

Democratic Reform and Injustice in Latin America: The Citizenship Gap Between Law and Society

by Alison Brysk

Latin America is a paradoxical world leader. In the twentieth century, Latin America led the struggle for democracy—and now, Latin America leads in unjust societies that cannot fulfill the promise of universal human rights despite elections and theoretical rule of law. The “citizenship gap” between developed formal entitlements and distorted life conditions, including massive personal insecurity, is greater than in any other region.¹ While Latin America receives the highest scores on electoral democracy and political participation in the developing world, the region has the worst record on effective rule of law, crime, and corruption except for grossly impoverished Africa and South Asia.² Latin America’s experience demonstrates how the rule of law can be systematically undermined by private and transnational displacement of power, as well as incomplete democratization of state institutions. The persistence of injustice demonstrates the interdependence of democratic processes in the public sphere and democratization of social relations.³

The transition to electoral democracy does make a difference in the level, incidence, and amelioration of political repression. In a pale echo of the past generation’s right-wing military authoritarian regimes, it is now egalitarian but undemocratic Cuba that has more than 300 political prisoners, the death penalty, and the world’s second highest number of journalists in jail.⁴ Nevertheless, democracy is not enough—the region’s most violent countries are democratic but insecure: Colombia and desperately impoverished Haiti, which some consider a failed state despite a series of internationally supervised elections and reconstruction efforts. Below the level of these signal political pathologies, for most Latin American countries, such as Mexico and Brazil, injustice is a chronic condition metastasized through an ostensibly democratic political body, most visible at the extremities of social marginality.

This essay will argue that injustice in Latin America is a problem of democratic deficits in *function*—despite the democratic structure of elections and institutions—

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and that better and broader human rights are the bridge between equal laws and unequal societies. The citizenship gap is not an inherent insufficiency of democracy for addressing social problems, as some populists claim, but rather an insufficient application of democracy to functional arenas of power outside the formal legal system that distort the juridical equality of citizenship.⁵ While the Washington Consensus neo-liberal program adopts a truncated version of human rights, narrowed to a thin set of individual liberties functional for the operation of free markets, a full spectrum of universal, indivisible human rights provides a basis for social equity and sustainable justice.

MINDING THE GAP

The democratic deficit in Latin America can be understood as a failure in the indivisibility, universality, and accountability of human rights. Indivisibility indicates the relationship between civil and social rights, while universality demands the extension of these interconnected rights to all citizens regardless of class or status. Accountability is the duty of the state to provide rights, which corresponds to citizens' entitlement to claim rights.

The Universal Declaration of Human Rights lays the foundation for the interdependence of “first generation” civil and political rights with “second-generation” social and economic rights, by including civil and political freedoms alongside fundamental requisites of human dignity such as a food security. The Preamble incorporates this interdependence in its definition that all human beings are “free *and* equal in rights *and* dignity” [emphasis added]. The lack of social rights may be the predominant acute threat to human dignity in some of Latin America's most impoverished countries and sectors. In Nicaragua, 46 percent of citizens are poor,⁶ and across the region, almost one-quarter live on less than \$2 a day.⁷ Both absolute and relative poverty are intertwined with lack of access to social rights such as health care and education. Education, in turn, empowers political participation and is highly correlated with access to justice.⁸

It is important to mention that in the long-run, the achievement of civil and political rights *depends* on prior and contextual social rights.⁹ One illustration of this linkage is the prevalence of land disputes as a systematic source of civil rights violations in Latin America. In democratic Brazil, between 1985 and 2000 almost 1,200 landless people and their advocates were killed.¹⁰

Furthermore, universality is a standard that should be upheld; normatively, a society is not free until all its members are free. “Social marginality” and legal status of “second-class citizenship” correlate with multiple vectors of inequity—notably race, class, and gender. As Assies, Calderon and Salman argue, “The debate over citizenship should include the everyday power games among social actors.”¹¹ A rights-based approach to the “anthropology of citizenship” changes the focus of addressing social inequity from humanitarian amelioration or economic redistribution by state or international provision of goods, to a political remedy for *discrimination* in the exercise of universal rights. While civil and political liberties are

often mistakenly categorized as purely negative individual freedoms from state intervention, rule of law and effective citizenship are collective conditions requiring the positive provision of collective goods of security by state authorities.¹² This means that it is the mandate and responsibility of a democratic state to provide systematic personal security, widespread access to justice, and democratic accountability for all authoritative institutions.

This expanded understanding of human rights undergirds the extension of democratic transitions beyond elections to “second-generation reforms” of judicial and security institutions and practices. Rights are associated with responsibilities, and the enactment of rights requires an answerable agent.¹³ Effective citizenship requires universal access to justice and policing, along with institutional accountability for the exercise of coercion. An indication of the Latin American state’s failure to meet its responsibilities in this regard is the lack in personal security. Latin America has the highest homicide rates of any world region: 18.5 per 100,000, compared to 6.8 across the developing world, and 2 in the Organization for Economic Co-operation and Development (OECD).¹⁴ One of the linkages between insecurity and the lack of state accountability is how public lack of confidence in abusive and corrupt police leads to individuals not reporting crimes, in turn leading to a deficit in prosecutions. In Brazil in 1998, victimization surveys indicated that only 33 percent of crime was reported; across the region, an average of 28 percent of citizens expressed confidence in the police.¹⁵ Freedom from fear is an integral part of democracy.

The remainder of this essay will discuss the dimensions of the contemporary human rights gap in Latin America, and assess some measures taken at the national and international levels to address it. The discussion will concentrate on the narrow but politically telling segment of first-generation rights abuses and show how they are influenced by the lack of state accountability and the denial of second-generation rights.

DIAGOSIS: IMPUNITY

Every year, tens of thousands of Latin Americans are denied fundamental rights to life, liberty, and personal integrity by direct government action, indirect state sponsorship, or systematic negligence. Impunity suggests that some social actors are not subject to the universal norms of the rule of law and that state authorities lack the capacity and/or political will to hold violators accountable for breaches of those norms. A fundamental attribute of democracy is equality before the law, which is the opposite of impunity. Thus, the persistence of political murders and disappearances, torture, police abuse and abusive detention, and widespread social violence are symptoms of an epidemic of impunity inconsistent with democracy.

Murder and disappearances are committed by state agents, state-sponsored paramilitaries, and state-tolerated vigilantes, and are often targeted at political activists, human rights advocates, and civil society leaders. Such assassinations are endemic in Colombia and Haiti, and sporadic but persistent in Mexico, Brazil, and most of Central America. In Colombia alone, in 2006 more than 70 trade unionists

were assassinated,¹⁶ while 69,298 persons were displaced by political violence in the first half of 2006.¹⁷ In both Colombia and Haiti, civilians are the primary victims of armed conflict, and sexual violence is frequent. Guatemala has experienced around 300 attacks each year against human rights defenders, resulting in dozens of deaths; four police killed two members of the Central American Parliament in 2006.¹⁸ According to the Organization of American States' (OAS) Special Rapporteur for Freedom of Expression, in 2006 Latin America nineteen journalists had been assassinated, nine in Mexico alone, along with hundreds of threats and attacks, and dozens of exiles.¹⁹ Explaining the political roots and consequences of attacks on the press, the report points to the cycle of impunity and self-censorship, and highlights the non-violent repressive use of defamation charges by defensive governments to persecute critical journalists, especially in Brazil, Peru, Cuba, and Venezuela.²⁰

Police abuse and killings, along with torture in detention facilities, are especially prevalent in Brazil and Mexico, but also present in the Andean countries and Central

Latin America's experience demonstrates how the rule of law can be systematically undermined by private and transnational displacement of power, as well as incomplete democratization of state institutions.

America. In Brazil, hundreds of criminal suspects, or mere residents of gang-controlled neighborhoods, die each year at the hands of police in muddled circumstances. In 2006, 138 civilians were killed in Sao Paulo clashes, while police in Rio killed 520 in the first half of 2006.²¹ In Mexico, "... arbitrary detention, torture, unfair trials and impunity are systematic at a state and federal level across the country."²² More specifically, in 2000, Jalisco reported 398 "injuries by state agents,"²³ the Human Rights Commission of Baja California recorded a 500 percent increase in torture, and the attorney general of Zacatecas admitted that judicial police use torture regularly.²⁴

Amidst this pattern, the legal and physical repression of social protest under elected governments merits special concern. Several countries have passed anti-terrorist legislation that has been turned against peaceful, domestic popular sector or anti-globalization protest, as in Chile and Paraguay.²⁵ In El Salvador, following a community protest against the privatization of water, thirteen citizens were arrested, charged with terrorism, and held without bail.²⁶ In Argentina, over sixty protesters have been killed in a decade of turmoil over privatization and economic crisis.²⁷

Throughout the region, illegitimate detention and abysmal prison conditions affect tens of thousands of the most vulnerable, and reflect the simultaneous breakdown and abuse of state authority. Prison riots and massacres in Brazil and Venezuela highlight more widespread problems. In Brazil's 1992 Carandiru riot, for example, 111 prisoners were killed by police.²⁸ Almost everywhere in Latin America, it is routine for suspects to spend years in pretrial detention, especially for rural, poor, and indigenous people—who often lack access to legal defense or capacity to

understand the charges against them. In Ecuador, over 70 percent of detainees have not been sentenced.²⁹ Prisoners are held in severely overcrowded facilities that do not meet basic standards of health, hygiene, or nutrition and experience chronic abuse by guards and fellow inmates. International reports identify particular problems with women's and juvenile facilities, which are judged to be sub-standard throughout the region.³⁰ This is particularly significant because, as a region, Latin America has unusually high rates of women in prison.³¹

In addition to commanding state violence in the public sphere, often colluding with private sector paramilitaries, gangs, landowners, and even multinationals, Latin American states foster private violence through neglect and differential protection of classes of social actors. Thus, half of Latin America's citizens suffer an additional epidemic of private abuse, facilitated by systematic state impunity for male violence against women. Given extremely high rates of rape, spousal abuse, and incest, some analysts of Latin America argue that "the family is the primary site of social violence" against women in the region.³² The Inter-American Development Bank estimates that "one to two in five" Latin American women are physically abused, while country-specific surveys show even higher rates.³³ Since large numbers of women who work outside the home in Latin America work in other peoples' homes, they also face widespread workplace/domestic violence and abuse. For example, in El Salvador, an estimated 21,500 girls aged 14 to 19 work as domestics; over 60 percent report mistreatment, including sexual harassment and assault.³⁴

The apogee of a "rape culture," generalized public insecurity, and the displacement of women into unsafe conditions where they are marginalized from state protection when they leave traditional roles is the unresolved mass murder of migrant women workers, labeled a "*femicidio*." In the Mexican border town of Juarez, over 400 women have been killed without any response from state authorities.³⁵ Similarly in Guatemala at least 580 women were killed in 2006; only 6 people were sentenced.³⁶ The jurisdiction of the law ceases at the threshold of the home, and an invisible private death penalty keeps women in their place as surely as any legislated purdah.

IS THIS "WHAT DEMOCRACY LOOKS LIKE"?

What patterns of social and political development can help explain this puzzling panoply of abuse and how do these patterns relate to democratic deficits? Human rights violations in contemporary Latin America are linked to a cross-cutting set of political and social conditions that reflect shortfalls in the interdependence, universality, and accountability dimensions of human rights. The prevalence, incidence, and levels of abuses can be mapped onto these factors.

The first factor that undermines accountability is incomplete state control of the monopoly of violence, due to partial democratization of "recovering authoritarian" states, exacerbated when protracted conflict leads to the privatization of state security.³⁷ Among the countries with the greatest numbers of assassinations, Brazil and Mexico demonstrate the first pattern of incomplete democratization, Colombia the second pattern of protracted conflict, and Guatemala both. The persistence of

unaccountable vigilantes, untamed militaries, and criminalized police is one consequence. An Inter-American Human Rights Commission study of the region concludes that most Latin American police are under-funded, corrupt, ill-trained, and overlap with criminals. On the other side of the equation, newly responsible judiciaries are also poorly trained, threatened by criminals (especially in Mexico and Colombia), and hampered by interference from the Executive (notably in Venezuela and Haiti).³⁸

State security is increasingly privatized. Private actors who wield deadly force include peasant patrols, official private security guards, and paramilitary vigilantes. Peasant patrols created during the civil wars in both Peru and Guatemala have been revived to fill the power vacuum in the countryside, dispensing rough justice that often is often abusive. In Paraguay, a government-mandated Citizens' Guard numbers 22,000—equivalent to the army and police combined. In Colombia, over 130,000 legal private security contractors patrol urban streets, rural areas, and multinational facilities, again exceeding the official armed forces of around 100,000.³⁹ Mexico, Brazil, and El Salvador also host tens of thousands of (largely unlicensed) private security guards and vigilantes.

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An important structural corollary to these institutional deficits is a systematic distortion in the nature of law from the heritage of *states of exception*, introduced by military rule or post-revolutionary codes. For example, Mexico's law lacks the presumption of innocence. Despite criminalization of torture, other aspects of investigation, detention, and prosecution led Human Rights First (lawyers' commission) on Mexico to conclude that: "The rules and practice of criminal procedure have been—and remain—an open invitation to abuse."⁴⁰

The effect of the interdependence of social and political rights is seen in a correlation between systematic abuse and social inequality. Overall, the level of vigilantism and crime over time and across regions is linked to social inequality—Latin America's insecurity is a product of its inequity.⁴¹ Within Latin America, sub-regional trends in violations follow this pattern: for example, life-threatening human rights abuse is worse in more developed but unequal Brazil than in poorer but more egalitarian Bolivia. In Brazil, the poorest 40 percent of the population receives roughly 10 percent of national income, while the top 10 percent of the population commands over 47 percent of resources.⁴² Furthermore, in Brazil, which boasts electoral competition and political participation, Amnesty International reports an estimated 8,000 cases per year of "modern slavery," reflecting a paradigmatic, interdependent abuse of forced and indentured labor.⁴³ The most violent country in South America—democratic Colombia—is the second most unequal, and about one third of land holdings in the country derive from "doubtful origin."⁴⁴ Groups,

sectors, localities, and even neighborhoods deprived of social rights are most at risk for violation of civil rights. In Guatemala, street children are often beaten, frequently arrested, and occasionally murdered. These children are the result of a society in which 200,000 children were orphaned by a thirty-year civil war, in which almost an equal number were internally displaced. In 1995, over 83 percent of children were living in poverty in Guatemala.⁴⁵

When rights are not universal, in theory as well as in practice, second-class citizenship becomes a determinant of human rights abuse. Second-class citizenship is more than social marginality; it is the construction of inequality under the law socially-based requisites of access; and privatization of legal access. In many societies, for example, people who transgress assigned social roles are status criminals, typically, prostitutes, street children, and the homeless. In Latin America, indigenous peoples are often characterized as juridical minors, while historically conquered tribes are administered through delegation of state authority to less accountable local legal structures. For all of these groups, as well as most poor and many rural Latin Americans, language, illiteracy, and lack of economic resources systematically exclude them from access to the legal system and protection from its excesses. For example, in 2004 Mexico had 82 lawyers to represent 13 million indigenous people.⁴⁶ It is no coincidence that indigenous people are a disproportionate number of those detained without trial, tortured, and convicted under controversial circumstances in that country. In Brazil, blacks are imprisoned at almost double their representation in the population.⁴⁷

The systematic failure of Latin American states to protect half of their citizens from gender-based violence is a “perfect storm” of second-class citizenship, from discriminatory laws to selective enforcement, from skewed access to justice to status dependency that contravenes universalism. An extensive recent report by the OAS (“Access to Justice for Women Victims of Violence in the Americas,” 2007) profiles the extent of impunity, the lack of legal constructs for abuse, and the lack of accountability.⁴⁸ The report notes that:

The vast majority of these offenses are never punished. . . . [despite] the fact that the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. . . has been ratified by more States than any other instrument of the Inter-American system. . . .” Speaking of legal structures and silences, it continues: “Outdated laws remain in force, as do discriminatory provisions based on stereotypes of the role of women in society. . . . Some countries still have laws that grant a rapist relief from punishment if he agrees to marry his victim. (xi)

Moreover, many countries do not criminalize marital rape, some set the age of consent as low as twelve, and others classify incest as consensual sex unless specific charges of rape are presented.⁴⁹

But even justiciable cases of domestic or sexual violence pressed by the minority of relatively empowered victims (or their survivors) are handicapped by delays,

mistreatment of victims and families, irregularities, shortage of resources, and lack of training. In addition,

. . . discriminatory socio-cultural patterns . . . influence the behavior of officials at all levels of the judicial branch of government. The latter do not regard such incidents of violence as priorities, do not take female victims seriously, disregard evidence critical to identifying the guilty parties, attach exclusive emphasis to physical evidence and testimony, give scant credence to the women victims' claims, and are disrespectful of the victims and their next of kin when they try to cooperate with the investigation. . . . Enforcement and supervision of restraining orders . . . are seriously flawed. . . . the institutions necessary for the administration of justice in rural, poor, and marginalized areas are often lacking; all too frequently no court-appointed attorneys or public defenders are available for victims of violence who are without economic means; and the public prosecutors' offices and police investigating the crimes often do not have the resources they require. . . (ix)

While some forms of human rights abuse can be predominantly traced to one aspect of the three democratic deficits, others reflect an intractable *overlap* of privatized violence, social inequity, and second-class citizenship. The physical and sexual abuse, illegitimate detention, and murder of street children illustrate complex socio-legal marginalization. As one Guatemalan youth explains: “The police will kill us, for being on the street, for not going home, for not having a family. . . Rights aren’t worth a lot to us.”⁵⁰

In these situations, rights advocates find still another contributor to impunity: the demobilization of affected groups, who do not avail themselves of the potential redress mechanisms of partial rule of law—in ironic contrast to the more socially empowered victims of a previous generation of military rule, who mobilized to secure those very mechanisms under conditions of heavier overt repression. Disempowerment is critical because, in general, human rights reform is most successful when it results from significant social mobilization rather than top-down liberalization, and when political mobilization includes local and affected actors as well as advocates.⁵¹

By contrast, a study of Guatemalan street children reminds us that rights struggles pass through stages of naming, blaming, and claiming—and that “highly marginalized individuals tend to drop out of the grievance transformation process at each step.”⁵² The social psychology of social marginality produces multiple sources of disempowerment: ignorance, normalization of violence, self-blame, fear of reprisals, and a sense of inefficacy. Indeed, in this study, the salient difference between those few victims who did use legal mechanisms to claim rights and the demobilized majority was their level of social marginalization, including ties to mainstream society and length of time on the streets.⁵³

The foregoing analysis of the sources of persisting patterns of human rights abuse in Latin America suggests that second-generation reforms must address the democratic deficits of institutional accountability, interdependent social rights, and second-class citizenship, as well as the confluence of all three. More specifically, reforms would need to promote access to justice, confront the social roots of crime,

provide appropriate legitimate policing, and assert leverage over international forces that diminish state capacity to provide both security and social rights. While democratizing Latin American states and the international community have begun to recognize the dysfunction of contemporary social conditions in the region, most reforms have been partial in conception and execution, and therefore limited in impact.

REFORMING INJUSTICE

In Latin America's generation of democracy, for at least a decade there have been efforts to reform justice in all of the major countries of the region. These efforts were generally focused on institutional rather than social features, potentially promoting accountability but not addressing social inequity or second-class citizenship. In many cases, reforms were requested or facilitated by international institutions, but those countries most subject to international pressure were also usually those at high risk for violations due to protracted conflict, severe indebtedness, or border-crossing social breakdown. Reforms of justice can generally be grouped as reform inspired by international law, constitutional and legal process reform, police reform, judicial infrastructure reform, and establishment of human rights institutions.

International human rights law has been promoted and internalized notably by the Southern Cone democracies and Costa Rica. For example, Argentina led the Inter-American Convention on the Forced Disappearance of Persons in 1997 and based the 2005 reopening of its retrospective human rights trials in part on an OAS ruling. In a more structural vein, in 2005 the Argentine Supreme Court declared that all prisons in that country must abide by UN standards. In Chile, the international attempt to extradite Augusto Pinochet energized numerous domestic trials for abuses committed under the dictatorship.⁵⁴ Moreover, international standards and activism led to the modification of the legal treatment of indigenous peoples' protests. Costa Rica has been a promoter of the United Nations High Commissioner, the ICC, global and inter-American treaties, and has readily incorporated international norms into domestic law, for example passing landmark gender equity legislation following ratification of CEDAW.⁵⁵ However, thus far in general, international law seems more useful for transitional justice than curbing chronic contemporary abuse, and more likely to be influential in countries that are already more democratic.

Constitutional reform has been common throughout Latin America, but has largely focused on prolonging executive tenure and/or economic liberalization. However, Bolivia, Venezuela, and Colombia have enacted Constitutional reforms to increase popular participation, specifically indigenous rights. In Bolivia, these reforms reinforced a system of local autonomy and parallel judicial systems for that country's indigenous majority. A promising human rights measure has occurred in

Colombia, bringing some improvement in access to justice despite relentless political violence:

*"In Colombia, which has been undergoing a severe political and institutional crisis, a new mechanism known as the tutela—introduced in the country's forward-looking 1991 Constitution—allows any citizen to go before any judge and demand the protection of his or her basic rights. Tutelas have been enormously efficient, and often result in rulings favorable to plaintiffs. To many analysts' surprise, more than a hundred thousand tutelas have been filed in the last five years, mostly by poor Colombians. Observers agree that the tutela has been an effective instrument for combatting discrimination and improving equal rights."*⁵⁶

Similarly, more comprehensive attention to rights in Venezuela's unfolding Constitutional reform has been cited by local citizen groups in securing police reform as well as attention to social rights.⁵⁷

Widespread reforms of criminal procedure, adopted in fourteen countries including the Andes, Southern Cone, and Central America, generally do increase the independence of investigations, defendants' rights, and victim protection in theory. Initiated by Southern expert networks, procedural legal reforms have been supported by United States Agency for International Development (USAID). But such reforms have not been adopted by key states Brazil and Mexico at the federal level (with a partial exception in some Mexican states).⁵⁸ Criminal justice reforms have improved pre-trial detention rates and the speed of trials in selected countries, notably Chile, Guatemala, and Bolivia. Some direct measures, like Chile's 1998 Law on the Rights of Arrested Persons, do seem to increase attention to rights. But overall, legal reforms have not produced consistent or widespread improvements in the administration of justice across the group of countries that have adopted them.⁵⁹

International actors have promulgated numerous judicial reform projects, mainly oriented towards capacity-building. Between 1993 and 2001, the Inter-American Development Bank dedicated 18 loans and 65 projects totaling \$461 million to justice sector reform in 21 member countries. Assessing the efficacy of these projects, their report concludes that "of 13 active justice loans, one (77 percent) is considered to be a "problem" project and six (46.2 percent) are considered to be "at risk."⁶⁰ Meanwhile, in 1992, the World Bank invested \$30 million in a Judicial Infrastructure Project for Venezuela, with similar measures in Peru—both assessed as unsuccessful by the donor.⁶¹ While Chile's comprehensive and energetic program is judged the region's leading case, reforms stalled in Argentina, modestly improved the quality of legal defense in Colombia, and foundered on lack of political will in Guatemala and Venezuela.⁶² A sympathetic Latin American scholar concludes, "Despite the specific results of some projects and initiatives, the overall analysis is critical, in the sense that the general goals of judicial reform have not been consolidated."⁶³

Complementary access to justice programs provides legal aid, legal information, alternative conflict resolution, and community support. Such projects seek to "level the playing field" when they train paralegals, grassroots advocates, and marginalized populations such as women and indigenous people. Prominent efforts in this domain

have been sponsored by UN agencies, the Soros Foundation, and European donors, notably in Guatemala and the Andean countries. These “demand-side” programs have been deemed somewhat more responsive to local conditions than top-down judicial reform. For example, Chile eliminated court costs to improve access for the poor, while Guatemala expanded public defenders’ programs and bilingual legal assistance.

Police reform has been an important concomitant of democratic transitions in some countries, and an internationally-mandated anti-corruption and crime control measure in others, with varying effects on human rights. In the wake of its 1983 democratic transition, Argentina attempted to regulate and retrain its police with limited success, then renewed its efforts during the mid-1990s. Inconclusive and inconsistent reforms may have reduced the incidence of torture by police, but did not prevent unexplained shootings in poor neighborhoods, police involvement in both political and extortion kidnappings, and massive corruption. As one Argentine scholar points out, police killings in Argentina rose every year from 1994 to 2000, even as police reform legislation was passed every year from 1991 to 1998. Without accountability, police were able to block reforms with threats, personnel shifts, and even manipulation of electoral campaigns.⁶⁴

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Similarly, both El Salvador and Haiti dismantled and restructured repressive police forces under international supervision, following internationally brokered resolution of civil wars. Yet prison conditions and police abuse are still reported to be abysmal in Haiti, and problematic in El Salvador. In El Salvador, the inadequacy of “community policing” to combat globalized gang wars and consequent creation of unaccountable “rapid reaction” forces illustrate the pitfalls of partial reform. Furthermore, militarization of police forces in Mexico and Brazil to fight crime and corruption has contributed to deterioration in human rights conditions. Police killings in Brazil did decline in the mid-1990s, following a series of investigations and the establishment of a police ombudsman, but such reforms were swamped as military forces and the military branch of the police were inserted into high-crime areas with little accountability.⁶⁵ More localized attempts at community policing in Brazil and Colombia have foundered on factors linked to social hierarchy, such as insufficient coverage of high-crime poor areas and insufficient training of poorly paid and educated street police, along with more generic shortfalls in public administration.⁶⁶ Most recently, the crisis in policing in Guatemala has led to a renewal of international involvement unprecedented in peacetime, the creation of a UN joint police reform Commission against Impunity, following a 2006 report by the UN Special Rapporteur for the High Commissioner for Human Rights.

Persisting human rights violations under democratic governments have been specifically addressed by the establishment of national human rights institutions, with varying mandates and resources. For example, the Mexican Human Rights Commission established in 1990, which has played a helpful role in monitoring and raising consciousness, is a passive body limited to the federal rather than state level, which appears to be the more significant venue of abuse. Human rights secretariats have also been established in Argentina, Brazil, and even Colombia, the former focused mostly on retrospective reparations, the second on international relations, and the third on monitoring. Ombudsmen, who may have some investigatory or persuasive power with legislatures and administrative offices, are found in a dozen countries. The key question for rights impact here is whether such offices have a specific mandate to serve as interlocutors for marginalized groups and second-class citizens, as Costa Rica's Ombudsman does for immigrants. The national human rights institutions of Argentina, Bolivia, Ecuador, Honduras, Mexico, and Peru participate in an international network of such bodies linked to the UN Office of the High Commissioner on Human Rights, which encourages capacity-building and directs attention to regional themes such as migration, indigenous peoples, and disability rights. In addition, special offices and programs for the protection of vulnerable populations, mainly indigenous peoples and women, are established throughout the Andean region. On the whole, these new institutions are promising gestures, but have overly generalized mandates, limited powers, and insufficient resources.

Another way to gauge policy response is to examine the set of measures taken on a high-risk country or issue basis. Brazil is clearly a hot-spot for numerous types of human rights violations, from indentured servitude to police abuse; thus, in 1996, Brazil launched a National Human Rights Plan. Several police officers were brought to trial and sentenced for their participation in the massacres of street children and prisoners. On the other hand, the same year 179 police from Rio were promoted as a result of incidents which killed 72 civilians.⁶⁷ The following year, Brazil passed a new torture law, but prosecutions have been extremely limited. With ongoing persecution of human rights advocates, Brazil then introduced a special Program for the Protection of Human Rights Defenders in 2004, but it has lacked sufficient funding and personnel. On the issue of violence against women, Brazil introduced a pioneering reform of women's police stations. While several hundred exist, they cover only 10 percent of Brazilian cities, are only open in the daytime, and have had a positive but disappointingly limited impact in reducing violence against women.⁶⁸

Similarly, it is instructive to see the range and limitations of reforms to deal with the abuse of trafficking individuals, most salient in Mexico and Central America. A defining feature of this class of abuse is that the vast majority of victims are women and children, usually poor. In conjunction with international agencies, NGOs, and the US government, Central American governments have introduced a wide variety of initiatives. For example, there have been police warnings for migrants and special

investigation units in Nicaragua and Costa Rica, special police training in Honduras, and shelters for victims in Nicaragua, Honduras, and Guatemala. But in a clear marker of second-class citizenship, the criminal penalties for trafficking are only one to three years in Guatemala, and three to six years even in gender-friendly Costa Rica. Even beyond the obvious imbalance of enforcement reform without attention to root social causes, the sheer legal inequity impedes effectiveness. In 1995, Guatemala amended its criminal code to provide the death penalty for kidnapping; compare the penalties for trafficking (mostly female victims) with the penalties for the parallel crimes of assault, kidnapping, and enslavement (of presumed male) citizens.

CLOSING THE GAP

What can be done to close the citizenship gap in Latin America and to allow democracy to foster freedom from fear? First of all, we must remind ourselves of the ways in which electoral democracy and rule of law do offer new resources for the defense of human rights. Transition to democracy implies the state's hegemony no longer intrinsically requires physical repression and armed conflict ceases. Even partial rule of law provides channels for institutional reform and opportunities for social mobilization; hence, the distorted version of citizenship in Latin America has historically offered an avenue for the struggles of dispossessed populations.⁶⁹

What institutional democracy without full-spectrum rights cannot provide is accountability for the relevant forms of power, such as private, transnational, and unelected coercive state agents. In an era of globalization, Latin American democracy looks like partially liberalized weak states struggling to cope with rising threats to social control. The mandated democratic institutions of legislatures and judiciaries lack traction over actors outside the state. They also cannot control unaccountable praetorians insulated by the Executive due to its dependency on their repressive services. Contemporary social conditions short-circuit the historic cycle of expansion of citizenship rights that accompanied the rise of modern capitalist democracy chronicled by T.H. Marshall, and the extension of liberal human rights to new groups and expansion to new domains.⁷⁰ As the political project of contemporary Latin American democracy narrows, elites lack electoral incentives and political will to promote the classic liberal social contract of protection in exchange for production. Both protection and production can be outsourced, and Latin American polities function as either "low-intensity democracies" or delegative populisms.⁷¹

In this scenario, the prospects for effective state-sponsored human rights reform along current lines are tenuous at best. Like the coalition that transformed Latin America's dictatorships to democracies, it will take a renewed effort from international and civil society to secure the new human rights agenda of social rights, accountability, and the deepening of democracy. State-sponsored reforms will be most effective to the extent they incorporate communities—of their own citizens, other democracies, and regional networks, and when they tackle the complex marginality of second-class citizenship. Injustice is a problem of power, and

speaking law to power is the unfinished business of real democracy in Latin America.

Notes

- ¹ Alison Brysk and Gershon Shafir, eds., *People Out of Place: Globalization and the Citizenship Gap* (London: Routledge Press, 2004).
- ² Christina Biebesheimer and J. Mark Payne, "IDB Experience in Justice Reform. Lessons Learned and Elements for Policy Formulation," *Inter-American Development Bank*, November, 2001. Available at: <http://www.iadb.org/sds/doc/sgc-IDBExperiences-E.pdf> (accessed February 25, 2008)
- ³ United Nations Development Program, *Democracy in Latin America: Towards a Citizens' Democracy* (New York: UNDP, 2004).
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