of judges.

is to develop better statistical methodologies for the region. We should overcome this deficiency through our efforts and principally with the collaboration of progressive judges, in order to ensure a greater degree of justice in the provision of better service to the citizenry.

As I have noted on other occasions, the ideological model that sustains our vision of the provision of justice seeks to a certain extent to create a new subject—the community—to whom judges in particular and the judicial branch in general should justify their actions, especially regarding what is mentioned above about how they carry out their work, as has been also recognized in the international context with the enactment of the Agreement on the Rights of Persons Before the Justice System in the Iberian-American Legal Arena, signed in Cancún in 2002.

Among all the conceptions of democracy that exist, Norberto Bobbio preferred the one that views it as “the exercise of power in public,” referring to those institutional mechanisms which obligate those who govern to make decisions openly and those who are governed to see how and where such decisions are made. Governing in public presupposes ensuring that power can be controlled through the oversight of the citizenry.

The discipline of the judges

The Judicial Branch, as a part of the tripartite system of power, is also obligated—and I would say doubly so due to the nature of its role—to ensure that its actions are transparent. In the past, it was enough to simply comply with the demands of democracy, that the judges be technically capable. There was not, at least in our country, any other requirement; the people accepted in good faith the sentences passed by the courts—even if they were not in agreement with all of their rulings—which were considered ivory towers, impenetrable to the citizenry’s gaze.

Currently, many variables exist that force us to reconsider the entire system of the administration of justice for the citizenry. The first, and possibly the most relevant, of these is that the people do not trust the justice system and that lack of confidence is not without justification. We must not forget that, to begin with, a justice system is not legitimized simply through the popular vote. Judges depend on the confidence of

the public to carry out their work. This confidence should rest on the two elements that define judicial activity: independence and impartiality. The people should view those who judge as being independent and impartial. The existence of that belief is what legitimizes judicial decisions. For that reason, judges should comport themselves in such a manner that a reasonable observer would perceive them to be irreproachable. All of the activities undertaken by judges—be they professional, academic, social, religious, personal, etc.—should be guided by the need to maintain that irreproachable image. Otherwise, there will not be confidence in what they do.

Secondly, there is a crisis of legitimacy of power that also affects the Judicial Branch, although we would wish that it were not so. Due to the fact that we are part of the power structure of the State, we are in the same boat, and this crisis is related to the political crisis faced by all of Latin America, made worse by the inequality and corruption that is rampant in our societies.

All of this has produced a situation in which today, more than ever before, the gaze of the citizenry is focused on judges’ performance. The citizenry obliges us to have very high ethical standards and to employ appropriate procedures, in order to achieve, in these very difficult circumstances, transparent proceedings that are perceived by the citizenry as being trustworthy. In that sense, for me, the most important challenge that the judicial systems faces is to regain the confidence of the populace, and that begins with proceedings that are based on the principles of transparency and accountability.

It is useful to note here that what has been said on other occasions: that for a justice system to be good, it must be as competent as it is impartial, as effective as it is independent, as responsible as it is accessible, and additionally it must also be perceived as morally trustworthy. Without this, there cannot be confidence in the rule of law. Finally, as has been mentioned, the quality of the justice system cannot be greater than the technical and moral quality of its judges, and it is precisely this quality that is sought through the adoption of disciplinary and ethical standards and accountability by the judges; because at the end of the day, the judges are the protagonists in the justice system, and without their commitment it will be difficult to communicate a message of impartiality and independence of their performance to society. ■



How to contact DPLF

E-mail: aportes@dplf.org Web site: www.dplf.org RSS: <http://www.dplf.org/rss.php>

⁶ This appraisal in no way takes away from the recognition of the efforts that have been made since 1970 in the Costa Rican Judicial Branch to develop an efficient system of judicial statistics, recognized as one of the best on the continent, which has served as a reference in a number of cases where other countries have reformed their systems. At this time, Panama is using ours as the example for the system it is implementing.



Shedding Light on the Judiciary: The Right to Information and the Courts

Molly Moore

Ropes & Gray, L.L.P.



Access to judicial records and to information about the judiciary is an important, yet often overlooked, aspect of transparency and access to information. While much legislative and scholarly attention has focused on promoting freedom of information and access to records with regard to the executive functions of government, much less has been done to secure or even evaluate access to judicial information.

In building upon a 2007 report on access to judicial information in Latin American countries by DPLF,¹ a report recently completed by Ropes & Gray LLP for the Open Society Justice Initiative takes the first step towards developing a dialogue on access to judicial information by summarizing key principles and providing an overview of the current status of access to judicial information in a number of countries around the world.²

Although many countries have enacted national freedom-of-information legislation, in most cases the judiciary is exempt from those laws, either explicitly or in practice. Thus, for the most part, courts have been left to create their own policies, rules, and practices related to access to judicial records and information about the judiciary, often without guidance from the legislature. The laws and practices of 15 countries and the European Union³ are reviewed in the Ropes & Gray Report; they were selected to illustrate various approaches that have been adopted in this area.

Categories of Judicial Information

The report analyzes three categories of information that are relevant to judicial transparency. The first, and most important, concerns the adjudicative work of the courts—including interim and final judgments and orders, transcripts, documents filed with the court (pre-, post-, and during trial), trial exhibits, recordings, settlements, and dockets. This category of information generally is the primary category covered in the report.

The next category is information of an administrative nature. This includes information about court budgets; personnel and human resources; contracts between the court and third

parties for construction, maintenance, office supplies, or the like; and organizational matters. Within these broad categories, however, there is considerable variation from country to country, and there seems to be no clear understanding of the meaning of “administrative” information.

The third category encompasses information about judges. This category includes information about salaries, personal finances (such as debts and investments), vacancies, disciplinary matters, and selection of judges.

Guiding Principles of Judicial Transparency

As with any access to information regime, the concept of transparency in the judicial realm must both advance and accommodate certain interests that at times may conflict. For example, providing access to documents relating to criminal cases involving minors involves privacy concerns, while releasing personal information about judges may involve security concerns (especially in countries where judges have been victims of retaliatory violence).

As with the development of access regimes applying to the executive branch, an access regime in the judicial realm should seek to advance the goals of ensuring transparency and enhancing the efficiency, effectiveness, and public confidence in the judicial system. The report suggests that the following goals should be considered and balanced in developing a system for providing access to judicial information: (i) safeguarding the public’s right to know; (ii) ensuring the independence of the judiciary from other branches of government; (iii) ensuring fair administration of justice (including the public’s perception of the judiciary and judicial decision-making); (iv) promoting the efficient administration of justice; (v) protecting the legitimate privacy interests of judges, parties to a proceeding or case, and third parties; and (vi) ensuring the security of judges, parties, and other participants in the judicial system.

Because of these competing interests, which are discussed in the report, and the sensitivity of much judicial information (as well as the absence of scrutiny of the courts on this issue),

¹ Due Process of Law Foundation, *Disclosing Justice: A Study on Access to Judicial Information in Latin America*, June 2007, available at <http://www.dplf.org/uploads/1196288391.pdf>.

² The report, *Access to Judicial Information Around the World* (2009) is available at www.right2info.org. The recommendations made in the report do not necessarily reflect the position of the Open Society Justice Initiative.

³ The countries surveyed in the report are Australia, Belgium, Bosnia and Herzegovina, Canada, Croatia, Ireland, Israel, Japan, New Zealand, South Africa, Spain, Sweden, Turkey, the United Kingdom, and the United States.

few judicial systems seem to have developed a comprehensive and uniform system of disclosure. As the report demonstrates, access schemes often are *ad hoc* and derive from many sources—constitutional principles, criminal and civil procedures codes, other laws, and court rules of practice—and few courts have created a system of access to judicial information that fully considers the principles described above.

The report recommends that some form of access to judicial records should be part of access regimes in every national and supranational jurisdiction. As of June 2008, at least 76 countries had developed a framework for providing access to information held by the government, and applying a comprehensive disclosure framework to the judiciary, while challenging, should be vigorously pursued.⁴

In some countries, freedom of information legislation explicitly applies to at least some types of information held by the judiciary. In most of the countries surveyed in this report, access to judicial records and information is left to the courts and often is addressed on a local or *ad hoc* level. The report suggests that articulating principles at the national level (*e.g.*, by the legislature or by a country's top judicial body) can help guide courts in balancing the competing interests discussed above and ensuring consistency, legitimacy, and public confidence in the judiciary.

The report concludes that an effective access-to-information law should:

1. specifically address access to information held by the judiciary;
2. include the presumption that all documents in a case file should be accessible to the public, subject to narrowly tailored exceptions;
3. require proactive publication of all decisions, and the reasoning supporting such decisions, of all courts;
4. require registration and indexing of all official documents, and encourage publication in electronic databases;
5. treat access to documents in civil cases and criminal cases the same, although some additional restrictions to protect due process and privacy rights may need to be put in place for criminal cases, as discussed below;
6. require the designation of a public official whose duty it is to respond to requests for documents that are unavailable in databases and provide them to those who request them.

Most countries surveyed in the report have implemented some, but not all, of these best practices. For example, the top courts of most countries studied generally make at least their fi-

nal decisions public, and also acknowledge that while resource considerations may lead governments to prioritize organizing case files of appellate courts, in principle the same broad rules should apply to all courts in a country. On the other hand, a prevalent shortcoming among countries surveyed in the report is inconsistency among a system's courts in policies for providing documents. Countries should ensure through legislation or otherwise that all courts are treating document access in the same way.

Another common shortcoming is that many countries provide varying degrees of access to documents, but do so through means other than statutes or constitutional clauses, leading to policies that are less consistent and clear than they would be if set forth in statutes or constitutional clauses. In Belgium, a 1994 law allows individuals to request documents from executive officials, which may include some judicial documents, but no statute specifically addresses document requests to the judicial branch.³ In Canada, statutes do not provide for public access to documents. Instead, the courts follow an "open courts principle," a judicially created policy that considers judicial access to be a fundamental principle, but does not positively offer consistent and convenient services to the public to facilitate access. For example, most Canadian courts provide access to documents only in paper format at the courthouse.⁴

In sum, the report concludes that access-to-information laws, in addition to applying to the judiciary, should be comprehensive, uniform within each country, clear, and easy to implement. It is important that a comprehensive access-to-information law encompass access to court documents and administrative records, for example, as opposed to different laws being applicable to different areas of judicial information. The law should also be uniform within each country and uniformly applied by all the courts. A lack of uniformity detracts from efficiency and fairness. The law should also be clear so that it cannot be arbitrarily applied. Lastly, the law should take into account how it will be implemented. For example, there should be sufficient funds to create and maintain an online database if the law calls for it.

These proposals are aimed at achieving comprehensive and meaningful access to judicial information. Just as access-to-information legislation improves the quality of decisions of and enhances public confidence in executive and administrative institutions of government, so too will the application of these access-to-information proposals to the judiciary promote the fair and efficient administration of justice while enhancing public confidence in the courts. ■

⁴ See <http://right2info.org/access-to-information-laws>.

⁵ Loi du 11 avril 1994 relative à la publicité de l'administration. Modifiée par Loi 25 Juin 1998 et Loi 26 Juin 2000, available at <http://www.privacyinternational.org/countries/belgium/loi-publicite.rtf>.

⁶ Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005, at vi, available at http://www.ciaj-icaj.ca/english/publications/ModelPolicyAccess_CJC_Septe.pdf.



Public Access to Judicial Information in the United States

David A. Schulz*

Levine Sullivan Koch & Schulz, L.L.P.



I. Nature of the Public's Access Rights

It is long settled in the United States that “[w]hat transpires in the courtroom is public property.”¹ The rights of the public and press to attend judicial proceedings and inspect judicial documents are secured primarily by a constitutional “right of access” and a common law right to inspect judicial records. At the federal level, the Freedom of Information Act, 5 U.S.C. §§ 552(b), *et. seq.*, that authorizes public access to government documents generally, does not apply to documents maintained by the Judicial Branch.²

A. The Constitutional Right of Access

1. Source and scope of the constitutional access right

The United States Supreme Court has interpreted the First Amendment to the United States Constitution to convey an affirmative, enforceable right of public access to certain government proceedings and information.³ In *Richmond Newspapers Inc. v. Virginia*, a landmark decision handed down in 1980, the Court concluded that the express constitutional guarantees of free speech, freedom of the press, and the right to petition the government enshrined in the First Amendment necessarily carry with them an implicit right to government information, such that “an arbitrary interference with access to important information” abridges the First Amendment.⁴

The Court reasoned in *Richmond Newspapers* that the First

Amendment plays a “structural role” in securing and fostering a democratic self government. “Implicit in this structural role is not only the principle that debate on public issues should be uninhibited, robust and wide open, but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.”⁵ In reaffirming the constitutional access right just two years later, the Court emphasized that the First Amendment protects the free discussion of government affairs to ensure that citizens can effectively “participate in and contribute to” democratic self-governance.⁶ This need for a citizenry informed about the actions of their government is the wellspring of the constitutional access right recognized in the United States.

In order to determine what government proceedings and documents are subject to the constitutional access right, the Supreme Court has developed a two-pronged test that evaluates both historic practices and policy objectives. The First Amendment right of access exists where government proceedings and information traditionally have been available to the public, and public access plays a “significant [positive] role” in the functioning of government.⁷ Under this “experience” and “logic” analysis, the right of access “has special force” when it carries the “favorable judgment of experience,” but what is “crucial” in deciding where the access right exists “is whether access to a particular government process is important in terms of that very process.”⁸

* Mr. Schulz is a partner in Levine Sullivan Koch & Schulz, L.L.P., a national law firm specializing in media, First Amendment, and intellectual property litigation. He is a lecturer in law at Columbia Law School in New York and a member of the New York Committee on Open Government, the state agency responsible for implementing freedom of information, open meetings, and personal privacy laws in New York. Mr. Schulz regularly represents news organizations in asserting the right of public access to government proceedings and government information. Currently, he is representing the *New York Times*, Associated Press, and other news organizations asserting the right to inspect court pleadings filed by Guantanamo detainees, and to court records containing allegations of torture.

¹ *Craig v. Harney*, 331 U.S. 367, 374 (1947).

² While the federal Freedom of Information Act exempts the judiciary, some state freedom-of-information laws do authorize access to documents in the states courts. The statutory provisions vary from state to state. *See, e.g.*, Fla. Stat. § 119.0714 (extending the Florida freedom of information law to court records). There are a few federal statutes that deal with access to certain specific types of judicial documents, such as the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*

³ The First Amendment provides, in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 583 (1980) (Stevens, J. concurring).

⁵ *Id.* at 569 (citing Matthew Hale, *The History of The Common Law of England* 343-45 (6th ed. 1820) and 3 William Blackstone *Commentaries* 372-73).

⁶ *Id.* at 569-573 n.7.

⁷ *Id.* at 571-72 (citation omitted).

⁸ *Id.* at 572.

In *Richmond Newspapers*, for example, the Court found a constitutional right of access to criminal trials by tracing the history of public trials back to the Norman Conquest of England and concluding that this long tradition of access “is no quirk of history,” but rather “an indispensable attribute of an Anglo-American trial.”⁹ The Court then catalogued the significant public purposes served by access to criminal trials, finding that: public access (1) enhances “the performance of all involved,” (2) protects judges and prosecutors from imputations of dishonesty, (3) discourages perjury, (4) educates the public, and (5) provides “an outlet for community concern, hostility, and emotion.”¹⁰ Open trials not only enhance the likelihood of justice, they “satisfy the appearance of justice.”¹¹ “[O]pen societ[ies] do not demand infallibility from their institutions,” the Court stressed, “but it is difficult for them to accept what they are prohibited from observing.”¹²

As discussed below, applying this “experience and logic” analysis, the constitutional right of access has been held to apply to virtually all judicial proceedings, including civil trials as well as criminal trials,¹³ the jury selection process,¹⁴ pre-trial hearings, and post-trial motions. The constitutional access right also extends to many judicial records including evidence and documents used during the course of a public proceeding, motion papers, affidavits and evidence relied upon by a court that substitute for a public hearing, and other categories of court records where the “experience and logic” analysis demonstrates that the constitutional right should apply.¹⁵

2. Limits to the constitutional access right

The constitutional access right is a qualified right, not an absolute right. The right can be overcome, and public access limited or denied, only where the party seeking to limit access demonstrates four things:

- a. **A substantial probability of prejudice to an equally compelling interest if public access is not limited.**¹⁶ The Supreme Court has stressed that a denial of the constitutional access right is permissible only when it is “essential to preserve higher values,” for example, to protect a defendant’s fair trial rights, or the identity of an undercover police officer.¹⁷ A compelling interest is required because “[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat.”¹⁸
- b. **The absence of any alternatives that will adequately protect the threatened interest other than a limitation of access.** Before the constitutional access right can be abridged, a “trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue.”¹⁹ For example, if closure is requested to protect against publicity that might harm a defendant’s fair trial rights, a number of alternative options exist that do not require a restriction on the public access right, such as more careful questioning of jurors during jury selection, curative instructions to jurors during the trial, delaying the trial, or changing the venue. A court must find such alternatives to be inadequate before it can restrict the constitutional access right.
- c. **The proposed restriction on access is narrowly tailored, to limit secrecy in time and scope.** Any sealing imposed must be no broader than necessary to protect the threatened interest. If a more narrowly tailored means of protecting the interest exists, such as limiting the denial of access to discrete sections of a hearing, it must be employed to limit the impact on the public’s access rights.²⁰
- d. **The restriction on access will meaningfully protect the threatened interest.** Under the principle of “non-futility,” a constitutional right may not be infringed for an idle purpose, so any limitation on the access right must be effective

⁹ See, e.g., *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988); *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 22-23 (2d Cir. 1984); *In re Cont’l Ill. Sec. Lit.*, 732 F.2d 1302, 1308 (7th Cir. 1984).

¹⁰ *ABC v. Stewart*, 360 F.3d 90 (2d Cir. 2004); *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994).

¹¹ See, e.g., *In re New York Times Co. (Biaggi)*, 828 F.2d 110 (2d Cir. 1987) (constitutional right of access to pre-trial motion papers in criminal prosecution); *Publicker Industries v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (constitutional right of access to filed motions in civil proceeding); *Hartford Courant v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004) (constitutional right of access to court dockets).

¹² See, e.g., *Richmond Newspapers, Inc.*, 448 U.S. at 581; *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”); *Press-Enterprise II*, 478 U.S. at 13-14; *ABC v. Stewart*, 360 F.3d at 100.

¹³ *Press-Enterprise I*, 464 U.S. at 510.

¹⁴ *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

¹⁵ *In re Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984); see also, e.g., *Press-Enterprise II*, 478 U.S. at 13-14; *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982).

¹⁶ See, e.g., *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14; *Johnson v. Greater SE Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277-78 (D.C. Cir. 1991); *In re New York Times Co.*, 585 F. Supp. 2d 83, 91-92 (D.D.C. 2008).

¹⁷ *Press-Enterprise I*, 464 U.S. at 510.

¹⁸ *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

¹⁹ *In re Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984); see also, e.g., *Press-Enterprise II*, 478 U.S. at 13-14; *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982).

²⁰ See, e.g., *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14; *Johnson v. Greater SE Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277-78 (D.C. Cir. 1991); *In re New York Times Co.*, 585 F. Supp. 2d 83, 91-92 (D.D.C. 2008).

in protecting the threatened interest for which limitation on access is imposed.²¹

The First Amendment right of access is an affirmative, enforceable individual right. Any member of the public or the press may object to closed proceedings or sealed documents.²² In order to restrict the constitutional right of access, a court must ensure that each of the four prerequisites is met. The public and press must be given notice and an opportunity to be heard when a proceeding is to be closed, and the court must make factual findings justifying any restriction on access with sufficient particularity to be reviewed on appeal.²³

B. The Common Law Right of Access

1. Source and scope of the common law access right

Before the constitutional access right was first articulated, federal courts had long recognized a common law right “to inspect and copy public records and documents, including judicial records and documents.”²⁴ In *Nixon v. Warner Communications, Inc.*, a case involving a record company’s request to copy President Nixon’s tape recordings after they were used as evidence in a criminal trial, the Supreme Court cited practices of U.S. courts dating back to the nation’s founding allowing broad public access to judicial documents. Common law affords the public a right of access to judicial records without any precondition or requirement for a “proprietary interest” or specific litigation need.²⁵ This historic right to inspect court records “allows the citizenry to monitor the functioning of our courts, thereby ensuring quality, honesty, and respect for our legal system.”²⁶ Like the constitutional right, the common law right of access to judicial records ensures that courts “have a measure of accountability” and promotes “confidence in the administration of justice.”²⁷

This common law right stands alongside and independent of the constitutional access right. There is no uniform agree-

ment over the scope of the common law right. Many courts hold that the common law right of access attaches to virtually any document filed with a court by a litigant.²⁸ Some courts, however, take a narrower view and find the common law right to apply only to documents that a court relies upon in exercising judicial power. As one court expressed this narrower view:

We think that the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access. We think that the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.²⁹

Courts also disagree about the point at which the common law right may be exercised. While the constitutional access right attaches to a document at the moment it is filed with the court, a minority of courts hold that the common law right to inspect a judicial record may not be enforced until the conclusion of a proceeding.³⁰

2. Limits to the common law right

Like the constitutional right, the common law access right is also a qualified right, and it can be overcome in various situations. Courts generally refer to common law as creating a strong “presumption” in favor of access that requires “compelling” reasons to overcome.³¹ The *Nixon* Court recognized a degree of discretion under the common law to deny access to court records where court files are being used “for improper purposes,” but without providing significant guidance on the boundaries to the exercise of such discretion.³² One Court of Appeals has articulated six factors to consider in assessing a request to limit the common law right of access:

- (1) the need for public access to the documents at issue;
- (2) the extent to which the public had access to the docu-

²¹ See *Press-Enterprise II*, 478 U.S. at 14 (party seeking secrecy must demonstrate “that closure would prevent” harm sought to be avoided); *In re Herald Co.*, 734 F.2d at 101 (closure order cannot stand if “the information sought to be kept confidential has already been given sufficient public exposure”); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1146 (9th Cir. 1983) (“[T]here must be ‘a substantial probability that closure will be effective in protecting against the perceived harm.’”) (citation omitted).

²² See, e.g., *Globe Newspapers*, 457 U.S. at 609 n.25 (public has right to notice and an opportunity to be heard before a judicial proceeding is closed); *United States v. Antar*, 38 F.3d at 1362 (same); *In re Herald Co.*, 734 F.2d at 102 (same).

²³ See, e.g., *Press-Enterprise I*, 464 U.S. at 510-511; *Biaggi*, 828 F.2d at 116.

²⁴ See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

²⁵ *Id.* at 597.

²⁶ *In re Cont’l Ill. Sec. Litig.*, 732 F.2d at 1308.

²⁷ *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).

²⁸ E.g., *F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) (documents accepted by a court in the course of judiciary proceedings are subject to the common law presumption of access); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994) (holding that a settlement agreement not filed with the court is not a judicial record subject to the common law access right).

²⁹ *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); see also *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 12-13 (1st Cir. 1986) (applying common law right only to “materials on which a court relies in determining litigants’ substantive rights”); *United States v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997) (concluding that a plea agreement withdrawn from the court when a plea deal fell through is not subject to the common law right of access).

³⁰ E.g., *Amodeo*, 44 F.3d at 14; *In re Reporters Comm. For Freedom of Press*, 773 F.2d 1325 (D.C. Cir. 1985).

³¹ See, e.g., *In re New York Times Co.*, 585 F. Supp. 2d at 92.

³² *Nixon*, 435 U.S. at 598.

ments prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.³³

Other courts have articulated a two-step analysis encompassing many of these same issues, but framing the test as a “balance” of (1) the weight to be given the “presumption of access” against (2) any “competing considerations” that militate against access.³⁴ Under this approach, the “weight” given to the presumption of access is “governed by the role of the material at issue in the exercise of . . . judicial power and the resultant value of such information to those monitoring the federal courts.”³⁵ The countervailing interests to be balanced against the presumption of access include such things as the danger of impairing law enforcement, judicial efficiency, and individual privacy.³⁶

Specific applications of access rights

A. Judicial Proceedings

The constitutional access right has been found to apply to virtually all proceedings conducted in the courts. In criminal prosecutions, the right does *not* extend to grand jury proceedings that historically have been closed for sound public policy reasons, including the protection of the privacy of innocent individuals who may be investigated but never charged with a crime.³⁷ Following arraignment, however, almost every aspect of a criminal prosecution is subject to the constitutional access right, from

pre-trial hearings,³⁸ through jury selection,³⁹ trial,⁴⁰ sentencing,⁴¹ and appeals.⁴²

Civil trials⁴³ and virtually all related proceedings⁴⁴ are also subject to a right of access. In specialized proceedings, such as those dealing with divorce, child custody disputes, or juvenile delinquency, the same access rights generally apply, but courts may find that privacy interests outweigh the access right in specific situations.⁴⁵

B. Judicial Documents

1. Court docket sheets

The public’s right of access to court dockets is unambiguously protected by both the First Amendment access right⁴⁶ and common law.⁴⁷ Dockets contain a chronological listing of all items filed in a case and all actions by the court. Access to dockets is protected because a review of the docket provides the only effective means to monitor the course of a prosecution or a civil lawsuit, so that “the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible.”⁴⁸

2. Court opinions and orders

Orders and opinions issued by a court are also subject to both the First Amendment and common law access rights.⁴⁹ Access to opinions and orders is critical to public monitoring of the judiciary, and essential to the development of common law.⁵⁰ As one court has explained: “It should go without saying that the judge’s opinions and orders belong in the public domain. Both

³³ *Johnson v. Greater S.E. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 n.14 (D.C. Cir. 1991) (citing *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980)). See also *Lugosch v. Pyramid Co.*, 435 F.3d 110, 120 (2d Cir. 2006) (discussing relation of constitutional and common law access rights).

³⁴ *Lugosch*, 435 F.3d at 119-20 (citation omitted).

³⁵ *Id.* at 119 (citation omitted).

³⁶ *Id.* at 120.

³⁷ E.g., *United States v. Sierra*, 784 F.2d 1518 (11th Cir. 1986); *In re Antitrust Grand Jury Investigation*, 508 F. Supp. 397 (E.D. Va. 1980).

³⁸ *Press-Enterprise II*; *In re N.Y. Times (Biaggi)*, 828 F.2d 110 (2d Cir. 1987).

³⁹ *Press-Enterprise I*; *United States v. Antar*, 38 F.3d at 1362, *ABC v. Stewart*, 360 F.3d at 92-93.

⁴⁰ E.g., *Richmond Newspapers, supra*; *Globe Newspapers, supra*;

⁴¹ E.g., *United States v. Alcantara*, 396 F.3d 189 (2d Cir. 2005).

⁴² E.g., *In re Sealed Case*, 26 Med. L. Rptr. [BNA] 1319 (D.C. Cir. 1997).

⁴³ E.g., *Rushford*, 846 F.2d at 253; *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 22-23 (2d Cir. 1984).

⁴⁴ E.g., *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (pre-trial and post-trial hearing subject to access rights); *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (preliminary injunction hearing).

⁴⁵ See, e.g., *State ex. rel. Gore Newspapers Co. v. Tyson*, 313 So.2d 777 (Fla. App. 1975) (reversing closure of divorce proceeding); *Palm Beach Newspapers, Inc. v. Harper*, 417 So.2d 1100 (Fla. App. 1982) (denying access to alimony hearing); *In re Adoption of H.Y.T.*, 458 So.2d 1127 (Fla. 1984) (upholding statute requiring mandatory closure of all adoption proceedings); *Herald Co. v. Tormey*, 537 N.Y.S.2d 978 (N.Y. Sup.) (error to close youthful offender proceeding), *aff’d*, 544 N.Y.S.2d 750 (N.Y. App. 1989); *Florida Publ’g Co. v. Morgan*, 322 S.E.2d 233 (Ga. 1984) (juvenile proceedings may be presumptively closed).

⁴⁶ *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *United States v. Valenti*, 987 F.2d, 708 (11th Cir. 1993).

⁴⁷ See, e.g., *United States v. Criden*, 675 F.2d 550, 559 (3d Cir. 1982); *In re State-Record Co., Inc.*, 917 F.2d 124, 129 (4th Cir. 1990). Several states have specific statutes mandating public access to state court dockets. See, e.g., Ind. Code Ann. § 33-32-3-3; Nev. Rev. Stat. § 17.170; N.J. Stat. Ann. § 2A:18-37; N.Y. Jud. Law § 255-b.

⁴⁸ *Hartford Courant*, 380 F.3d at 93.

⁴⁹ *PepsiCo Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995) (judicial opinions belong to the public).

⁵⁰ See *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984).

litigants and judges may protect properly confidential matters by using sealed appendices to briefs and opinions.⁷⁵¹

3. Filed motion papers

The public's qualified rights of access extend to pleadings, motions, and other substantive papers filed with a court that affect the merits of a lawsuit.⁵² Some statutes and court rules recognize narrow situations in which pleadings must be kept confidential for limited periods of time.⁵³ Records in some categories of cases, such as adoption, guardianship, and juvenile delinquency matters are sometimes sealed or redacted to protect privacy interests.⁵⁴

4. Materials concerning court administration

Records dealing with the routine administration of the courts, rather than the resolution of a particular case, are not typically subject to either the constitutional or common law right of access. For example, plans developed by court clerks for identifying and contacting potential jurors, records relating to payments made to court-appointed counsel, and other purely administrative matters have been held to be outside of the access rights.⁵⁵ ■

⁵² *E.g.*, *Lugosch v. Pyramid Co.*, 435 F.3d 110 (2d Cir. 2006) (common law and constitutional right of access to summary judgment motion papers); *In re Cendant Corp.*, 260 F.3d 183 (3d Cir. 2001) (right of access extends to all documents filed in a civil lawsuit); *In re New York Times (Biaggi)*, 828 F.2d 110 (2d Cir 1987) (right of access to pre-trial motions in a criminal prosecution).

⁵³ *E.g.*, False Claims Act, 31 U.S.C. § 3729, *et seq.* requires certain complaints to be sealed for 60 days while the government investigates the allegations.

⁵⁴ See, *e.g.*, *Palm Beach Newspapers, Inc. v. Limbaugh*, 967 So.2d 219 (Fla. App. 2007) (allowing divorce settlement to be kept confidential); *Copeland v. Copeland*, 930 So.2d 940 (La. 2006) (finding court order sealing entire record in divorce and child custody case to be overbroad). Some state statutes require particular records to be kept confidential. See, *e.g.*, Ind. Code Ann. § 31-39-1-2 (closing records of juvenile proceedings); Md. Code, State Gov't § 10-616(b) (closing adoption and guardianship records).

⁵⁵ For example, many states have laws restricting the disclosure of information provided to the clerk for initially screening potential jurors, *e.g.*, N.Y. Jud. Law § 509; Pa. R. Crim. P. 632(B). These administrative records are not to be confused with names and addresses of jurors selected to sit on a specific jury, which are subject to the constitutional access right. *E.g.*, *United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008); *ABC v. Stewart*, 360 F.3d at 93.



AportesDPLF

DPLF's quarterly newsletter, begun in 2007 as part of our Judicial Accountability and Transparency Program (JAT), became a fixture in our work and the judicial reform and human rights regional dialogue in 2008. In the final 2008 edition, we expanded the newsletter to include Equal Access to Justice Program (EAJ) issues and activities.

The newsletter is sent to our on-line mailing list, as well as distributed in hard copy to key judicial authorities in the region and other stakeholders. *AportesDPLF* is now warmly received by many organizations and officials throughout Latin America.



To subscribe to AportesDPLF please send an e-mail to aportes@dplf.org.



The Judicial System in the New Bolivian Constitutional Order

Eduardo Rodríguez Veltzé

Former Chief Justice of the Supreme Court of Bolivia and former President of Bolivia



Bolivia's New National Political Constitution (*Nueva Constitución Política del Estado*, NCPE) was enacted on February 7, 2009. The Constitution was drafted by a Constituent Assembly elected in 2006 and later, on January 25, 2009, adopted through a Constitutional Referendum by a 61.43% majority. As a result of its origins and the political support it received, but largely because of its content, this Constitution marks a major breakthrough in the legal and constitutional structures that had governed the country since the adoption of the 1967 Constitution, which was repeatedly amended in recent years under democratic rule.

The first article of the NCPE describes the nature of the new State and defines the foundations or principles that underpin it: “*Bolivia is constituted as a Social Unitarian State of Plurinational and Communitarian Law that is free, independent, sovereign, democratic, intercultural and decentralized, and has autonomous entities. Bolivia is grounded on the principles of plurality and political, economic, legal, cultural and linguistic pluralism, as part of the national integration process.*”

The *legal pluralism* element, as the conceptual basis for the development of the new legal system, is integrally connected to the *plurinational* nature of the new State, which is composed of native nations and peasant peoples as well as the intercultural communities, and with the explicit recognition of the *communitarian* form of governance in which these nations and peoples elect or appoint their authorities and exercise other rights guaranteed in the NCPE.

The governing structure and organization of the state includes the Legislative, Executive and Judicial Bodies (formerly known as Powers), and now the Electoral Body. Each of these bodies maintain their characteristics of independence, separation, coordination and cooperation, as well as functions such as control, defense of society and defense of the State, and none of these functions may be fulfilled by a single body or delegated between the various bodies.

The Judicial Body and the Plurinational Constitutional Tribunal (*Tribunal Constitucional Plurinacional*) are regulated under the same NCPE section, which includes six chapters that

address general dispositions; Ordinary Courts and the Supreme Court of Justice; Agro-Environmental Jurisdiction (*Jurisdicción Agroambiental*); the Native Peasant Indigenous Jurisdiction (*Jurisdicción Indígena Originaria Campesina*); the Judicial Council (*Consejo de la Magistratura*); and the Plurinational Constitutional Tribunal. Although the composition is fairly similar to that established in the previous Constitution, there are some significant innovations regarding the concept of *legal pluralism* and the mechanisms for electing the authorities of the main tribunals.

The NCPE defines the judicial function as singular, but also provides for the coexistence of the ordinary jurisdiction exercised by courts contemplated in the legal standard with the *native peasant indigenous jurisdiction* that is exercised by these communities' own authorities, noting that both jurisdictions enjoy equal status. The indigenous jurisdiction hears community matters within the jurisdiction of each nation or group of people. The NCPE provides that a secondary law of “jurisdictional demarcation” shall determine the material scope and the mechanisms of coordination and cooperation between the *native peasant indigenous jurisdiction* and other jurisdictions.

Furthermore, the NCPE delegates to the Plurinational Constitutional Tribunal the responsibility to receive consultations from *native peasant indigenous authorities* on the application of their legal norms to specific cases, and to resolve conflicts of jurisdiction between *native peasant indigenous* jurisdictions and rural and agro-environmental jurisdictions. The Constitutional Tribunal will be *plurinational* in its composition, with representatives from both the ordinary justice system and the *native peasant indigenous* justice system.

The new system has therefore given relevance to *native and peasant indigenous* justice fora, which have multiple sources and, in many cases, pre-exist the Republic itself. The NCPE brings them under a *single* regime, subject to the constitutional supremacy of the new State, according to a singular and practical view of the new *legal pluralism*, which forms the constitutional basis of the State.

The Constitutional Tribunal will be plurinational in its composition, with representatives from both the ordinary justice system and the native peasant indigenous justice system.

The judges of the Supreme Court of Justice, the Agro-Environmental Court, the Plurinational Constitutional Tribunal and the members of the Judicial Council are elected by universal suffrage, and candidates are pre-selected by a vote from two-thirds of the members of the Plurinational Legislative Assembly. The Electoral Body controls this process and is responsible for publicizing each candidate's qualifications, while the candidate may not campaign under penalty of being barred from holding office. Tenure has been reduced from ten to six years, with no possible reelection.

The voting members of the Departmental Courts are elected by the Supreme Court of Justice, based on a pre-selection by the Judicial Council. The rest of the judges are elected by the Council through a process of competitive qualifications evaluation and competency testing.

The Judicial Body will most likely be established once the Plurinational Legislative Assembly has been elected in December 2009 and approves, within the maximum term of one year, the Judicial Body Law (*Ley del Órgano Judicial*), which shall determine—among other substantive issues—the number of Tribunal and Council members. The NCPE does not include any provision in this respect, but does in its transitional provisions set forth that the judicial posts and the current judicial career system should be reviewed.

The NCPE reduces significantly the representation of the Supreme Court of Justice (*Tribunal Supremo de Justicia*, formerly *Corte Suprema de Justicia*). The Court no longer represents the Judicial Body, and its Chief Justice does not chair or sit on the Judicial Council and does not participate in the constitutional succession to the Presidency of the State in case of death or resignation of the heads of the other bodies, as provided by the former Constitution. As for the Court's competencies, its powers as the highest contentious and administrative tribunal have been partially transferred to the Agro-Environmental Court (*Tribunal Agroambiental*, formerly *Tribunal Agrario Nacional*), which has authority to hear cases and actions concerning the use of land and natural resources. No reference has been included as to Justices of the Peace (*Juzgados de Paz*) or other jurisdictions which may be created and regulated by secondary legislation.

The Plurinational Constitutional Tribunal (formerly Constitutional Tribunal, *Tribunal Constitucional*) retains its role as guarantor and interpreter of the Constitution. With regard to this latter role, the NCPE has eliminated the power of “authentic” interpretation by the Legislative Body, and defines as interpretation criteria the original intent of the framers and the wording of the Constitution. The Tribunal's decisions are binding, mandatory and are not subject to subsequent appeal. Apart from the power to consider actions of constitutionality, additional powers have been included, such as the authority to rule on conflicts of jurisdiction between the *plurinational* government and the autonomous and decentralized territorial entities, as well as conflicts between these entities, and to review Freedom actions (formerly *Habeas Corpus*), constitutional injunctions (*Amparo Constitucional*), protection of privacy actions (formerly *Habeas Data*), and Popular and Compliance actions.

The Judicial Council (*Consejo de la Magistratura*, formerly *Consejo de la Judicatura*) retains its disciplinary and administrative functions. It no longer includes magistrates among its members and has adopted the principle of “citizen participation” in the execution of its functions.

The most recent studies on the problems of Bolivia's judicial system point to the lack of access to less complicated and more efficient judicial services which seek to facilitate the peaceful and legitimate settlement of conflicts for all persons; the need for broader administrative justice spaces for the expeditious resolution of citizen challenges to public entities' actions; the political interference with the system, which causes a

disproportionate politicalization of justice and judicialization of politics; the absence of comprehensive and efficient public policies on public security; and the violation of due process rules as well as universal human rights principles. The NCPE provides an opportunity to address these and other challenges to improve and revitalize the judicial system and, in this way, strengthen its independence, efficiency and accessibility—all prerequisites for restoring the rule of law as a democratic value of the new *Estado Unitario Social de Derecho Plurinacional Comunitario*: the Social Unitarian State of Plurinational and Communitarian Law. ■

The judges of the Supreme Court of Justice, the Agro-Environmental Court, the Plurinational Constitutional Tribunal and the members of the Judicial Council are elected by universal suffrage.



How to contact DPLF

E-mail: aportes@dplf.org Web site: www.dplf.org RSS: <http://www.dplf.org/rss.php>



The Election of Judges

Anthony Champagne

Professor of Political Science, University of Texas at Dallas



Judicial elections are rare in all countries except in the United States of America. In the U.S., judicial elections are a common form of selecting judges in many of the American states. In fact, only five of the states have systems of judicial selection where the governor or legislature appoints judges and where no judicial elections take place. All other states have at least some judicial elections. These elections take several forms.

According to the American Judicature Society, a highly respected judicial reform organization, seven states initially select their judges through partisan elections. With partisan elections, judicial candidates are listed with a political party label on an election ballot and will benefit (or suffer) from the electoral support generated by that political party affiliation.

Fourteen states initially select their judges through nonpartisan elections. In this election, judicial candidates run for office, but do not appear on the ballot with a party label. As a result, unlike partisan elections, voters do not have the party affiliation to aid them in their choice of a judge.

Such a system does lessen the importance of political party affiliation in the election of judges, but it also reduces the proportion of votes cast for judges and lessens the information that voters have about judges since they will not be able to determine the judicial candidate's political party by simply reading the ballot.

Sixteen other states have a form of judicial selection where judges are initially appointed to their offices, but they then run for re-election in retention elections. In a retention election, a judge has no opponent. The ballot asks the voter if the judge shall be retained in office and the voter responds with a yes or no vote. Judges in retention elections do not run with a party label. Nine other states have combinations of selection systems (hybrid systems) that include at least some judicial elections.

Very few judges are defeated in retention elections, in large part because the judge does not have an opponent. In those rare cases where a judge is defeated, it is usually because of a scandal or an organized interest group that mobilizes the electorate against a candidate due to the judge's controversial views or decisions. It is rare in retention elections, however, for judges to raise much money for their campaigns and organized opposition to judges in retention elections is also rare.

The greatest controversies involving judicial elections tend to involve partisan elections, although some nonpartisan elections can equal the intensity of partisan elections. That is

because some nonpartisan election states are truly nonpartisan; while others are highly partisan, with the only distinction between it and a partisan election state being the lack of a party label on the ballot. Every state has its own political culture and some states have far more raucous judicial campaigns than others.

The variety of election systems is related to the federalist system in the USA where each state is free to design its own state judicial system. Another explanation for the variety of judicial election systems is that states were added to the USA in different time periods where different judicial selection systems were in vogue. Several of the older states, for example, in the eastern USA have appointed judges. Western states often have nonpartisan judicial elections. Southern states often have partisan elections. The different periods of judicial reform movements in the USA have led to these different systems of judicial selection.

Initially, judges were appointed either by the governor or by the legislature. In the mid-1800s, judicial elections became quite popular as a way to give judges an independent political base separate from the influence of the appointing officials. Then, in reaction to the influence of political parties and political machines over judges, nonpartisan election of judges was developed. Finally, to reduce the importance of political party machines and increase the independence of the judiciary, a selection system was developed that is commonly called the Missouri Plan since that was the first state that adopted the system.

With the Missouri Plan, a commission composed of lawyers and lay people would recommend a group of persons for a judgeship and the governor had to appoint one of the members of that group to the bench. After serving as a judge for a period of time, the judge would then run for office to retain the judgeship in a retention election.

Over the past 25 years, the major debate over state's judiciaries has been over problems in judicial elections—especially partisan judicial elections. A number of developments have led to this controversy. A number of states, especially Southern states, have gone through a dramatic political transformation from being overwhelmingly Democratic Party states to being overwhelmingly Republican Party states. As a result, in the 1980s-1990s, judicial elections in a number of states became hotly contested where Republican judicial candidates increas-

ingly defeated Democrats and won judicial offices. In some states, the transformation was dramatic with dozens of Democratic judges being swept from office in one election. That, for example, occurred in 1984 in Texas where the popularity of Republican presidential candidate Ronald Reagan led numerous Democratic judges running for reelection in partisan elections to be swept from office simply due to Reagan's popularity.

Another development over the past 25 years in the United States has been a huge battle over tort law. In tort cases, individuals or businesses are sued for monetary damages because of alleged harms that they have caused to others. Businesses and insurance companies who insure them and individuals against such law suits naturally want to minimize these lawsuits and the damage awards. Lawyers who represent these businesses and insurance companies are known as insurance defense lawyers and, of course, they share the interests of their clients.

Conversely, a segment of the legal profession known as plaintiffs' lawyers make their incomes by winning tort suits for their clients and receiving a portion of the damage award as payment. The plaintiffs' lawyers are often aligned with consumer groups and with labor unions that tend to see their interests as contrary to the interests of business. These opposing groups have gotten involved in judicial elections by heavily funding judicial candidates who support their pro- or anti-tort law agenda.

It is this battle over tort law, coupled with high levels of political partisanship in a number of states, that has changed the nature of judicial elections. Huge amounts of money are now being raised in judicial elections, especially for state supreme courts, in a number of states. It is now common for judicial candidates for state supreme courts in some states to raise over one million dollars for their campaigns. In a few state supreme court races, tens of millions might be spent.

However, other factors also influence the battles over the election of judges. In some states, criminal justice has become an important issue that can mobilize voters for or against judicial candidates. It has become increasingly common for opponents of judges to focus on a controversial decision in a criminal law case that was made by an incumbent judge and use that decision in political attacks against a judge. Thus, a judge who has released a criminal on bail who then committed murder, or a judge who gave a seemingly light sentence to a child abuser, can expect that decision to haunt him or her in the next political campaign. Of course, judges make hundreds of decisions and there are always one or two that can be used against the judge in a campaign.

The financial contributions of those involved in the battle

over tort law are needed because the nature of judicial campaigns has changed over the past 25 years. In many states, if candidates for state supreme courts are going to mobilize voters in elections, they must run television advertisements. Those advertisements are expensive to produce and even more expensive to run. And, of course, the ads must be attention-getting, so they will often accuse opponents of favoring child abusers, or insurance companies over sick people, or some other allegation that will attract the public eye.

Reformers who want to change judicial elections generally want states to move away from partisan and nonpartisan elections to the Missouri Plan where judges run only in normally non-controversial retention elections. In addition to criticizing judicial elections because of the political campaign contributions that are involved, the high levels of partisanship, and the sometimes vicious campaigns, reformers worry that the quality of judges chosen in a competitive elective system will not be as high as the quality of judges chosen under the Missouri Plan.

It may well be that the personalities of judges chosen under competitive elective systems are different from those chosen under competitive elective systems, but there is no evidence of a difference in the quality of judges from the perspective of such characteristics as quality of law school attended or experience prior to becoming a judge.

To a great extent, the controversy over the selection of judges in the USA involves a theoretical dispute over the extent to which judges should be accountable to voters versus independent of electoral control. Of course,

the dispute is also a political one where particular interests may see an advantage to elected accountable judges versus more independent judges. A dominant political party in a state, for example, will likely prefer elected judges simply because that system will give the party more political offices for its members.

Nevertheless, in spite of the problems with judicial elections in reference to undignified campaigns, vicious campaign ads, and huge campaign contributions from interests that want to affect the outcomes of litigation, in most states judicial elections remain popular with voters. Leaders in the American legal community such as former U.S. Supreme Court Justice Sandra Day O'Connor have worked assiduously to get states to adopt the Missouri Plan. Justice O'Connor and other bar leaders are concerned with the impartiality of justice and the appearance of impartiality of justice where there is such an entanglement between judicial candidates and interest groups. However, in spite of these reform efforts, it seems likely that contested judicial elections in the United States will continue for many years to come. ■

Judicial elections are rare in all countries except in the United States of America. In the U.S., judicial elections are a common form of selecting judges in many of the American states.



Judicial Elections: A Personal View

Robert H. Alsdorf

Judge (ret.) and Professor at the Seattle University School of Law*



Under the United States Constitution, judges nominated by the President and confirmed by the United States Senate to the nation's federal courts hold their offices "during good behavior." By general agreement, that constitutional provision has been interpreted as meaning that the federal judges hold their positions for life unless impeached and removed from office, which has almost never been attempted in more than 200 years. Although their initial selection is subject to approval by the citizens' representatives, the United States Senators, federal judges are never subject to any sort of electoral process.¹

State and local courts are quite different. In the early- to mid-1800s, during a populist resurgence against the perceived power of corporations and political insiders, the great majority of states chose to have members of their benches chosen by vote of the citizens of each jurisdiction. As additional states joined the Union, most continued that practice. At the present time, more than 80% of judges who sit in state and local courts are subject to public elections. The details of these electoral processes, and the length of the judicial terms, vary from court to court and from state to state.

My Personal Experience with Elections

I served for 15 years as a general jurisdiction trial judge in the State of Washington, which is located in the Pacific Northwest region of the United States. After having worked as a trial lawyer for 17 years, I was appointed to an open judicial position on July 1, 1990 by the Governor of Washington. The position had a four-year term, and there were two years left in the term. In order to retain the seat, I had to stand immediately for election.

I had been appointed to that seat after a non-partisan committee for the Seattle-King County Bar Association had reviewed the qualifications of all lawyers who had declared themselves interested in becoming judges, and had made rec-

ommendations to the Governor of approximately 10 candidates they believed to be most qualified for judicial openings. These candidates were then interviewed by the Governor and his staff, and the governor made his selection as various judicial positions became open.

Nonetheless, that carefully designed process did not entirely control the electoral process. Any lawyer who wanted to run for the position to which I had just been appointed could declare him or herself to be a candidate for my seat before the end of July 1990, and their candidacy and mine would both be voted on as part of the general election then scheduled for September 1990. There was no pre-screening or prior approval of any sort required for any such opponent.

Anticipating this process, friends of mine formed a broad committee of lawyers of all political persuasions to prepare advertisements, write letters, speak on my behalf, and raise money to cover the expenses of my campaign. Ultimately, nobody filed against me, and I was elected unopposed. I was subject to this electoral process in 1990, 1992, 1996, and 2000. As a general rule, approximately 10% of judges are challenged in any given election and in none of those races did any lawyer choose to run against me.

However, I did join in one contested race. In 2004, I decided to mount a campaign for a seat on the Supreme Court of the State of Washington. There were six candidates for this position. I was fortunate to obtain professional and bi-partisan support, and to be endorsed by many different groups interested in public policy. Although I won the urban portions of the state by a wide margin in September 2004, I was far behind in the rural parts of the state, and when all votes were counted my candidacy for the state's highest court was defeated. At almost the same time, the four-year trial court term to which I had been re-elected in 2000 expired in January 2005, and I retired from the bench.

* From 1990 through 2005, Robert Alsdorf served as a trial judge for civil and criminal cases in the Superior Court for the State of Washington in Seattle, during which time he served a term as Chief Civil Judge. He retired from the bench in 2005. He currently holds the position of Distinguished Jurist in Residence at the Seattle University School of Law and through Alsdorf Dispute Resolution acts as arbitrator, mediator, and Special Master by court appointment or by agreement of the parties. He is a 1973 graduate of the Yale University Law School.

¹ There are several excellent organizations providing research and assistance on issues relating to the conduct and ethics of judicial elections. They include the following: American Judicature Society: www.ajs.org; Brennan Center for Justice: www.brennancenter.org; Justice at Stake Campaign: www.justiceatstake.org; and National Center for State Courts: www.ncsconline.org.

The Impact of Choosing to Elect Judges

Judicial elections are conducted in almost all of the states in the United States. State judicial terms can range from four years to as much as 12 years. In my state, Washington, trial judges are elected for four-year terms, and appellate judges for six. In some states, judges are subject to “retention” elections; that is, the voters are asked to approve or disapprove of a sitting judge, and only if a majority of the voters disapprove of the judge is the position then declared open and other candidates permitted to run for the position in the next full election. Some of these state judicial elections are explicitly non-partisan, with candidates being prohibited from identifying or manifesting any political affiliation. Other states expect candidates to identify themselves as Democrats, Republicans, or members of another party.

Like any human being, I would have been delighted to have had an absolutely secure position, and not be subject to periodic review by the voters. I have often envied the lawyers I know who were appointed to life-time positions on a United States federal court. That sort of security permits a judge to enforce the law as written, without fear or favor, without concern that he or she would be removed from the bench if the powers that be should be upset with a ruling. Nonetheless, I emphatically do not believe that electing judges is a bad thing, even though in my last election I failed to secure a seat on our state’s highest court.

The Good Side of Elections: Transparency

Why do I think that judicial elections can be beneficial? There is one fundamental reason. To be respected by the citizenry, a justice system must be transparent and fair—it must be seen by the citizens as being unbiased and independent of other political power centers. It must apply the rules equally, to rich and poor alike. It must apply neutral rules, and explain its decisions and rulings in language that citizens understand. When a judge is subject to public election, that judge necessarily understands that public interest.

I know that this reality affected me as a judge, and even more so as elections approached. I would think to myself, “What will the public think of this ruling? If I rule this way, will I be voted out of office?” That sort of thinking has a good and a bad side. The bad side is this: if I am too concerned about keeping my position, I might not rule as the law requires, I might just rule the way the majority wishes, an approach that would be devastating and unjust for disfavored minorities.

The good side is this: I am fully aware that I should take the time to provide a public explanation of my ruling, so that people can understand why I ruled the way I did. I have long believed that the most important person in the courtroom is not the

winning party. It is the losing party. The party who loses deserves to know that he or she has been heard, that all arguments have been considered. The party who loses deserves to know why its favored or strongest argument was still insufficient. If being subject to elections makes us as judges attentive to the public’s right to know, then it is a good thing.

I experienced this tension in a major way in a ruling that I made only a few short months before the election period in 2000. I found that a very popular law, passed by the citizens in an open election by a majority of more than one million votes, was unconstitutional. It was a tax reduction measure. My ruling meant that a much-hated tax was to be reinstated. I honestly expected that ruling in that manner would cause the public to vote against me in the upcoming election, but I knew that as a judge I had to do what the law required. And as a person who believes that the losing party is the most important party, I decided that even if it were to be my last ruling, it would be my best.

Although I was careful to include legal reasoning that would allow it to be upheld on the inevitable appeal to the state’s Supreme Court, I did not write my decision primarily for lawyers. I wrote it in language that I believed could easily be understood by citizens with a secondary school education. When I issued the decision, I announced it in open court and had it published on the internet. It was reprinted in newspapers all over the state, and tens of thousands of citizens downloaded and copied the decision. Some newspapers called it a “civics lesson” for the population. To my surprise, despite the predictable initial furor over my ruling, nobody filed to run against me.

I believe elections can have the beneficial effect of making judges attentive to the citizenry and therefore of making courts more transparent. There are countervailing dangers in elections, however.

The Risks from Elections: Money and Campaign Promises

Thus, I believe elections can have the beneficial effect of making judges attentive to the citizenry and therefore of making courts more transparent. There are countervailing dangers in elections, however. Campaigns for judicial office can be expensive. I feel fortunate to live and work in a state where there is a long, professional, non-partisan tradition for our courts, where lawyers gather support for judges (and where the judges themselves are ethically prohibited from asking anybody for money) but in some other states the pressures are immense, the partisanship is clear, and the need for money and the influence of money are great.

At the time I write this article, a case is pending in the United States Supreme Court on the issue of whether an elected state supreme court judge who has been the beneficiary of large campaign-related contributions from a single party must recuse and remove him or herself from sitting on and deciding a case in which that large donor is involved. For the sake of justice and

the appearance of justice, it is my hope that the Supreme Court will say, “Yes, the judge who is the beneficiary of large campaign contributions may not sit on a case and must remove him or herself from a case if a reasonable person would believe that the donation is large enough to influence the judge’s vote.”²

That might seem like a simple proposition, but the question is difficult—if you are to run a campaign for office, how do you pay for it? The honest judge, the honest public official, might not have the money to mount a campaign on his or her own. In most states, the judges’ supporters have to raise money; in others, the elections are entirely publicly financed. I am worried about what our Supreme Court might say to permit fundraising without requiring a judge to stand aside when a litigant raises money, because in recent years it has struck down certain other ethical limitations on the conduct of candidates for state judicial office, essentially stating that if they are candidates for a public position, that they are the equivalent of mere politicians.

I believe that, as would-be holders of a public trust, as trustees of a system of justice, judges and judicial candidates alike must live by a higher standard than that applied to other elected officials. Politicians have a duty to represent the side that elected them, to try to deliver what they promised. Elected judges, on the other hand, have the duty to deliver justice to all citizens, popular and unpopular, majority and minority, whether those citizens voted for the candidate or not.

There is another problem with elections: judicial speech and campaign promises. When judges are subject to election, the voters need to obtain sufficient information to be able to make an intelligent choice among the candidates. There are many questions. Who has selected or nominated this candidate? Who supports the candidate? Is the candidate professionally respected? Is the candidate bigoted or biased? How does one know which candidate is competent? What does the candidate stand for? Is there a non-partisan

committee or group that can publicly comment on and rate the candidates’ abilities in a straightforward way?

In our state, there is a long tradition of many different political and public interest groups addressing these questions and providing their perspectives on the candidate to the press and to any person who is interested. This helps the citizens make decisions on how to vote. The question of how the public can learn about the candidates and make meaningful choices must be considered and addressed if and when any jurisdiction decides to hold elections for judges. This particular issue also raises the specific question: what may the judicial candidate say in the course of an election campaign?

I believe that a judge must be very careful not to commit him or herself or even appear to commit him or herself on any issue that is likely to come before that judge; if the candidate does so, then whoever is the loser once that issue comes to court will believe that the decision was fixed, that the judge refused to listen, and that justice is unavailable. Judges may properly use

the opportunity of elections to explain the neutral functions of the courts, and not to pre-commit themselves to ruling in a specific way on a specific issue, but the temptation to say more, to play to public sentiment and popularity, is very strong. Any electoral process must address the question of what limits are placed on electoral speech.

A Personal Conclusion

No system of justice is perfect. No system of election or selection is perfect. Even “pure” merit-based selection systems can be manipulated or biased. I have found, however, that elections can perform a valuable service

by making the candidate and judge sensitive to the needs of the population as a whole, and sensitive to his or her duty—as a trustee of justice—to explain his or her rulings clearly and fairly. And if that is done, the entire population will be the beneficiary. ■

To be respected by the citizenry, a justice system must be transparent and fair—it must be seen by the citizens as being unbiased and independent of other political power centers. It must apply the rules equally, to rich and poor alike.

² On June 8, 2009, the United States Supreme Court indeed decided the case this way, with a majority of 5-4: *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009).



How to contact DPLF

E-mail: aportes@dplf.org Web site: www.dplf.org RSS: <http://www.dplf.org/rss.php>



The Real Cost of Pre-trial Detention in Latin America

Denise Tomasini-Joshi

Associate Legal Officer, Open Society Justice Initiative



At least 9.3 million people spent some time in pre-trial detention in 2006—a number likely to be higher this year. Many detainees are accused of minor, non-violent crimes and a significant number will be absolved. All of them, however, will—as a result of their detention—be at risk of losing jobs, falling ill, being assaulted, developing into a drug user or a gang member, and becoming estranged from their families. In numerous places, pre-trial detention regimes enable the use of torture, bribe-seeking, and other forms of corruption.

Effective mechanisms for pre-trial release—such as periodic supervision and electronic monitoring—exist and are being used in some jurisdictions, albeit sparingly. When properly used, such mechanisms or alternatives to detention avoid the negative social consequences of pre-trial detention without undermining public security. Since 2005, the Open Society Justice Initiative has sought to engender policy debates to foster an environment where pre-trial detention is used more rationally and sparingly in Latin America. To do so, the Justice Initiative commissioned country case studies—in Argentina, Chile, and Mexico—which calculate the true economic costs and consequences of existing pre-trial detention regimes. Moreover, the studies quantify the social costs of pre-trial detention practices—typically costs borne by individuals, households, and communities—such as a detainee’s loss of employment. The Argentina and Chile cost studies are summarized below (at the time of writing the Mexican¹ cost study had not been completed).

Argentina²

The Argentina cost study was undertaken by the Center for the Implementation of Public Policies Promoting Equity and

Growth (*Centro de Implementación de Políticas Públicas para la Equidad y el Crecimiento*, or CIPPEC). The study was organized around the federal prison service, with Buenos Aires as a province-based case study,³ using secondary sources to establish basic statistics such as: number of detainees processed, number of visits per month, and the duration of proceedings. This data was then corroborated through fieldwork consisting of randomly applied detainee surveys and randomly-selected detainee file reviews in four penitentiaries. Finally, individual interviews were held with different operators from the justice system, including judges and prison officials.

The Argentina study found that in 2008, 57% of all the people in prison in Argentina were in pre-trial detention. Moreover, 50% of those people were charged with property crimes rather than with the type of violent crime usually associated with public insecurity. The ratio of pre-trial detainees to convicted prisoners in Buenos Aires, however, was 72% for 2006, the last year when data were available.

After careful review of the data, the researchers estimate that the annual cost of pre-trial detention in 2007 was 115.2 million USD nationwide.⁴ The study found that the state’s share of that cost was 68%, the detainees’ 12%, and the detainees’ families’ 20%. Costs borne by the state are costs related to the penal process (investigation and public defense), annual

HIV care expenditure post-detention, and loss of social security contributions from those detainees previously employed. Since the study did not include the pre-trial proportional cost of building and maintaining the detention facilities, we can assume that both the amount and proportion assigned to the state may be higher. Costs borne by the detainees are: labor costs, risk of death

These studies show that the real cost of over-reliance on pre-trial detention entail significant opportunity and human rights costs—not only for the state, but also for detainees, their families, and communities.

¹ The Mexico study was developed by Dr. Guillermo Zepeda Lecuona of the *Centro de Investigación para el Desarrollo* (CIDAC) in Guadalajara, Jalisco.

² The full Argentina study titled: *The Social and Economic Impact of Pre-trial Detention in Argentina* will be posted in English and Spanish on CIPPEC’s Web site at: <http://www.cippec.org/nuevo>.

³ Argentina has a hybrid criminal justice system with both inquisitorial and adversarial characteristics. Additionally, it is a federal system comprised of 23 provinces.

⁴ The range of the costs was estimated to be between 313.4 million, to nearly 1 billion, Argentinean pesos. Using a conservative calculation based on that range, the cost was approximated at 435.29 million Argentinean pesos, or approximately 115.2 million US dollars.

and illness, loss of employer social security contributions, and extra-legal payments (i.e. bribes). Costs borne by the detainees' families are: those related to the maintenance of the detainee (food, blankets, medicine, cigarettes, etc), visiting time, payments for private attorneys, and extra-legal payments.

The authors faced a number of difficulties in the development of the study: 1) lack of other studies attempting to measure the economic and social costs of pre-trial detention, 2) difficulty accessing accurate and useful data, 3) inability to differentiate costs borne by detainee between females and males, 4) inability to quantify some of the social costs of pre-trial detention,⁵ 5) inability to calculate marginal costs, and 6) difficulty accounting for value transference.⁶ Most of these problems were shared by the Chilean authors, as will be seen below.

The Argentina study concludes that the state should adopt a policy in which expenditure is directly related to compliance with human rights norms concerning detainees, their families, victims of crime, and society as a whole, as well as a more efficient disciplinary strategy that allows evaluation according to objective criteria. The authors note that this approach might not necessarily be cheaper but rather will increase the benefits (in terms of security and respect for the rule of law) arising from funds already expended. In other words, the state and society as a whole will get more for their money.

Chile⁷

The Chile cost study was developed by *Fundación Paz Ciudadana* in Santiago. Chile has a centralized oral-adversarial system of criminal justice. As such, statistics on the court system are centrally located and there is no need to survey individual regions. The authors of the study depended mostly on the Chilean Treasury Department's budget office numbers. Chile's reform of its criminal justice system focused greatly on due process rights. As a result, Chile has one of the lowest percentages of pre-trial detainees in the region, 22%, as a proportion of its total incarcerated population. Nonetheless, given Chile's high rates of incarceration,⁸ the total numbers of pre-trial detainees remains high. Furthermore, the rate of incarceration in Chile appears to be increasing.

The Chile study avoids characterizing costs as borne by specific groups and instead divides costs between direct (found in the budgets of different criminal justice agencies) and indirect (social costs related to loss of employment, time spent in

prison visits, risk of death, illness or injury, etc). The study finds that in 2007 the direct yearly cost of pre-trial detention in Chile was 63.9 million USD.

To measure the indirect or social costs of pre-trial detention in 2007, the authors looked at the following variables: loss of detainee income, cost of family visits (divided between costs of transportation and goods brought for the detainees, and opportunity cost for time spent in the visit), cost of private attorneys, and cost of death in detention. These indirect costs added up to 28.5 million USD. The total cost then adds up to 92.4 million USD.

Conclusions

Accused persons, given their special status provided in both local and international legal instruments, should be granted certain benefits under the law, including the presumption of innocence and the opportunity to remain free during criminal proceedings as long as doing so does not entail certain legally-specified risks. These cost studies provide a starting point for determining the compensation to be paid to people wrongly detained, in countries where those payments are provided for by law. But the most important finding of these studies is that the real (direct, as well as indirect) cost of pre-trial detention is much higher than what can be found in a state's budgets. These studies show that the real cost of over-reliance on pre-trial detention entail significant opportunity and human rights costs—not only for the state, but also for detainees, their families, and communities.

Another important finding is the need to compile better data on pre-trial detainees. Lack of such data can encourage corruption and torture, and leads to inefficiencies in the system. The inability of the authors of the Argentina and Chile studies to find complete and reliable data for certain factors in what are considered developed countries with well-established justice systems, exemplifies how this part of the justice population can be ignored. The Argentina and Chile studies both found that many accused in their respective countries have committed non-violent property crimes. Detailed data are needed to help justice system operators make better decisions about provisionally releasing those who can be safely supervised in the community. Until that is done pre-trial detention will continue to be used as an anticipated sentence in violation of human rights norms. ■

⁵ These include: individual and family suffering, loss of quality of life, impact of social stigma, and interruption of life projects, among others.

⁶ For example, when families pay bribes this constitutes a cost to the families but a benefit to the guards.

⁷ The full Chile study titled *Los costos de la prisión preventiva en Chile*, will be posted on Fundación Paz Ciudadana's Web site at: <http://www.pazciudadana.cl/>.

⁸ Currently in Chile there are 316 prisoners for every 100,000 inhabitants, putting the country in 33rd place worldwide on this figure. See, World Prison Brief, International Center for Prison Studies at: <http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/>.



Oral proceedings and pre-trial detention in Ecuador

Diego Zalamea
Consultant

The purpose of this article is to describe an administration of justice reform process undertaken in Ecuador whereby, in spite of the absence of any legal basis, the stakeholders managed to substantially change the degree of enforcement of rights, the quality of the public service, the performance of their roles, and procedural celerity.

Background

The New Ecuadorian Code of Criminal Procedure, requiring the adoption of an oral and adversarial justice system, was approved on January 13, 2000 and came into effect on July 13, 2001. This article will address in detail two objectives of this reform: the introduction of the oral system and the prevention of the abuse of pre-trial detention. The legal wording of the Code did not facilitate the achievement of either purpose: the requirement that the resolution of provisional measures be in writing remained in place.¹ With a view to limiting the misuse of pre-trial detention, the possibility of requesting this measure was denied to private prosecutors (acting as third parties) in the case. However, time proved that this was a naive strategy, as the institutional mission and the inertia of legal culture provided all the incentives necessary for public prosecutors to continue to request pre-trial detention. Therefore, the impact was nil. In practice, the numbers of the National Social Rehabilitation Office (*Dirección Nacional de*

Rehabilitación Social) show that the habit of holding prisoners without convictions in preventive custody continued, and that the number of suspects in pre-trial detention is increasing under the oral-adversarial system (Figures 1 and 2).²

Experience in the city of Cuenca and national impact

The first figures caused deep concern among many members of the justice sector. A pessimistic view gained currency that the problem of pre-trial detention was irremediable. In this scenario, an initiative was developed by the stakeholders in a relatively small city (417,632 inhabitants). On August 16, 2004 an inter-institutional commitment was signed and a new oral procedural model for the adoption of pre-trial detention came into force. The hearing model adopted may be described pursuant to the parameters that follow. Initially, the judge holds a hearing and opens the discussion on the legality of the detention. The second stage is that of the indictment, where the prosecutor announces the charges to the defendant and explains the legal consequences. At a third stage, the prosecutor may request the pre-trial detention of the defendant. If so, a debate is held on three aspects: whether the crime charged carries a prison sentence of more than one year, if there is sufficient evidence to bring the case to trial,³ and whether the need exists to deprive the defendant of his/her liberty to ensure appearance at trial. Finally, the judge issues a decision.

This model faced a reactionary setback which jeopardized its continuity and resulted in clear regressions: the model is not applied to crimes which are not flagrant. Nevertheless, unprecedented results were achieved within a year, such as the restrictions on the overuse of pre-trial detention (Figures 3 and 4).⁴

The figures reveal significant changes in various aspects: with regard to abuse of pre-trial detention, there has been a reduction of one third.⁵ The role of the supervisory judge (*juez de garantías*) has also changed considerably. Supervisory judges did not have a defined role in the past—100% of prosecutor requests were admitted in the three cities—but now effectively control all measures involving deprivation of liberty: in one out of two cases in which pre-trial detention is not granted there was a request by the prosecutor. As for prosecutor requests, there are five times more cases in which pre-trial detention is not requested after the introduction of the oral system. This change is the outcome of both the reluctance of judges to always award the prosecutor's

Figure 1: Percentage of prisoners without sentence

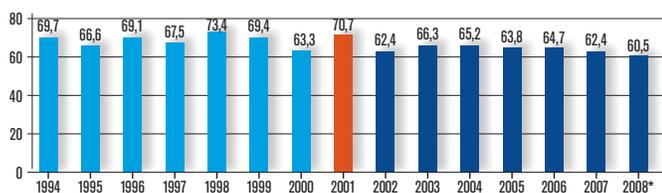
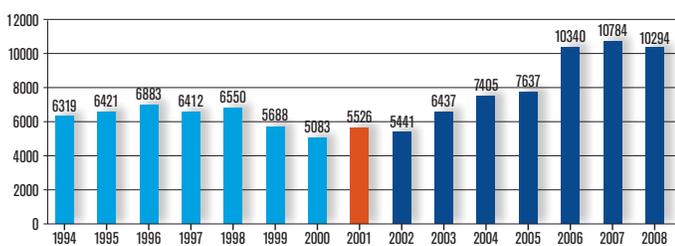


Figure 2: Number of prisoners without sentence



Source: Diego Zalamea in *Prisión preventiva y reforma procesal penal*, CEJA, 2009.

¹ The request for provisional measures is made in writing by the prosecutor. The resolution by the judge is also done in writing, without the defense being notified about the decision.

² This phenomenon is explained by the greater efficacy of the oral system in criminal prosecution.

Figure 3
Fiscal petitions

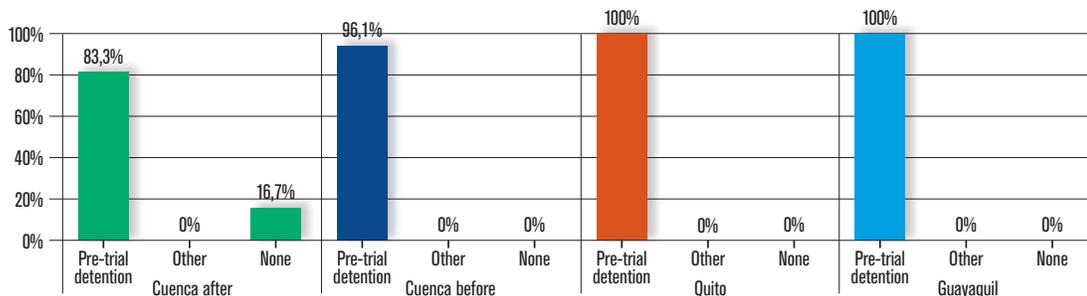
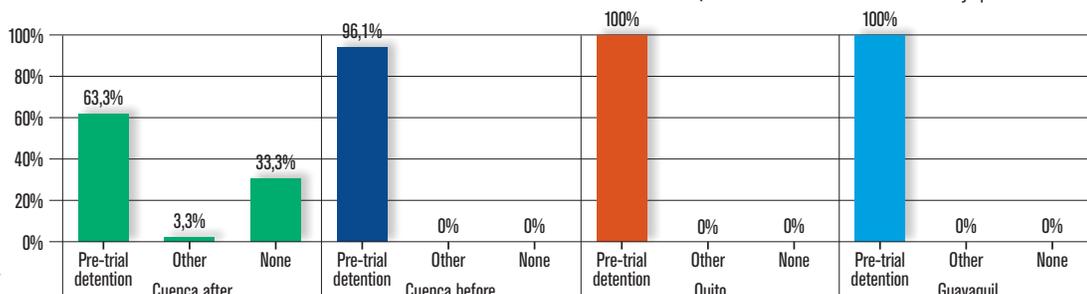


Figure 4
Judicial resolutions



Source: Diego Zalamea in Prisión preventiva y reforma procesal penal, CEJA, 2009.

requests, as well as and the difficulty for the prosecution in maintaining extreme positions in a public and adversarial hearing.

Changes have also been observed in terms of procedural celerity. Based on the requirement that detainees must be brought before a judge within 24 hours of arrest, we can identify the following trends (Figure 5).

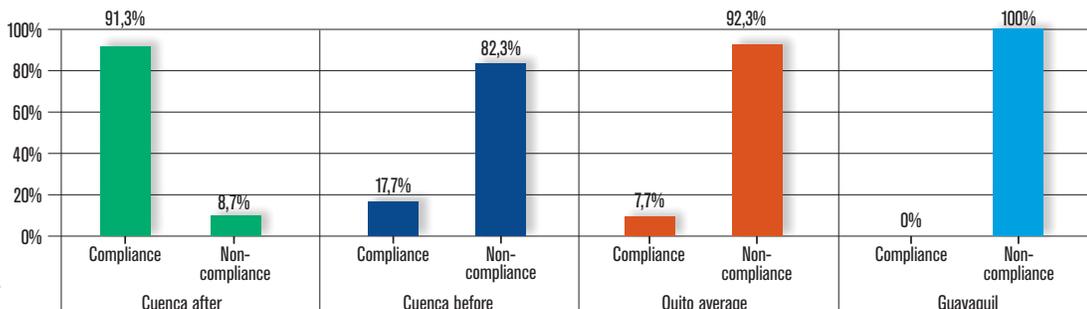
As the data becomes available to the public, the experience has gone from being a highly controversial issue to becoming the most salient feature of the Ecuadorian system of justice, to such a degree that it is currently the most extensively studied of all procedural reforms. After an initial stage in which the results were associated to the specific characteristics of the stakeholders in Cuenca, the focus shifted to the methodology applied and the necessity to replicate it. The first case was the city of Guacaleo; then, under a more aggressive policy, oral procedures were implemented in the district of Cañar (Azogues (64,910 inhabitants), Biblián (20,727 inhabitants), Cañar (58,185 inhabitants) and Troncal (44,268 inhabitants)). The repeated successes spawn a movement which forced the Supreme Court of Justice to issue

regulations requiring oral proceedings throughout the country (Official Record 221 from Wednesday, November 28, 2007), and in spite of significant implementation challenges, the results have been positive.

Visible changes in the quality of justice and the decisions of stakeholders eventually prevail over the interests of the political spheres. The requirement for oral proceedings is present in the new Constitution (of October 2008) as well as in the reform to the Code of Procedure (of March 2009). With regard to pre-trial detention, judges are only allowed to apply it under exceptional circumstances and a wide range of non-custodial measures is established.

For Ecuadorian justice, this experience has extended beyond the progress achieved in the application of pre-trial detention. It has demonstrated the power of stakeholders to improve the quality of the administration of justice and the potential of a democratic procedural methodology committed to due process. Furthermore, it has proved that significant improvements do not require large capital investments and has revived the idea that a better justice is possible. ■

Figure 5
Compliance with 24 hour-guarantee



Source: Diego Zalamea in Prisión preventiva y reforma procesal penal, CEJA, 2009.

³ Article 167 (1) and (2) of the Code of Criminal Procedure.

⁴ The statistics on the application of pre-trial detention were taken from: Diego Zalamea, Reporte del estado de la prisión preventiva en Ecuador, in Prisión preventiva y reforma procesal penal, CEJA: Santiago, CEJA: Santiago.

⁵ By April 2008, a variation was already visible in prison population: according to figures of the National Social Rehabilitation Office, in Cuenca those held in pre-trial detention represented 46% of the prisoners, whereas at the national level pre-trial detainees amounted to 62%.

Board of Directors

Reinaldo Figueredo Planchart

Board Chair

Alejandro Garro

Board Vice-Chair

Douglass Cassel

President of DPLF

Susan Popkin

Treasurer

Jorge Carpizo

Christopher Jochnick

Helen Mack

Alain Philippson

Jeremy Popkin

Margaret Roggensack

Ronald Scheman

Staff

Katya Salazar

Executive Director

Laura Park

Director of Operations and
Outreach

Emilie Joly

Program Coordinator

Mirte Postema

Program Coordinator

María Clara Galvis

Senior Consultant based
in Bogotá

Fatima Andrada

Senior Consultant

The Due Process of Law Foundation (DPLF) is a non-profit, non-governmental organization based in Washington, D.C., that promotes reform and modernization of national justice systems in the Western Hemisphere. DPLF was founded in 1998 by Professor Thomas Buergenthal, currently a judge on the International Court of Justice, and his colleagues of the United Nations Truth Commission for El Salvador. DPLF's work is carried out through three programs: Equal Access to Justice, Judicial Accountability and Transparency, and International Justice.



Due Process of Law Foundation

1779 Massachusetts Ave., NW Suite 510-A

Washington, D.C. 20036

Tel.: (202) 462.7701—Fax. (202) 462.7703

E-mail: info@dplf.org Web site: www.dplf.org



Please send us your comments and/or contributions for possible publication to aportes@dplf.org.

This publications was made possible thanks to:

FOUNDATION OPEN SOCIETY INSTITUTE
& Soros Foundations Network



**National Endowment
for Democracy**

Supporting freedom around the world