

Fordham International Law Journal

Volume 26, Issue 6

2002

Article 7

Pretrial Detention, Human Rights, and Judicial Reform in Latin America

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Jonathan L. Hafetz

Abstract

This Article seeks to address important questions raised by pretrial detention and judicial reform in Latin America. It analyzes the potential impact of criminal procedure reforms on pretrial detention rates. It also discusses whether more general ‘rule of law’ reforms promoted by international donor organizations like the World Bank can affect the abuses associated with prolonged pretrial detention—whether, in other words, the circle may be squared between economic development and human rights. In addition, this Article describes the adoption of central elements of an American-style adversarial system in Latin America and its prospects for influencing judicial reform. It argues that while human rights advocacy and formal criminal procedure reforms constitute an integral part of combating prolonged pretrial detention, they must be accompanied by meaningful structural reforms that promote the independence of the judiciary, the adaptation of reforms to each country’s unique political, social, and cultural history, the establishment of effective provisions for pretrial release such as bail statutes, and the adoption of lending policies by donor organizations that encompass criminal as well as civil law reform. Part I describes the problem of prolonged pretrial detention and its link to other human rights abuses in Latin American prisons. It also describes the causes of extraordinarily high pretrial detention rates, including the absence of effective provisions for pretrial release and the slow, archaic procedures of civil law inquisitorial criminal justice systems. Part II outlines the international human rights norms governing the detention of accused persons. It also summarizes legal challenges to excessive pretrial detention in Latin America as well as in other regions. Part III discusses the criminal procedure reforms adopted in several Latin American countries. It focuses on how the reforms affect not only pretrial detention but also the country’s criminal justice system as a whole. This Part then discusses the more general judicial reform policies of international donor organizations and their potential impact on human rights abuses like prolonged pretrial detention. Part IV describes several strategies for reducing pretrial detention in the future. It underscores the need to establish effective mechanisms for pretrial release such as bail statutes. It also discusses the need to alter the behavior of key actors in the criminal justice system, especially judges, prosecutors, and defense attorneys, and to adapt reforms to the particular political and social climate within the target countries. Finally, it underscores the role leading international donor organizations can play by linking ongoing judicial reform projects with human rights abuses like pretrial detention.

PRETRIAL DETENTION, HUMAN RIGHTS, AND JUDICIAL REFORM IN LATIN AMERICA

*Jonathan L. Hafetz**

INTRODUCTION

Excessive pretrial detention remains one of the most severe human rights problems in Latin America. Between seventy to ninety percent of inmates in Latin American prisons have never been convicted of a crime but are being held pending trial. Prolonged detention of those who have yet to be convicted not only violates international human rights norms but also contributes to the overcrowding, violence, and other deplorable conditions in many Latin American prisons.

Human rights advocates have challenged instances of prolonged pretrial detention and won significant victories, including at the Inter-American Commission on Human Rights. These victories have affirmed and expanded the international norms governing the treatment of prisoners.

Also, many of the region's criminal justice systems are undergoing significant reforms. Countries such as Bolivia, Chile, Guatemala, and Venezuela, have introduced far-reaching changes to their criminal procedure codes that seek to increase efficiency and, in turn, reduce the staggering levels of pretrial detention. These changes impose time limits on investigations, institute speedy trial provisions, and establish more judicial oversight at all stages of the criminal process, including pretrial detention. They reflect a historic shift from an inquisitorial system of justice — the traditional model in Latin America — to an adversarial one. For example, criminal procedure reforms establish open public trials with oral proceedings and give investigative powers to prosecutors rather than judges. The effect of these reforms on rates of pretrial detention has, however, yet to be determined.

In addition, Latin American countries have been the objects of a broader judicial reform movement aimed at modernizing slow, sometimes dangerously inefficient civil law systems. The principal motive of this movement is economic — that promot-

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ing good government and the rule of law will make the region's legal systems more market-friendly and create the necessary conditions for economic development in today's global economy. Some form of judicial reform initiative is currently underway in approximately eighty percent of the countries in the region. The reforms are backed by leading international donor organizations like the World Bank, which has invested over US\$300 million in judicial reform projects in Latin America, as well as by the United States Agency for International Development ("USAID"), which has played an important role in the region for several decades. The reforms include promoting judicial independence, speeding the processing of cases, increasing access to dispute resolution mechanisms, and professionalizing the bench and bar.

This Article seeks to address important questions raised by pretrial detention and judicial reform in Latin America. It analyzes the potential impact of criminal procedure reforms on pretrial detention rates. It also discusses whether more general "rule of law" reforms promoted by international donor organizations like the World Bank can affect the abuses associated with prolonged pretrial detention — whether, in other words, the circle may be squared between economic development and human rights. In addition, this Article describes the adoption of central elements of an American-style adversarial system in Latin America and its prospects for influencing judicial reform. It argues that while human rights advocacy and formal criminal procedure reforms constitute an integral part of combating prolonged pretrial detention, they must be accompanied by meaningful structural reforms that promote the independence of the judiciary, the adaptation of reforms to each country's unique political, social, and cultural history, the establishment of effective provisions for pretrial release such as bail statutes, and the adoption of lending policies by donor organizations that encompass criminal as well as civil law reform.

Part I describes the problem of prolonged pretrial detention and its link to other human rights abuses in Latin American prisons. It also describes the causes of extraordinarily high pretrial detention rates, including the absence of effective provisions for pretrial release and the slow, archaic procedures of civil law inquisitorial criminal justice systems.

Part II outlines the international human rights norms gov-

erning the detention of accused persons. It also summarizes legal challenges to excessive pretrial detention in Latin America as well as in other regions.

Part III discusses the criminal procedure reforms adopted in several Latin American countries. It focuses on how the reforms affect not only pretrial detention but also the country's criminal justice system as a whole. This Part then discusses the more general judicial reform policies of international donor organizations and their potential impact on human rights abuses like prolonged pretrial detention.

Part IV describes several strategies for reducing pretrial detention in the future. It underscores the need to establish effective mechanisms for pretrial release such as bail statutes. It also discusses the need to alter the behavior of key actors in the criminal justice system, especially judges, prosecutors, and defense attorneys, and to adapt reforms to the particular political and social climate within the target countries. Finally, it underscores the role leading international donor organizations can play by linking ongoing judicial reform projects with human rights abuses like pretrial detention.

I. *THE SCOPE AND CAUSES OF PROLONGED PRETRIAL DETENTION*

Excessive pretrial detention is one of the most pressing issues confronting the criminal justice systems of countries throughout Latin America. Seventy to ninety percent of inmates currently incarcerated in Latin American countries have never been tried or sentenced.¹ Because they have cases pending at some stage of the process, these inmates are commonly known as *procesados*. In Honduras, Paraguay, and Uruguay, for example, approximately ninety percent of inmates are unconvicted;² in the Dominican Republic, the figure is approximately eighty-five percent;³ in Haiti, it is approximately eighty percent;⁴ and in

1. See, e.g., J. Brady Anderson, *Promoting the Rule of Law Around the World*, 36 *TRIAL* 84, 85 (2000).

2. See HUMAN RIGHTS WATCH PRISON PROJECT, *PRISONERS IN LATIN AMERICA AND THE CARIBBEAN*, available at <http://www.hrw.org/advocacy/prisoners/americas.htm>.

3. See *id.*

4. See *id.*

Venezuela, it was approximately seventy-five percent⁵ until recent reforms reduced that number.⁶ Even in those countries with relatively better records in this respect, such as Brazil, roughly one-third of the inmate population is unconvicted.⁷

The large number of unconvicted prisoners in Latin America is a central cause of the severe overcrowding and associated abuses for which the region's prisons are notorious. The prisons often contain appalling living conditions, prisoner-on-prisoner violence, and abuses by guards.⁸ Massacres and riots have occurred in prisons throughout the region. Overcrowding is the most severe problem facing Brazil's prison system — the region's largest, contributing to often wretched conditions, heightened tension among inmates, inmate-on-inmate violence, attacks on guards, and riots.⁹ Similarly, overcrowding is a primary cause of the extreme violence in Venezuelan prisons.¹⁰ Latin American prisons, according to one account, constitute "repositories for the accumulated woes crippling the region's justice systems."¹¹

The general denial of pretrial release to criminal defendants and the excessive duration of criminal proceedings contribute significantly to excessive pretrial detention. Countries in Latin America generally lack any effective means of provisional pretrial release pending prosecution (such as bail statutes in the United States). While there has been some movement towards increasing the availability of pretrial release, the effect thus far has been limited. Venezuela enacted legislation to allow for provisional release pending prosecution, but it was never imple-

5. See HUMAN RIGHTS WATCH/AMERICAS, PUNISHMENT BEFORE TRIAL: PRISON CONDITIONS IN VENEZUELA 2 (1997) [hereinafter PUNISHMENT BEFORE TRIAL].

6. See DEPARTMENT OF STATE COUNTRY REPORTS: VENEZUELA (2001) (describing a 57% decrease in 2000 in the number of detained prisoners who had not been convicted of a crime).

7. See HUMAN RIGHTS WATCH, BEHIND BARS IN BRAZIL, available at <http://www.hrw.org/reports98/brazil/Brazil.htm>.

8. See, e.g., PUNISHMENT BEFORE TRIAL, *supra* n.5.

9. See HUMAN RIGHTS WATCH, BEHIND BARS IN BRAZIL, ch. III (1998); *Americas: Inside Latin America's Worst Prison*, BBC NEWS, Dec. 14, 1998 (describing a 1992 riot at Sao Paulo prison that left over one hundred inmates dead); Sebastian Rotella, *Brazil Unlocks Jail Reforms Justice*, L.A. TIMES, Oct. 12, 1999 (stating that overcrowding of prisons turns jails and police lockups into "de facto penitentiaries").

10. See, e.g., *Venezuela Prison Violence Claims Ten*, BBC WORLD, Dec. 10, 1998.

11. Rotella, *supra* n.9.

mented.¹² In Brazil, judges have failed to take advantage of alternative sentencing measures despite recent efforts by the government to increase their use.¹³

The excessive duration of criminal proceedings results partly from the inquisitorial model that has traditionally characterized Latin American legal systems. Inquisitorial systems are characterized by extensive pretrial investigation and interrogation to ensure that no innocent person actually goes to trial.¹⁴ Pretrial investigation, which is secret, takes a great deal of time and is vulnerable to abuse.¹⁵ The responsibility for prosecuting, defending, and adjudicating cases is concentrated in the judge, who develops the evidence at trial and calls and questions witnesses himself; the role of the public prosecutor and defense attorney is usually restricted to asking follow-up questions or suggesting lines of inquiry.¹⁶

The reliance on written documents rather than oral testimony in inquisitorial systems also increases delays. Moreover, the process generally cannot be truncated by the defendant's guilty plea but must continue through trial and sentencing.¹⁷ As a result, many unconvicted inmates spend several years behind bars awaiting a verdict in the cases against them. Indeed, some remain in prison for a longer period than if they had been convicted of the crime itself. While this problem is not unique to inquisitorial systems in Latin America,¹⁸ the relative lack of resources in the region exacerbates its severity.

12. See PUNISHMENT BEFORE TRIAL, *supra* n.5, at 30; DEPARTMENT OF STATE COUNTRY REPORTS: VENEZUELA, *supra* n.6 (describing implementation of the *Codigo Organico Processal Penal* in 2000).

13. DEPARTMENT OF STATE COUNTRY REPORTS: BRAZIL (2001); Rotella, *supra* n.9 (noting that only about 3% of offenders in Brazil are sentenced to community service or probation, compared with about 30% in the United States).

14. See ERIKA S. FAIRCHILD & HARRY R. DAMMER, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 125 (2000).

15. See Steven E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System*, 5 SW. J.L. & TRADE AM. 365, 390 (1998).

16. William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 7 (1992).

17. FAIRCHILD & DAMMER, *supra* n.14, at 127.

18. See Hendrix, *supra* n.15, at 390 (noting that in France, 51.9% of those in detention were awaiting trial rather than serving sentences); Pizzi, *supra* n.16, at 6 (citing the "staggering inefficiency" of the Italian criminal justice system as a cause of the shift from an inquisitorial to adversarial system, and noting that the enormous backlog of cases delayed even routine cases for ten years or longer).

II. INTERNATIONAL HUMAN RIGHTS LAW GOVERNING PRETRIAL DETENTION

Excessive detention before trial violates established international human rights norms. Article 9(3) of the International Convention on Civil and Political Rights ("ICCPR") establishes a general presumption of release pending trial,¹⁹ as does Article 7(5) of the American Convention on Human Rights.²⁰ The United Nations Human Rights Committee has suggested that Article 9(3) of the ICCPR means that accused persons should be detained prior to trial only "to prevent flight, interference with evidence, or the recurrence of crime" or "where the person constitutes a clear and serious threat to society which cannot be contained in any other manner."²¹

Particularly lengthy periods of pretrial detention also violate provisions of the ICCPR guaranteeing the right to "trial within a reasonable time or to release"²² and to trial "without undue delay,"²³ and provisions of the American Convention on Human Rights ensuring a right to be tried "within a reasonable time."²⁴ The United Nations Human Rights Committee has indicated that detention of four years or more before trial may violate the ICCPR's right to trial without undue delay.²⁵ In extreme cases, prolonged detention before trial may also violate the presump-

19. See International Convention on Civil and Political Rights, G.A. Res. 2200 A (xxi), art. 9(3), 999 U.N.T.S. at 171 & 1057 U.N.T.S. at 407 (Dec. 16, 1966) [hereinafter ICCPR]. Article 9(3) states: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial." *Id.* See also General Comment No. 8 of the Human Rights Committee on the International Covenant on Civil and Political Rights, art. 9 (Sixth Sess. 1982), Report of the Human Rights Committee, adopted Apr. 12, 1984 by the Human Rights Committee, 40 U.N. GAOR Supp. (No. 40) U.N. Doc. A/40/40 (stating "[p]re-trial detention should be an exception and as short as possible").

20. See American Convention on Human Rights, July 18, 1978, art. 7(5), OEA/Ser. L.V./II.82, 1144 U.N.T.S. 123 (right of detained person to appear promptly before a judicial official and to be tried "within a reasonable time or be released without prejudice to the continuation of the proceedings.").

21. *Hugo van Alphen v. the Netherlands* (No. 305/1988) (July 23, 1990), Official Records of the General Assembly, Forty-Fifth Session, Supplement 40A (A/45/40), vol. II, annex IX, sect. M, para. 5.8, cited in PUNISHMENT BEFORE TRIAL, *supra* n.5, at 33 n.72.

22. See ICCPR, *supra* n.19, art. 9(3).

23. *Id.* art. 14(3)(c). A defendant must, however, receive "adequate time . . . for the preparation of his defense." *Id.* art. 14(3)(b).

24. See American Convention on Human Rights, *supra* n.20, art. 8(1).

25. See *Fillastre v. Bolivia* (No. 336/1988) (Nov. 6, 1991), U.N. Doc. CCPR/C/43/D/336/1988 (1991).

tion of innocence itself.²⁶

But while international human rights norms limit the lawful length of detention before trial, excessive detention remains endemic to regions such as Latin America. The next Part examines current reform efforts that, directly or indirectly, attempt to address this problem.

III. *PRETRIAL DETENTION AND CURRENT REFORMS*

This Part examines judicial reform efforts in Latin America. It first discusses criminal procedure reforms, focusing on several Latin American countries. It then examines broader judicial reform initiatives in the region sponsored by international organizations such as the World Bank.

A. *Criminal Procedure Reforms*

Many Latin American countries have undertaken significant criminal justice reforms that seek to increase the speed in which cases are processed and to address problems such as excessive pretrial detention. While some of the impetus has been a desire for greater efficiency, concerns about human rights violations have also played an important role. USAID's Administration of Justice program has long stressed the link between improvement in the administration of criminal cases and human rights,²⁷ though often with limited success.²⁸ The reforms reflect the historic shift from an inquisitorial to adversarial system now underway in countries throughout Latin America. The reforms also, however, underscore the importance of other factors, such as the behavior of key institutional actors and a country's political and social history, in producing meaningful change in areas like pretrial detention. Several reform projects are summarized below.

26. See ICCPR, *supra* n.19, art. 14(2); see also American Convention on Human Rights, *supra* n.20, art. 8(2); Giménez v. Argentina, Inter-American Commission on Human Rights, Case 11.245 (1996) ("[T]he risk of inverting the presumption of innocence increases with an unreasonably prolonged pre-trial incarceration. The guarantee of the presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial imprisonment is prolonged unreasonably.").

27. See José E. Alvarez, *Promoting the 'Rule of Law' in Latin America: Problems and Prospects*, 25 GEO. WASH. J. INT'L L. & ECON. 281, 289 (1991).

28. See THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 172 (1999) (discussing the changing role of USAID in Guatemala since the 1980s).

1. Chile

Chile has undertaken sweeping changes to its criminal justice system.²⁹ In 2001, Chile started to implement a new code of criminal procedure that dramatically restructures its criminal justice system, abandoning elements of an inquisitorial system in favor of an adversarial one. The reforms have already been implemented in areas outside Santiago and will be implemented in the capital beginning in 2004.³⁰ Initial reports suggest the reforms have brought a more transparent process, greater protection of defendants' rights, and quicker trials.³¹

The reforms grew out of two different impulses: the reaction to the traumatic human rights abuses of the 1970s and 1980s, and the desire to increase the efficiency of the judicial sector.³² The reforms transform the roles of key players in the judicial system, moving toward the tripartite system of American criminal procedure: prosecutor, defense attorney, and judge. Prosecutors have become the institutional actors responsible for bringing and managing criminal actions, separating them from the judicial branch, under which they formerly operated³³, and giving them the authority to exercise their discretion to dismiss certain minor offenses.³⁴ The reforms also create an important role by defense attorneys, who are now responsible, in principle if not in practice, for protecting basic trial rights.³⁵ Judges also have a dramatically different role under the new system. The reforms transform judges from the actors who once controlled the entire investigation, presentation of evidence, and final determination, into independent, impartial referees.³⁶ In addition, the reforms introduce various case management devices to

29. See *Chile Begins Major Judicial Reform Effort*, REUTERS BUS. BRIEFINGS, Dec. 16, 2000.

30. See David BOSCO, *Santiago's Aftershocks*, LEGAL AFFAIRS 67, 68-69 (July-Aug. 2002).

31. See DEPARTMENT OF STATE COUNTRY REPORTS: CHILE (2001).

32. See Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects For Criminal Procedure Reform in Chile*, 5 SW. J.L. & TRADE AM. 323, 324, 328 (1998).

33. See *id.* at 337.

34. See *id.* at 340-41 (adopting the "opportunity principle," which gives prosecutors the power to dismiss some cases based on certain criteria, but makes the exercise of such power subject to a judicial check); cf. Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 503-04 (1975) (describing the system of "mandatory prosecution" in civil law systems).

35. See Rodrigo, *supra* n.32, at 348-50.

36. *Id.* at 353.

speed the processing of cases, including time limits for police to file a complaint, a two-year limit on investigations, and coordination of the court calendar.³⁷

Thus far, the reforms have strengthened the presumption of innocence and sparked the establishment of a professional public defender service.³⁸ The reforms should benefit from the increasing approval of the judiciary that preceded them and from the inclusion of a range of actors from political and civil society in the reform process.³⁹ Ultimately, the reforms' impact on pretrial detention will be measured not primarily by formal changes to criminal procedure codes, but rather by altering the way cases are handled through fundamental institutional change. To succeed, the reforms will also have to overcome the country's traditional resistance to the principle of the presumption of innocence.⁴⁰

2. Venezuela

Venezuela, which has historically had one of the most severe pretrial detention problems in the region, has also instituted reforms to its criminal procedure code. The new code, the *Código Organico Processal Penal* ("COPP"), entered into force in July 1999. The COPP makes far-reaching changes to the criminal justice system,⁴¹ establishing open, public trials with oral proceedings and verdicts by juries or panels of judges. It also limits the time police may detain persons without charges and places investigations under the supervision of prosecutors, turning judges — formerly investigators — into impartial arbiters. The COPP provides that an individual accused of a crime cannot be detained during criminal proceedings unless he is seized in the act of committing the crime or the judge finds that there is a danger the accused may flee or obstruct the investigation.⁴² Under no circumstances may an accused person be detained longer than the possible minimum sentence for the alleged crime, nor may

37. *Id.* at 362-63.

38. See Bosco, *supra* n.30, at 68.

39. See WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* 151-52 (2000).

40. See *id.* at 69; cf. CAROTHERS, *supra* n.28, at 176 (noting that the desire for criminal justice reform may be expressed in terms of getting "tougher" on crime).

41. See, e.g., Steven Gutkin, *Latin Americans Revamp Court Systems That Can't Deliver Justice*, ASSOC. PRESS (May 31, 1998) (summarizing the proposed changes).

42. DEPARTMENT OF STATE COUNTRY REPORTS: VENEZUELA, *supra* n.6.

the detention exceed two years.⁴³ An important goal of the changes is to create a speedy, open public trial process in place of the old, closed inquisitorial process.⁴⁴ Thus far, reforms appear to have had some success in reducing rates of pretrial detention.⁴⁵ More recent amendments to the COPP, however, increase the circumstances under which an accused may be detained, and thus threaten to limit the impact of the reforms.⁴⁶

3. Guatemala

Like other Latin American countries, Guatemala has overcrowded prisons and high rates of pretrial detention.⁴⁷ In 1994, Guatemala initiated sweeping reforms of its criminal procedure code, including shifting the responsibility for investigations from judges to prosecutors, increasing the power of defendants to oppose prosecution and contest the investigation, adopting oral trials,⁴⁸ and allowing for plea bargaining in a number of cases.⁴⁹ The reforms also establish a presumption of innocence, which limits pretrial detention to exceptional circumstances and specific conditions such as reasonable risk of flight.⁵⁰ In no case may detention last for more than one year or for a longer period of time than the accused could have been incarcerated had he been convicted of the crime charged.⁵¹

Guatemala also approved new reforms to the code in 1997 that allow for greater participation in the criminal justice system by indigenous communities.⁵² For example, the reforms create community courts with authority to resolve less serious criminal cases. These courts can use local law or practice, including in-

43. *Id.*

44. See PUNISHMENT BEFORE TRIAL, *supra* n.5, at 38-39.

45. See *supra* n.6.

46. See DEPARTMENT OF STATE COUNTRY REPORTS: VENEZUELA, *supra* n.6 (describing more recent reforms and public perceptions that the COPP has been responsible for increase in crime).

47. See DEPARTMENT OF STATE COUNTRY REPORTS: GUATEMALA (2001).

48. See Hendrix, *supra* n.15, at 393-94.

49. *Id.* at 397-98.

50. *Id.* at 394-95.

51. *Id.*

52. *Id.* at 402. Similarly, in Bolivia, criminal justice reform includes increased respect for indigenous languages and tribal governments. See Sebastian Rotella, *A New Breed of Justice Reshaping Latin America Reform: Watchdogs in Bolivia help change archaic law system*, L.A. TIMES, Oct. 11, 1999, at A1.

digenous law, with certain restrictions.⁵³

Problems, nonetheless, still persist, such as the weakness of the defense bar⁵⁴ and corruption and inefficiency among the judiciary.⁵⁵ Gains in establishing respect for the rule of law have also been limited.⁵⁶ For example, one study found that while the reforms give judges in Guatemala significant power to seek corroborating evidence in criminal cases, many judges fail to use that power, and cases are thus often decided based on incomplete evidence.⁵⁷ Thus, notwithstanding the procedural reforms and rapid expansion of donor activity,⁵⁸ the overall changes in criminal justice systems have been modest and problems like pretrial detention remain severe.

B. *Judicial Reform*

Criminal procedure reforms reflect a broader trend of judicial reform initiatives underway throughout the region. Numerous Latin American countries have undergone extensive reforms of their judicial systems over the last two decades, often with the help of donor organizations like the World Bank and the Inter-American Development Bank ("IDB"), as well as government agencies like USAID.⁵⁹ These reforms emphasize the rule of law, which includes strengthening the judicial branch, speeding the processing of cases, and professionalizing the bench and bar.⁶⁰ International organizations may have different priorities. The World Bank, for example, firmly links judicial reform to fostering economic growth and alleviating poverty.⁶¹ USAID has often focused specifically on improving the functioning of a country's judicial and legal system.⁶² Although these broader judicial re-

53. See Hendrix, *supra*, n.15, at 403.

54. *Id.* at 407-08.

55. See CAROTHERS, *supra* n.28, at 81.

56. See *id.* at 315-16.

57. See LUIS PASARA, LAS DECISIONES JUDICIALES EN GUATEMALA: UN ANALYSIS DE SENTENCIAS EMITADAS POR LOS TRIBUNALES, *discussed in* Michael Dodson, *Assessing Judicial Reform in Latin America*, 37 *LATIN AMERICAN RESEARCH REV.* 200 (2002).

58. See CAROTHERS, *supra* n.28, at 165 (describing how Guatemala is "overrun with aid programs.").

59. Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, *WORLD BANK RESEARCH OBSERVER* (Feb. 1999).

60. See *World Bank and Legal Institutions*, at www1.worldbank.org/publicsector/legal/workdbank.htm.

61. *Id.*

62. See Alvarez, *supra* n.27, at 313-14.

forms do not directly focus on curbing prolonged pretrial detention, they may nonetheless help reduce the severity of the problem by promoting good government and efficiency. A much greater impact could be realized, however, if leading donor organizations like the World Bank more clearly incorporated a commitment to combating human rights abuses into their judicial reform programs.

1. Economic Development and the Judicial System

The link between a country's judicial system and its ability to foster private transactions — the subject of ongoing debate — dates back several centuries.⁶³ Many reformers and commentators now stress the importance of an effective judicial system in both protecting property rights and ensuring the business relationships critical to market transactions.⁶⁴ There appears to be at least some correlation between the quality of a country's legal institutions and the pace of its economic development,⁶⁵ though the strength of the link remains a matter of debate.

In the last decade, donor organizations like the World Bank, IDB, and the Asian Development Bank have approved or initiated over US\$500 million in loans for judicial reform projects in twenty-six countries. USAID spent almost US\$200 million on similar projects during the same period.⁶⁶ At present, the majority of developing countries and former socialist states receive some type of assistance to help them reform their judicial systems.⁶⁷ As a result, an unprecedented degree of financial and technical resources are presently focused on facilitating judicial reform.⁶⁸

Latin America has been the target of numerous judicial reform projects in the past several decades. USAID helped initiate the process with judicial reform programs in Central America in

63. See Messick, *supra* n.48. Adam Smith would later link a nation's economic development with the establishment of "a tolerable administration of justice." *Id.*

64. See *id.* (citing research); see also PRILLAMAN, *supra* n.39, at 1 (discussing the link between a strong judiciary and sustainable economic development).

65. See, e.g., CAROTHERS, *supra* n.28, at 164. Some commentators note that economic development may also create better institutions. See Alberto Chong & Cesar Calderon, *Causality and Feedback Between Institutional Measures and Economic Growth*, 12 *ECON. & POL.* 69 (2000)

66. See Messick, *supra* n.48.

67. See *id.*

68. See *id.*

the 1980s.⁶⁹ By the end of the 1990s, the World Bank, and later the IDB, approved or were considering thirty judicial or legal reform projects in seventeen countries in the region by the early 1990s.⁷⁰

In Latin America, a well-functioning judicial system is widely considered to play a role in fostering private sector development within the market economy.⁷¹ To enhance the protection of property and contract rights, governments have introduced various measures including modernizing property registries, streamlining judicial procedures, creating alternative dispute resolution systems, and professionalizing the bench and bar.⁷² As an empirical matter, however, there remains some question as to the overall effect of rule of law reforms on economic development.⁷³

Furthermore, the path to judicial reform is not without obstacles. Attempts to alter judicial systems can engender opposition from existing actors, such as a nation's organized bar, whose members may fear that quicker trials will translate into a decline in their status and value to the system.⁷⁴ Reforms may fail when they lack the participation of important sectors in the country, and ought, therefore, to seek to foster efficient, responsible public institutions and agencies rather than focus exclusively on the judiciary.⁷⁵ Judicial reform, in short, should not be treated solely as a technical matter nor should political factors be ig-

69. See Alvarez, *supra* n.27, at 285 (describing the history of the Administration of Justice program which provided, *inter alia*, support for specialized professional training, programs to enhance prosecutorial and judicial capabilities, strengthening professional organizations, and increasing the availability of legal materials).

70. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, BUILDING ON QUICKSAND: THE COLLAPSE OF THE WORLD BANK'S JUDICIAL REFORM PROJECT IN PERU (April 2000) [hereinafter BUILDING ON QUICKSAND].

71. See Edgardo Buscaglia, *A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America*, 17 INT'L REV. LAW & ECON. (1997); Alvarez, *supra* n.27, at 324 (noting the implicit assumption of USAID's Administration of Justice program that an independent and efficient judiciary is conducive to economic development).

72. See BUILDING ON QUICKSAND, *supra* n.70.

73. See, e.g., Aymo Brunetti & Beatrice Weder, *Political Sources of Growth: A Critical Note on Measurement*, PUB. CHOICE 82, 125-34 (1995); see also Messick, *supra* n. 48 (noting that rigorous econometric methods for verifying this hypothesis are in their infancy).

74. See Messick, *supra* n.48.

75. See, e.g., Patrick McAuslan, *Law, Governance, and the Development of the Market: Practical Problems and Possible Solutions*, in JULIO FAUNDEZ, GOOD GOVERNANCE AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES (1997).

nored in the process.⁷⁶

A broader critique of judicial reform posits that the endeavor itself is inherently flawed and will simply repeat the mistakes of the law and development movement of the 1960s. This movement, which originated at leading American law schools, espoused the idea that law was central to the development process. Law was viewed as a tool that could be used to promote social reform, with lawyers and judges acting as social engineers.⁷⁷ Proponents believed that law and development would ultimately lead to the creation of institutions in developing countries much like those in the advanced liberal democracies of the United States and western Europe.⁷⁸ This movement represented an ambitious attempt by USAID, the Ford Foundation, and other private American donors to reform the judicial systems and substantive laws of developing nations.⁷⁹ Although the movement eventually came under severe criticism⁸⁰ and essentially collapsed, American lawyers and legal scholars continue to act in ways that seek to shape the fundamental economic and political institutions of the developing world.⁸¹ The extent to which current judicial reform projects can avoid the fate of the law and development movement has yet to be determined.

2. The World Bank and the Limits of Judicial Reform

The potential impact of judicial reforms on pretrial deten-

76. See PRILLAMAN, *supra* n.39, at 4-5.

77. See John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM J. COMP. L. 457 (1977).

78. See Brian Z. Tamanaha, Book Review, *The Lessons of Law and Development*, 89 AM. J. INT'L L. 470, 473 (1995).

79. *Id.* at 472-74.

80. See, e.g., David Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062, 1080 (1974) (attacking the movement's legal liberal model as "ethnocentric and naïve."); Alvarez, *supra* n.27, at 287 (noting that law and development programs reflected faith in "the transformative power of law.").

81. See Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 14 (1998) (arguing that "the thrust of international development policy today remains essentially what it was in the sixties and seventies: to export markets, democracy, and the rule of law to the developing world."); Hugo Fruhling, *From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America*, in MANY ROADS: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD (Mary McClymont & Stephen Golub eds., 2000) (noting the influence of Ford Foundation projects on the current criminal procedure reform in Chile).

tion rates has been limited by attempts to divorce economic development from human rights abuses. This shortcoming may be traced to the policies governing leading international donor organizations.

The World Bank, the largest and most influential international donor organization, is prohibited by its Articles of Agreement from interfering in the political affairs of its members. The International Monetary Fund ("IMF") operates under similar restrictions. The World Bank has construed the prohibition in its Articles of Agreement as precluding support of judicial reform projects unless relevant to a country's economic development and the Bank's lending strategy for that country.⁸² Like the Bank, the IMF views human rights law as "political," and, therefore, beyond the scope of its authority and ability, which is it sees as confined to economic issues.⁸³

Thus, in contrast to USAID, which has focused extensively on criminal justice reform, the World Bank, the leading non-state actor in promoting judicial reform, has tended to avoid penal issues and procedures.⁸⁴ Initial projects, such as the extensive Venezuela Judicial Infrastructure Project, approved in 1992, focused on administrative and management reforms, and the training of judges.⁸⁵ The Bank has addressed issues like pretrial detention only indirectly, by promoting good government and judicial efficiency.

The World Bank has, however, increasingly moved from a narrow, technical focus to a more comprehensive view of legal systems that recognizes the importance of judicial independence in the overall scheme of reform.⁸⁶ In Peru, for example, when the Bank realized that the government was undermining judicial independence, it cancelled the US\$22.5 million judicial reform

82. 2 *THE WORLD BANK IN A CHANGING WORLD* (Ibrahim F. Shihata ed., 1995).

83. See Balakrishnan Rajagopal, *Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights*, 11 *B.U. INT'L L.J.* 81 (1993). In contrast to the World Bank, which is principally a development institution originally designed to assist postwar reconstruction, the IMF was designed to maintain an orderly system of receipts and payments between countries. See *id.* at 87-88 (describing the various constraints on the IMF).

84. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELA JUSTICE SYSTEM* (1996) [hereinafter *HALFWAY TO REFORM*].

85. See *id.*

86. See *BUILDING ON QUICKSAND*, *supra* n.70.

project.⁸⁷

IV. REDUCING PRETRIAL DETENTION

This Part discusses various ways to reduce the rate of pretrial detention in Latin America, including: creating effective provisions for pretrial release such as bail statutes; changing the behavior of key institutional actors like judges, prosecutors, and defense attorneys; adapting reforms to an individual country's particular history, culture, and politics; and eliminating obstacles that preclude leading donor organizations like the World Bank from linking judicial reform efforts with human rights abuses like pretrial detention.

A. *Creating Effective Bail Provisions*

While criminal procedure reforms offer the promise of quicker case resolution and a decrease in rates of pretrial detention, they often do not go far enough. Creating effective provisions for pretrial release is an important way to address excessive pretrial detention.⁸⁸ In Bolivia, courts are only now beginning to provide bail for certain prisoners, and judges may still detain suspects under arrest if considered a flight risk or for obstruction of justice.⁸⁹ In the Dominican Republic, few defendants are actually granted bail despite severe problems of pretrial detention.⁹⁰ In Colombia, bail is available only in connection with minor offenses or after extremely long periods of time detained before trial.⁹¹ Merely creating the necessary legal framework, however, will not suffice, as judges and other actors in the criminal justice system must become accustomed to a system in which pretrial release is more routinely granted.

87. *See id.*

88. Human Rights Watch, *Excessive Pretrial Detention*, available at <http://www.hrw.org/advocacy/prisons/pretrial.htm> (last visited Oct. 10, 2002) (describing need for expansion of pretrial release). In the United States, for example, federal law establishes a presumption in favor of pretrial release, and the Bail Reform Act authorizes release on bail absent a risk of flight or danger to the community. *See* 18 U.S.C. § 3142; *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the Bail Reform Act); Michael K. Ryan & Benjamin K. Olson, *Bail*, 88 GEO. L.J. 1157 (2000).

89. *See* DEPARTMENT OF STATE COUNTRY REPORTS: BOLIVIA (2001).

90. *See* DEPARTMENT OF STATE COUNTRY REPORTS: DOMINICAN REPUBLIC (2001).

91. *See* DEPARTMENT OF STATE COUNTRY REPORTS: COLOMBIA (2001).

B. *Changing How Actors Behave, As Well As Criminal Codes*

Reforming criminal codes and transforming criminal justice systems from an inquisitive to adversarial model can help address the problem of excessive pretrial detention. There may, nevertheless, be limits to the improvements to be gained from borrowing procedural devices from another type of system — in this case from adversarial systems — without altering the behavior of key organizational actors like prosecutors and defense attorneys. As William T. Pizzi cautions, parts of one system, such as prosecutorial discretion in an adversarial system, “cannot easily be separated from the rest of the system and isolated for incorporation in a different legal system.”⁹² Criminal procedure reflects a society’s cultural, historical, and political values, and the adoption of new forms, without more, will likely prove limited in scope.⁹³ There may be resistance to implementing reforms that change formal legal procedures as well as the way the system operates in practice and the respective roles of the primary actors.⁹⁴ Civil law systems not only have different historical roots and traditions than adversarial ones,⁹⁵ but also have gradually evolved into distinct systems with their own views about authority, rules, methods of organization, and the conception of justice itself.⁹⁶ Thus, the improvement in rates of pretrial detention to be gained from the adoption of the principles and forms of an adversarial system depends to some extent on whether there are corresponding changes at an institutional and structural level. Judicial reform may ultimately prove more political

92. See William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1373 (1993). Although Professor Pizzi was discussing the converse — the possible adoption by adversarial systems of civil law controls like judicial review of prosecutorial action — his general point applies here. *Id.*

93. See *id.* Judicial reforms elsewhere demonstrate this point. Cf. Steven Lee Myers, *Russia Glances to the West for its New Legal Code*, N.Y. TIMES, July 1, 2002, at A1 (describing doubts about the impact of sweeping changes to Russia’s criminal code given “the day-to-day practice of Russian justice, where corruption is rife and resistance to change deeply entrenched” and noting that changes to Russia’s code guarantees a suspect legal representation from the time of arrest but fails to detail how lawyers will be paid when defendants cannot afford them).

94. See DEPARTMENT OF STATE COUNTRY REPORTS: VENEZUELA, *supra* n.6 (summarizing obstacles implementing Venezuela’s new criminal procedure code).

95. See Damaška, *supra* n.34, at 529-43.

96. See *id.* at 487-529.

and culture than technical in nature.⁹⁷ Certainly, as the case of Peru under Alberto Fujimori demonstrates, modernization of the judiciary will not bring about meaningful reform in pretrial detention and other areas unless the underlying principle of judicial independence is firmly established.⁹⁸

Furthermore, reducing excessive pretrial detention requires administrative changes that increase efficiency. For example, Bolivia's new Code of Criminal Procedure contains fixed limits on the amount of time defendants can be held awaiting trial and sentencing.⁹⁹ Even so, prolonged detention remains a problem due to factors such as judicial corruption, lack of public defenders, poor case-tracking mechanisms, and complex criminal justice procedures.¹⁰⁰

The limit of normative change on pretrial detention rates within an adversarial system is illustrated by the United States' attempt to improve efficiency in processing criminal cases. In the early 1970s, the United States Congress and state legislatures enacted "speedy trial" acts to ensure that criminal cases were decided quickly. The acts set specific deadlines which, if not met, would lead to dismissal of cases.¹⁰¹ The mere adoption of these laws, however, has generally failed to shorten disposition times. Rather, the key determinant in whether "speedy trial" acts met their goals was whether they affected key institutional actors like judges, prosecutors, and defense attorneys.¹⁰²

Proponents of judicial reform in Latin America are experiencing a similar phenomenon. Initially, the primary focus was on reforming criminal procedure codes and moving towards a

97. See Dodson, *supra* n.57.

98. See LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUDICIAL REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* (1998), *cited in* Dodson, *supra* n.57.

99. See DEPARTMENT OF STATE COUNTRY REPORTS: BOLIVIA, *supra* n.89 (fixing period at eighteen months).

100. *Id.*

101. 18 U.S.C. Sec. 3161 (providing that an individual arrested for a federal offense must be indicted within thirty days of arrest and, where a plea of not guilty is entered, brought to trial within seventy days of the filing of the indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date occurs last).

102. See J. Andrew Read, Comment, *Open-Ended Continuances: An End Run Around the Speedy Trial Act*, 5 GEO. MASON L. REV. 733 (1997) (noting the pattern of federal judges granting "open-ended continuances" to avoid the strict limits of the Speedy Trial Act).

more adversarial system. More recently, the emphasis has shifted to changing how key organizational actors behave by re-creating or reorganizing police forces, prosecution agencies, and public defender offices.¹⁰³ Continued focus on these institutional actors and arrangements will be a critical part of reform efforts. Judicial reform requires not only better trained judges but also the necessary infrastructure of institutions that constitute a well-functioning legal system.¹⁰⁴

*C. Adopting Reforms to a Country's Political, Social,
and Cultural History*

To succeed, reforms must also be adapted to the particular history and climate of the target country. In countries where tension with indigenous groups has led to political unrest, civil war, and widespread human rights abuses by the military, criminal procedure reforms must take account of how the system had previously acted as a tool for the oppression of ethnic minorities. Similarly, in societies historically plagued by injustice and inequality, inclusion of a broad sector of society and a more bottom-up approach will likely prove critical to meaningful reform.¹⁰⁵

In Guatemala, for example, the judicial reforms of the 1980s, which were backed by USAID funding, were undermined by their lack of popular support and by strong resistance from the targeted institutions themselves.¹⁰⁶ By creating community courts with jurisdiction over less serious criminal cases that give indigenous communities a greater stake and degree of autonomy, Guatemala's most recent judicial reform effort has taken an important step in the direction of building broader popular support for judicial reform and overcoming the negative associations of past efforts.¹⁰⁷ Yet, while judicial reform efforts have

103. See, e.g., DEPARTMENT OF STATE COUNTRY REPORTS: DOMINICAN REPUBLIC, *supra* n.90 (describing modest increases in availability of state-funded public defenders in the Dominican Republic); DEPARTMENT OF STATE COUNTRY REPORTS: GUATEMALA, *supra* n.47 (describing the creation in Guatemala of justice centers that unite judges, public defenders, prosecutors, police, and others in a team approach to addressing problems).

104. See generally LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 111-12 (1999) (describing the various institutions that must be part of successful judicial and legal reform).

105. See CAROTHERS, *supra* n.28, at 169.

106. See *id.* at 172.

107. See *supra* nn. 52-53 and accompanying text.

made some progress there, the judiciary and other government institutions remain plagued by corruption, incompetence, and inefficiency, and the principle of the rule of law remains tenuous.¹⁰⁸

Similarly, judicial reform in El Salvador must address the legacy of widespread human rights abuses during the Salvadoran civil war of the 1980s and the impunity of the military.¹⁰⁹ U.S. involvement in that conflict, at the same time USAID was backing judicial reform, created feelings of suspicion and distrust that current reform efforts must work to overcome. Following the peace accords, reform of El Salvador's criminal justice system became a high priority in the effort to rebuild the country's institutions, and a number of important laws were passed, including restrictions on pretrial detention.¹¹⁰ Their successful implementation has, however, been undercut by the lack of widespread national support, including among members of the judiciary, and by rising crime rates, which the police and security forces attribute to the criminal justice reforms themselves.¹¹¹

Chile presents a related challenge — the judiciary's association with the human rights abuses committed during a prior military dictatorship. The judiciary has long been criticized for its actions during the Pinochet regime, including its refusal to exercise jurisdiction over the military tribunals, its application of laws granting amnesty to military officials, and its rejection of attempts by families of victims to seek justice against the perpetrators. Given the link between the judiciary and the former military regime, criminal procedure reform must now be accompanied by genuine judicial independence and the promotion of defendants' rights in order to have a meaningful impact.

D. *Overcoming the Prohibition on "Political" Interference by Leading Donor Organizations*

The effort to combat human rights abuses like pretrial detention will be advanced by harnessing the potential impact of judicial reforms by donor organizations such as the World Bank

108. See Carothers, *supra* n.28, at 81.

109. See MARGARET POPKIN, PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR, *cited in* Dodson, *supra* n.57.

110. See *id.*

111. See *id.*

and IMF. Generally, the World Bank has considered human rights violations in lending decisions only when those violations have amounted to clear or preponderantly economic concerns.¹¹² While the World Bank has increasingly supported judicial reform projects in Latin America,¹¹³ it does not support criminal procedure reforms because it considers them “political” and thus in violation of its Articles of Agreement.¹¹⁴

The World Bank’s prohibition on interference with the “political affairs” of a member should not preclude attempts to protect against human rights abuses like prolonged pretrial detention. The Bank already views its development mandate as going beyond economic advancement.¹¹⁵ Moreover, despite the emphasis in its Articles of Agreement on “economic considerations” and the prohibition on interference in a member state’s “political affairs,” the Articles do not define either term, granting the Bank considerable leeway in fleshing out their meaning.¹¹⁶ An early concentration on the financial sector led to a focus on government regulation, which in turn led to policies to reform the judicial sector.¹¹⁷ The Bank has gradually expanded its view of what factors qualify as “economic considerations” to include those operations that promote a range of economic, social, and cultural rights such as health, education, social welfare, and employment.¹¹⁸ The Bank’s loans to developing countries are now considered the country’s principal source of foreign capital, potentially giving the Bank significant influence over human rights

112. See John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 *CORNELL INT’L L.J.* 331, 337 (2000).

113. See BUILDING ON QUICKSAND, *supra* n.70 and accompanying text.

114. According to Article IV:

The Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to [promote economic development, increase productivity, and thus raise standards of living in the less-developed areas of the world.]

The World Bank Articles of Agreement, art. IV, Sec. 10.

115. See Ciorciari, *supra* n.112, at 355.

116. See Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 *TRANS-NAT’L L. & CONTEMP. PROBS.* 47, 49-56 (1996). The Bank has defined an economic factor as any factor that has a “direct and obvious economic effect relevant to the [World Bank’s] work.” *Id.* (internal quotation marks omitted).

117. See *id.* at 54.

118. See *id.* at 57.

issues like excessive pretrial detention.¹¹⁹

Indeed, the World Bank's own promotion of good government reforms undercuts its position that human rights are beyond its mandate.¹²⁰ A growing body of evidence links economic development to the protection and promotion of human rights,¹²¹ and human rights may be linked to a range of the Bank's activities. For example, when a World Bank-financed judicial reform program is aimed at a specific aspect of a judiciary's operations, it can influence the way that judicial system will function for all people.¹²² The concern about the reliability of a judicial system among investors embodies a subset of broader concerns about judicial insecurity due to fear of arbitrary arrest and imprisonment and the absence of fair pretrial and trial procedures.¹²³ Even a seemingly "political" determination like guaranteeing criminal defendants procedural rights can in the long-run have important economic effects, such as improved business confidence¹²⁴ — a central goal of the type of "rule of law" reforms the Bank widely sponsors.¹²⁵ In fact, changes in judicial efficiency have been measured by documenting changes in times to disposition in criminal cases and pretrial detention rates.¹²⁶

A number of solutions have been proposed to overcome the World Bank's resistance to promoting and protecting human rights. The Bank could interpret the prohibition in its Articles of Agreement to bar involvement in domestic partisan affairs.¹²⁷ It could also adopt the view that the prohibition on political interference does not extend to abuses of "fundamental human rights."¹²⁸ Alternatively, the Bank could amend its Articles of Agreement to explicitly grant it the right to consider human rights issues in lending decisions and to authorize it to refuse to enter into or to withdraw loans from countries that consistently

119. See Halim Moris, *The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance?*, 4 ILSA J. INT'L & COMP. L. 173, 175 (1997).

120. See Bradlow, *supra* n.116, at 65.

121. See *supra* nn.63-65 and accompanying text; see also Rajagopal, *supra* n.71, at 87.

122. See Bradlow, *supra* n.116, at 59.

123. See HALFWAY TO REFORM, *supra* n.84.

124. See Bradlow, *supra* n.118, at 62.

125. See *supra* nn.63-73 and accompanying text.

126. See PRILLAMAN, *supra* n.39, at 148-49 (providing statistics from Brazil and Chile).

127. See Bradlow, *supra* n.116, at 81.

128. See Giorciari, *supra* n.112, at 370.

violate human rights. It might even create a sub-agency to evaluate the impact of lending decisions on human rights conditions in a borrowing country.¹²⁹

Similarly, there is good reason for the IMF to drop its resistance to considering human rights in its lending policies. Although the IMF was initially seen as a short-term money institution, it has become increasingly involved in long-term development.¹³⁰ The IMF's articles grant it "wide international responsibilities" in "economic and related fields," suggesting that the IMF could permissibly incorporate related fields like human rights into its decisions.¹³¹ Indeed, as development is increasingly understood to encompass human rights, it becomes more difficult to separate development issues from human rights issues.¹³²

Thus, notwithstanding their principal focus on economic development, international financial institutions like the World Bank and IMF can still play an important role in addressing human rights issues, especially those like pretrial detention that are closely connected to improving the efficiency of a country's judicial system.¹³³

CONCLUSION

Prolonged pretrial detention remains one of the most significant human rights problems in Latin America today and contributes to the overcrowding, violence, and other deplorable conditions in the region's prisons. Many Latin American countries have introduced significant changes to their criminal procedure codes, marking a historic shift from an inquisitorial to an adversarial system. Meanwhile, international donor organizations like the World Bank continue to sponsor judicial reform initiatives to increase efficiency and promote economic development. While human rights advocacy and criminal procedure re-

129. See Moris, *supra* n.119, at 199-200.

130. See Rajagopal, *supra* n.83, at 92.

131. *Id.* at 94 (quoting Article 1(2)).

132. See *id.* at 97.

133. See Bradlow, *supra* n.116, at 86. *But see* Moris, *supra* n.119, at 182 (describing the grounds cited by those who oppose action by the World Bank on human rights, including violation of the Bank's Articles of Agreement, "violation of international law prohibiting coercion in any form including economic coercion, violation of principles of sovereign integrity and sovereign equality, and violation of recipient states' right to development.").

forms represent an important part of combating prolonged pretrial detention, they must be joined with other changes, such as establishing effective provisions for pretrial release, altering the behavior of judges, prosecutors, and defense attorneys, adapting reforms to an individual country's particular history and social context, and overcoming the resistance of influential donor organizations like the World Bank to factoring human rights into their lending policies.