

Criminal Justice and Impunity in Latin America

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Abstract

1

Criminal justice in Latin America has changed fundamentally over the past decades. Up until the late 20th century, it was based on a traditional inquisitorial procedural system which severely limited the rights of the parties to the proceedings, especially those of the accused. This problematic state of affairs had its roots in the region's colonial history, but from the 1980s onwards almost all countries in the region began to fundamentally reform their criminal justice systems heavily influenced by the US adversarial approach. In this essay, we will first discuss the challenges facing criminal justice by outlining the development of the reforms and taking into account their effective implementation. On this basis, we will examine the question of how criminal justice reacts to current developments in criminal policy. We then will look at how the state of criminal justice affects impunity in the region and the factors that explain the high level of impunity. We conclude by glancing at potential future developments.

I. Introduction

The ground-breaking reforms in the late 20th century in Latin America 2 laid an important foundation for the region's States to effectively improve their prosecutorial system in accordance with the rule of law. These reforms aimed at creating a modern system by introducing changes on both the normative (especially procedural) and the institutional-organisational level. However, the practical implementation of these new criminal justice systems in the various countries often proved difficult, as we will see in the following. In addition to the challenges linked thereto, criminal justice in Latin America has to respond to and cope with current criminal policy

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problems, in particular, the issue of rising crime in large parts of the region and the significant erosion of authority of law enforcement agencies that often goes hand in hand with increased crime rates. If a State is unable to guarantee effective prosecution, criminal justice becomes equated with impunity (*impunidad*), a concept originally derived from the human rights discourse.¹ As in many regions of the world, in Latin America, a lack of public trust in law enforcement authorities and corruption particularly hinder effective prosecution or even make it impossible. This leads to widespread impunity, especially in the field of organised and political crime, which we will look at in more detail below.

II. Criminal justice in Latin America

- 3 Criminal justice has manifold tasks. One of its key functions is to identify criminals and bring them to justice. However, modern criminal justice systems also have the additional remit of preventing crime, rehabilitating offenders and supporting victims. Various authorities and institutions are required to fulfil these tasks, including the police and the public prosecutor's office, criminal defence (sometimes organised by the State), courts and the prison system. For a long time, (inquisitorial) Latin American criminal procedure did not regard the institutionalised form of criminal defence as a part of the criminal justice system nor were the functions of the prosecution and the court clearly separated, as we will see below.

1. The reform movement

- 4 In the early 1980s, a fundamental reform of criminal justice began taking place in Latin America.² The criminal justice system that had existed up to this point had been introduced by the Spanish and Portuguese during the colonial era. It thus had its roots in 14th-century Europe and was particularly characterised by its strictly vertical organisation: the judge and prosecutor in each case was the same person and this individual was

1 Kai Ambos, Straflosigkeit von Menschenrechtsverletzungen. Zur "impunidad" in süd-amerikanischen Ländern aus völkerstrafrechtlicher Sicht (Max-Planck-Institut für ausländisches und internationales Strafrecht 1997).

2 See thereto the paper by Duce and Fuentes in this volume.

not only responsible for passing judgment but also oversaw the investigations that preceded it. The two key figures in this so-called inquisitorial criminal procedure thus were the accused and the judge. This system did not provide for an oral hearing or for a defence to be mounted for the accused, let alone any option to challenge the judgment. Rather, so-called desk judgments were made in writing and in secret. Furthermore, the judges were closely linked to politics and, accordingly, there was no *de facto* independent judiciary. This highly bureaucratic criminal procedure saw the accused as a mere object of the proceedings rather than as a subject with rights of his or her own.³

While this penal system was reformed in continental Europe in the 19th century in the wake of the Enlightenment, it continued to exist in Latin America. However, the developments in the field of human rights in the mid-20th century and the concomitant recognition of fundamental procedural rights meant that this outdated system needed to be fundamentally reformed.⁴ The Inter-American Court of Human Rights (IACtHR), which was established in 1979 based on the American Convention on Human Rights (ACHR), has considerably strengthened procedural rights in Latin America, often with reference to the case law of the European Court of Human Rights. In particular, the IACtHR further developed the right to a fair trial (the so-called *debido proceso*) to include the presumption of innocence, the right to a defence and the right to be heard before a competent, independent and impartial court or judge.⁵ The outdated inquisitorial procedural system was unable to guarantee these rights and, accordingly, a new system based on orality, immediacy, and adversariality (the so-called *proceso acusatorio o adversarial*) needed to be developed.

The main objective of the reforms, therefore, was to transition to a system that guaranteed the rights of defendants and victims and strengthened

3 Eberhard Struensee and Julio B J Maier, 'Introducción', in Julio B J Maier, Kai Ambos and Jan Woischnik (eds), *Las Reformas Procesales Penales en América Latina* (Ad Hoc 2000); Daniel Pastor, 'Proceso penal latinoamericano', in Kai Ambos (ed), *Ciencias criminales en Alemania desde una perspectiva comparada e internacional* (Göttingen University Press 2018).

4 Article 10 Universal Declaration of Human Rights, Article 18 American Declaration of the Rights and Duties of Man, Article 14 International Covenant on Civil and Political Rights, and – particularly important for Latin America – Articles 8 and 25 American Convention on Human Rights.

5 Christian Steiner and Marie-Christine Fuchs (eds): *Convención Americana sobre Derechos Humanos. Comentario* (Konrad Adenauer Stiftung 2019).

criminal defence.⁶ Furthermore, in the late 20th century, many Latin American countries transitioned from dictatorships or authoritarian regimes to democracies. This also led to reform efforts in the field of (criminal) justice, especially with regard to the separation of powers (particularly between the executive and judicial powers) while simultaneously seeking to improve the reputation of criminal justice which hitherto had been regarded as untrustworthy and inefficient.⁷

7 Thus, it is no coincidence that this wave of reform encompassed a number of parallel national reform processes. This almost region-wide overhaul of criminal justice systems was the result of similar postcolonial developments that culminated in Latin America's comprehensive embrace of democratisation and were shaped significantly by the rapidly expanding inter-American system of human rights. This process began at the regional level from the 1970s onwards and culminated in the 1990s, when Guatemala (1994), Costa Rica and El Salvador (1998), Venezuela (1999), as well as Chile and Paraguay (1999) revised their systems. In States with a federal structure, such as Argentina and Mexico, reforms were initially implemented in selected provinces (in Argentina long before Mexico). A large number of other States followed suit later and, in some instances, the reform process continues to this day. In some instances, it has even triggered subsequent reforms leading to constitutional amendments, as is the case in Colombia and Mexico.

8 These reforms were not limited to procedural law but also affected the structure of the judicial system as a whole.⁸ In many States in the region, the greatest institutional change was arguably the introduction of the *Ministerio Público* (a government agency whose main role is to conduct criminal prosecution). This public ministry often is enshrined in constitutional law and usually also includes the public prosecutor's office (*Fiscalía*). The reforms thus for the very first time gave public prosecutor's offices a key role in the fight against crime in Latin America. Since then, these offices have been authorised to issue instructions to the police and thus formally lead criminal investigations. For their part, the police must conduct investigations under

6 Cristián Riego et al., *Prisión Preventiva en América Latina. Evaluación y Perspectiva* (CEJA, vol 1 2009/ vol 2 2011).

7 Struensee and Maier (n 3) 20–4; Mauricio Duce and Rogelio Pérez Perdomo, 'Citizen Security and Reform of the Criminal Justice System in Latin America', in Hugo Frühling, Joseph Tulchin and Heather Golding (eds), *Crime and Violence in Latin America: Citizen Security, Democracy and the State* (Woodrow Wilson Center Press 2003) 78.

8 Duce and Pérez Perdomo (n 7) 78.

the direction and responsibility of the public prosecutor's office and follow its instructions. This was the first time that public prosecutor's offices were structured as autonomous institutions in Latin America to guarantee their independence and place them in a position of oversight to conduct criminal investigations.⁹ However, there are considerable differences between the national legal systems, especially with regard to the importance and function of the *Ministerio Público*. As new constitutions were adopted in many States, constitutional courts were also introduced, as was the case in Chile, Colombia, Peru and others. These courts were charged with ensuring that the rights of the accused in criminal proceedings were respected, in particular, the rights to a defence and to be tried with judicial impartiality.

2. Pretrial detention and the implementation of the reforms

Have the reforms been able to remedy, or at least reduce, the abuses typical of criminal justice in Latin America? This question is best answered using the example of pretrial detention, which is a paradigmatic indicator of the state of any criminal justice system. Traditional criminal procedure usually provides for the possibility of pretrial detention without precisely defining its preconditions and, accordingly, it is often ordered in anticipation that there will be further punishment (so-called *sentencia anticipada*). As a consequence, revising the rules on pretrial detention was one of the reform's key concerns.¹⁰ The aim was to refine the use of pretrial detention in a way that aligned it with the two rule-of-law-principles of presumption of innocence and proportionality. Instead of adhering to the existing procedure that automatically ordered pretrial detention, case-by-case assessments were to be carried out using rational criteria while respecting the rights of the accused in accordance with the relevant human rights standards. This was intended to reduce the high number of persons remanded in custody prior to trial,¹¹ however, despite widespread recognition of the need for a new approach in line with the rule of law, a large number of prisoners held in Latin American countries still have not been convicted by a final judgment:

9 Pastor (n 3) 104, 107.

10 Riego et al. (n 6).

11 Riego et al. (n 6).

The proportion of prisoners held in pretrial detention as a percentage of the total number of all detainees¹²

	1988–89	2004–06	2015–18	2019–21
Paraguay	NA	72.4	77.9	77.3
Bolivia	NA	74.0	69.9	65
Uruguay	91.0	94.0	69.7	22.3
Venezuela	71.0	55.0	63.0	62.5
Dom. Rep.	85.0	77.0	60.3	58.6
Honduras	88.3	63.5	53.1	NA
Panama	NA	62.8	53.0	37.5
Guatemala	73.0	43.9	51.8	48.4
Peru	NA	69.5	39.8	36
Mexico	61.0	59.0	39.4	40
Argentina	NA	58.0	36.4	43.5
Brazil	NA	34.4	35.4	29.5
Ecuador	69.8	63.0	34.9	37
Colombia	54.0	65.0	33.7	24.5
Chile	53.0	34.6	33.3	34
El Salvador	91.2	28.2	29.5	23.1
Nicaragua	54.9	14.4	21.4	NA
Costa Rica	44.3	29.4	13.3	48

- 10 Although the figures show that numbers of prisoners held in pretrial detention have, on the whole, decreased in recent years, it is obvious that the numbers are still very high given that in some countries more than half of the total number of detainees are awaiting trial. Between 2019 and 2021,

12 Table elaborated by the authors based upon the Institute for Criminal Policy Research, World Prison Brief data <www.prisonstudies.org/map/south-america> accessed 28 October 2021; Inter-American Commission on Human Rights (IACHR), Report on the use of pretrial detention in the Americas, OEA/Ser.L/V/II. Doc. 46/13, 30 December 2013, 21–22; United Nations Office on Drugs and Crime (UNODC), Persons held in prisons – by status 2010–2019 <<https://data.unodc.org/data/prison/total%20persons%20held%20unsentenced>> accessed 28 October 2021; López-Calva, United Nations Development Programme (UNDP), Justice Delayed, 14 September 2021 <www.latinamerica.undp.org/content/rblac/en/home/presscenter/director-s-graph-for-thought/justice-delayed---four-out-of-ten-people-are-imprisoned-without-.html> accessed 28 October 2021. Where percentages varied, the average value was listed.

the average percentage of persons held in pretrial detention in Latin America was 43.2 %; in comparison, the European average for this period was 25.7 %.¹³ There are many different reasons for the high numbers in many – though clearly not in all – Latin American states in this regard. To begin with, the criteria for pretrial detention are often loosely applied and lead to its excessive use, essentially continuing aspects of the inquisitorial system from the pre-reform period.¹⁴ Having said that, concern about recidivism and a general increase in crime are also key reasons why pretrial detention is ordered so frequently. The rising crime rate in Latin America in recent decades, particularly with regard to violent crime and property offences, has had a major impact on public safety and the sense of security throughout the region. As such, efforts to improve these aspects of civil life have become one of the central drivers shaping current criminal policy.¹⁵ This development has led to increased repression, a trend that can be observed by the fact that the defendants' rights, in particular the presumption of innocence, prohibitions on the use of evidence and the right to a defence, are being seriously curtailed for reasons of public safety in the spirit of *neo-punitivismo*, something that is deplored by critical observers.¹⁶

As a result of this trend, pretrial detention is losing its exceptional character and becoming a regularly applied instrument of crime prevention.¹⁷ This has even led to the involvement of the Inter-American Court of Human Rights which, in the *Chaparro Álvarez* case, issued a reminder that pretrial detention may not be ordered for preventive purposes. On the contrary, it held that pretrial detention should only be used for the legitim-

- 13 Luis Felipe López-Calva, 'Justice Delayed' (2021) UNDP <www.latinamerica.undp.org/content/rblac/en/home/presscenter/director-s-graph-for-thought/justice-delayed---four-out-of-ten-people-are-imprisoned-without-.html> accessed 28 October 2021. Cf. also UNODC (2021) 7 <https://www.unodc.org/documents/data-and-analysis/statistics/DataMatters1_prison.pdf> accessed 28 October 2021. Worldwide, around 30 % of the prison population is made up of pretrial detainees, for an overview see <https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All> accessed 15 September 2022.
- 14 Marcelo Bergman, *More Money, More Crime: Prosperity and Rising Crime in Latin America* (Oxford University Press 2018) 256–7.
- 15 Corporación Latinobarómetro (2017) 58–9 <www.latinobarometro.org/LATDocs/F00006433-InfLatinobarometro2017.pdf> accessed 28 October 2021; Duce and Pérez Perdomo (n 7) 84.
- 16 Duce and Pérez Perdomo (n 7) 76; Pastor (n 3) 109.
- 17 Gustavo Fondevila and Miguel Quintana-Navarette, *Pre-trial detention and legal defence in Latin America*, *International Journal of Law in Context* (2021) 17, 76; Riego et al. (n 6).

ate aims of preventing the accused from hindering the upcoming trial or from evading justice.¹⁸ Despite this jurisprudence, pretrial detention is still being widely used as a general preventive measure in the region.¹⁹ There is often considerable political pressure on judges to order pretrial detention, especially in cases of great public interest and where the media echo and magnify populist demands, all of which only contributes to the problem.²⁰ Ultimately, this further aggravates problems within prison systems, especially since prisoners awaiting trial and those already convicted are often not accommodated separately, contrary to human rights regulations.

12 The practice of pretrial detention thus forms the core of a counter-movement (referred to as the *contrarreforma*) towards a preventive, security-focused criminal law. In addition to these criminal policy considerations, criminal investigations and proceedings still take too long and thus negatively impact the number of prisoners held in pretrial detention. The consequence of these overly long trials really should be to release these prisoners. In addition, a discrepancy can be observed between the norms of procedural law and actual court practice.²¹

13 Overall, the example of pretrial detention shows, as a *pars pro toto*, that normative progress in terms of procedural rights is being undermined by legal practice influenced by populist trends in criminal policy. Fears of a further rise in the crime rate and the associated calls for a strengthening of public safety ultimately mean that reforms are being undermined while aspects of the old system are being revived. The effective implementation of the reforms depends largely on the political and legal frameworks that operate in the criminal justice context. Accordingly, the reforms' success needs to be measured in light of the current challenges facing criminal justice.

18 See IACtHR, *Chaparro Álvarez y Lapo Íñiguez v. Ecuador* [2007] para. 103; also see IACtHR, *Bayarri v. Argentina* [2008], voto razonado de Sergio García Ramírez, para. 8.

19 Riego et al. (n 6).

20 Pastor (n 3) 110.

21 Duce and Pérez Perdomo (n 7) 76; also cf. IACtHR, *Tibi v. Ecuador* [2004], voto razonado de Sergio García Ramírez, para. 62.

3. Current challenges

The challenge that criminal justice faces in maintaining public safety is particularly evident in the rising homicide rate: As a region, Latin America has by far the highest homicide rate in the world. This is driven home by the fact that only about 8 % of the world's population live in the region, however, 33 % of the homicides annually registered worldwide are committed there:²²

*Homicide rate per 100,000 by world region (2000–2018)*²³

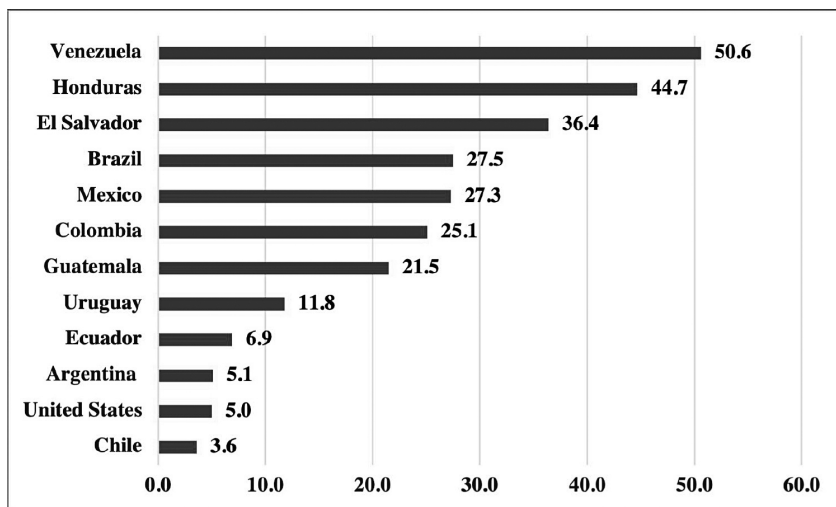
Region	2000–03	2004–07	2008–11	2012–15	2016–18
Africa	13.81	7.34	6.10	10.38	12.9
Asia	4.21	4.49	3.11	2.98	2.17
Europe	2.58	2.34	2.26	2.38	3.03
Oceania	3.99	3.86	3.31	1.75	2.87
The Americas	14.76	17.69	20.84	21.70	16.53
Globale average	7.95	8.26	7.94	11.30	5.93

Although these numbers cover the entire American continent, including the United States, Canada, and some Caribbean countries, by far the largest proportion of homicides are committed in Latin America, as the following figure shows.

22 Robert Muggah and Katherine Aguirre Tobón, 'Citizen Security in Latin America: Facts and Figures, Strategic Paper 33, 4', Igarapé Institute (2018) 23 <<https://igarape.org.br/wp-content/uploads/2018/04/Citizen-Security-in-Latin-America-Facts-and-Figures.pdf>> accessed 28 October 2021.

23 Muggah and Aguirre Tobón (2018), based on Homicide Monitor <<https://homicide.igarape.org.br>> accessed 28 October 2021; for a breakdown by individual states, see UNODC, Global Study on Homicide 2013 <www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf> accessed 28 October 2021; UNODC, Victims of intentional homicide, 1990–2018 <<https://dataunodc.un.org/content/data/homicide/homicide-rate>> accessed 28 October 2021.

Homicide rate per 100,000 inhabitants by State (2018/ 2019)²⁴



16 As can be seen in the above graphic, some of these countries have exorbitantly high homicide rates, especially Venezuela (50.6), Honduras (44.7) and El Salvador (36.4), where the homicide rate is higher than the rate for civilian losses in some war zones.²⁵ As a result, homicide rates in these three countries can be classified as being extreme while in other countries, such as Brazil (27.5), Mexico (27.3), Colombia (25.1) and Guatemala (21.5) the rate can be classified as endemic. However, there are also Latin American States where the homicide rate is much lower, such as Ecuador (6.9), Argentina (5.1) and especially Chile (3.6).

17 Although it is not possible to draw a completely homogeneous picture of the region, it is striking that the homicide rate in many Latin American countries is alarmingly high.²⁶ Criminal justice cannot and should not be seen as the panacea to rising crime rates in any country.²⁷ The pressure on criminal prosecution agencies and the criminal justice system as a whole

24 Diagram based on: Igarapé Institute: Homicide Monitor.

25 UNODC, 'Global Study on Homicide' (2013) 22 <https://www.unodc.org/document/s/data-and-analysis/statistics/GSH2013/2014_GLOBAL_HOMICIDE_BOOK_web.pdf> accessed 28 October 2021.

26 Muggah and Aguirre Tobón (n 22).

27 Corporación Latinobarómetro (n 15) 58–9.

obviously increases with rising crime, which has also contributed to the above-mentioned *contrarreforma*. A connection is often all too quickly established between increased crime and the reform of criminal justice based on the rule of law, overlooking the fact that criminal law is only one possible means of fighting crime which needs to be embedded within a larger holistic approach that addresses the social, economic and political factors that drive crime.²⁸ There are, nevertheless, specific steps that justice systems can take to alleviate rising crime rates. An example of this is the so-called *Plan Cuadrante*, which has increased the police presence in neighbourhoods with high crime rates in Bogotá and Santiago de Chile. This increased police presence has, among other benefits, made it possible to gather and systematically evaluate valuable information and identify crime patterns to locate ‘hot spots’. This, in turn, has provided the basis for effective crime prevention programmes which have led to a sustained reduction of the crime rates in both cities. However, such approaches require sufficient resources as well as a professional and non-corrupt police force.²⁹

Rising crime and the public’s perceived impotence of the criminal justice system to address it are shaking confidence in States’ law enforcement authorities.³⁰ The annual public opinion surveys conducted by the non-profit organization *Corporación Latinobarómetro* show that there is widespread institutional distrust throughout the region with only 36 % of Latin Americans trusting the police and a mere 25 % trusting the judiciary, as shown in the table below.³¹

28 Duce and Pérez Perdomo (n 7) 84–8.

29 Bergman (n 14) 221–3.

30 Bergman (n 14) 224–5.

31 For a deeper analysis of the surveys provided by *Corporación Latinobarómetro*, see Paolo Parra Saiani, Enrico Ivaldi, Andrea Ciacci and Lucia Di Stefano, ‘Broken Trust. Confidence Gaps and Distrust in Latin America’, *Social Indicators Research* (2021) <<https://link.springer.com/article/10.1007/s11205-021-02796-3#citeas>> accessed 16 September 2022.

*Average trust in State institutions and the church (in per cent)*³²

	2015	2016	2017	2018	2020
Church	69	66	65	63	61
Military	44	50	46	44	44
Police	36	38	35	35	36
Government	33	28	25	22	27
Judiciary	30	26	25	24	25
Parliament	27	26	22	21	20
Political parties	20	17	15	13	13

- 19 This low level of trust in the criminal justice system is in line with the downward trend of overall institutional trust in recent years, the church being the exception.³³ It is therefore not surprising that the classic democratic institutions (political parties, parliament, judiciary and government) enjoy much less trust than the church and even the military, regardless of past military dictatorships in the region.³⁴ However, despite this general trend, there are significant differences between individual countries where, for example, over 40 % of respondents in Costa Rica stated that they trusted

32 Muggah and Aguirre Tobón (2018) 38; Corporación Latinobarómetro, Informe 2017 <www.latinobarometro.org/LATDocs/F00006433-InfLatinobarometro2017.pdf> accessed 28 October 2021, 2018 <www.latinobarometro.org/latdocs/INFORME_2018_LATINOBAROMETRO.pdf> accessed 28 October 2021 <www.latinobarometro.org/lat.jsp> accessed 28 October 2021. For the studies, more than 20.000 citizens of the following 18 states were interviewed: Nicaragua, Uruguay, Ecuador, Bolivia, Argentina, Venezuela, Chile, Colombia, Dominican Republic, Costa Rica, Guatemala, Panama, Peru, Honduras, Paraguay, Mexico, El Salvador and Brazil.

33 It should be noted, however, that the increasing cases of sexual abuse in the Roman Catholic Church in some countries in the region have led to a dramatic decline of trust. For example, the sexual abuse scandals in Chile have severely damaged the reputation of the (Catholic) Church, leading to a drop in trust to 31 % in 2020 (from 60 % in 2005), see Statista, Level of trust in the Catholic Church in Chile from 2005 to 2020, <<https://www.statista.com/statistics/1250162/evolution-level-trust-church-chile/>> accessed 16 September 2022. Contrary to this development in Chile, the level of trust in the church in some other countries remains high, for example in Paraguay and Honduras at 77 % and 74 % respectively, cf. Statista, Level of trust in the Church in Latin America in 2020, <<https://www.statista.com/statistics/1250194/latin-america-church-trust-rate-country/>> accessed 16 September 2022. Interestingly, in addition to the church, universities also receive high scores in terms of institutional trust, cf. Parra Saiani et al. (n 31) 1.

34 On the “trust gap” between police and military in Latin America, see Sabine Kurtenbach and Adam Scharpf, *The Return of the Military*, GIGA Focus (December 2018) 3.

the judiciary while only 20 % of respondents in Honduras and Paraguay did so.³⁵ On average, however, trust in the criminal justice system is extremely low in most Latin American countries.³⁶

A lack of trust inevitably leads to a loss of authority on the part of law enforcement agencies, which are no longer taken seriously in their function of preventing and fighting crime. This perception of ineffectiveness then flows through to feelings about public order and security as well as the State as a whole. One consequence of this has been that fewer and fewer citizens are relying on the criminal justice system and are instead turning to vigilante justice and private security companies, for those that can afford them, to address concerns about crime.³⁷ Criminal justice in Latin America is thus in a state of profound crisis which is now caught in a negative feedback loop involving rising crime rates and dwindling public confidence. 20

III. Impunity in Latin America

There is a long tradition of impunity in Latin America. In many States, 21 military dictatorships and authoritarian regimes continued to rule well into the second half of the 20th century (e.g. in Chile and Argentina). For a long time, the crimes committed during these regimes' time in power, particularly the persecution and arbitrary killing of government critics, widespread use of torture and disappearances of citizens, were not dealt with under criminal law. In addition to this historical aspect of impunity, the above-mentioned crisis in criminal justice, organised crime and corruption (which will be discussed below) pose both new and ongoing challenges in Latin America. As a result, a large proportion of violent crimes in many States in the region remain without consequences, particularly in Mexico, Honduras, Peru, and Venezuela, all of which are considered to have very high rates of impunity.³⁸ Some reports even claim that impunity in these States runs as high as 90 % or more.³⁹ However, such numbers should be regarded with a certain amount of scepticism given that the high number of unreported cases and the lack of official and/or reliable crime statistics make it almost impossible to reliably determine the extent of impunity.

35 Corporación Latinobarómetro (n 15) 24–5.

36 Bergman (n 14) 225; Muggah and Aguirre Tobón (n 23) 38.

37 Duce and Pérez Perdomo (n 7) 82; Muggah and Aguirre Tobón (n 23) 38.

38 World Justice Project, Rule of Law Index 2017–2018 (2018) 43, 92, 111, 156.

39 Bergman (n 14) 160–1.

- 22 Having outlined the challenges facing criminal justice both at the normative and factual level, the following section will focus on organised crime, corruption and institutional violence as the key causes of impunity.

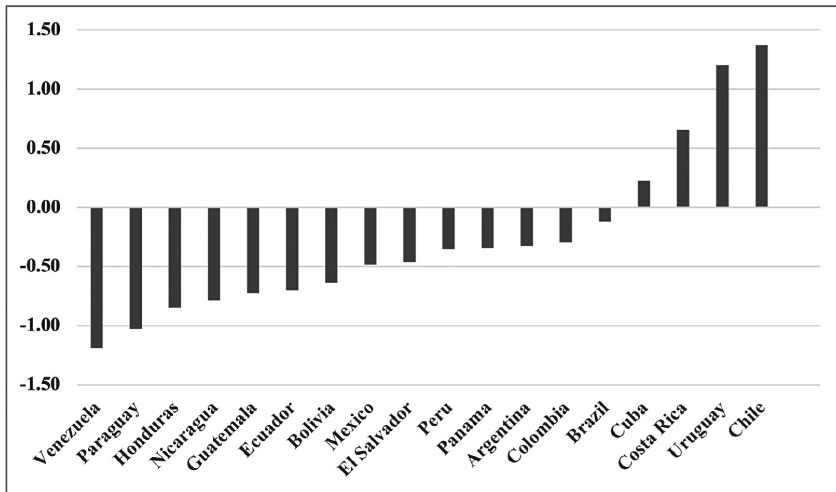
1. Corruption and organised crime

- 23 The independence of the judiciary in terms of both organisation and staffing, as well as its ability to function, are key factors in enforcing the rule of law. The absence of these factors is a central cause of the widespread impunity in many Latin American States. Corruption *de facto* restricts the independence and function of the judiciary when institutional weaknesses provide a gateway for external influence over process and procedure.
- 24 The prevalence of nepotism, blackmail and peddling favour significantly influences the functioning of State criminal justice institutions in large parts of the region. These deficiencies open the door for organised crime to exploit the system to further its own purposes, including narcotics and human trafficking as well as money laundering, as individuals within these systems fall prey to a pervasive culture of accepting bribes, having their decisions influenced by criminal elements or accepting patronages that conflict with their professional duties.⁴⁰ The case of General Mauricio Santoyo, who served as the head of security of Colombia's then-President Álvaro Uribe, is a prime example of the corruption issues facing the region. His role within government placed him in the upper echelons of the State's institutional structures. Later, he was convicted of supporting, protecting and being on the payroll of paramilitaries who were smuggling cocaine from Colombia to the United States. This case shows how high up corruption can and has spread in parts of the region and how such individuals undermine both their associated institutions and the rule of law in general, serving to further weaken State institutions in terms of both practice and public confidence.
- 25 In a few Latin American States, particularly in Chile, Uruguay, and Costa Rica, the judiciary shows a high degree of independence and, perhaps

40 Bergman (n 14) 258, 266. See generally on corruption and criminal law in Latin America Kai Ambos, Ezequiel Malarino and Marie-Christine Fuchs, *Corrupción y Derecho Penal: Prevención, Investigación y Sanción* (KAS 2021), <<https://www.kas.de/documents/271408/4591369/9788413978772.pdf/a56542b5-3b68-ad79-8e08-5e554e6f89ff?version=1.0&t=1628874816089>> accessed 16 September 2022.

unsurprisingly, it is in these same States that corruption has been most successfully kept in check, as the following figure shows:

Control of corruption in Latin America (average 1996–2020)⁴¹



In Chile, Uruguay and Costa Rica, the good records on corruption correlate with their relatively low homicide rates. A correlation that is repeated – though to the opposite extreme – in the rates of both corruption and homicide in Venezuela and Honduras, where the numbers are extremely high. Even though the extent of corruption and the level of serious crime are determined by complex and varied combinations of variables, an interesting parallel becomes apparent. This also includes the element of public trust in the criminal justice system and the belief in its legitimacy. For example, as set out above (II.), trust in the criminal prosecution authorities is rather high in Costa Rica and extremely low in Honduras.

For a long time, criminal justice in Latin America has been unable to divest itself of the taint of corruption. However, there was recently something of a landmark case where both corruption and impunity suffered a

41 Diagram based on: The Worldwide Governance Indicators <<http://info.worldbank.org/governance/wgi/#home>> accessed 28 October 2021. On the methodology applied, see <<http://info.worldbank.org/governance/wgi/Home/Documents#wgiDataSources>> accessed 28 October 2021 and Anja Rohwer, Measuring Corruption <<https://www.ifo.de/DocDL/dicereport309-rr2.pdf>> accessed 28 October 2021.

setback. For the very first time in Brazil, business leaders and high-ranking politicians were charged and convicted in a corruption trial by an independent judiciary.⁴² Even though this case concerned bribes for awarding construction contracts and illicit contributions to election campaign funds, ‘Operação Lava Jato’ (‘Operation Car Wash’) has reverberated across Latin America and its impact could trigger a supra-regional change of course. In Brazil, successfully prosecuting this remarkable case was made possible primarily through a leniency programme called ‘*colaboração premiada*’ (‘Rewarded Cooperation’), which allows reduced punishment if defendants make detailed confessions. Although these procedures are not uncontroversial, they have proven an effective strategy for fighting corruption in Brazil. The reforms of the 1990s established the public prosecutor’s office as an independent organ within the criminal justice system. This has allowed its now largely autonomous work to proceed in a manner that is less susceptible to corruption and institutional weaknesses, especially with regard to political pressure and organised crime. The *Operação Lava Jato* case shows that institutional change to combat corruption is possible and can enable criminal prosecution, even in highly politicised contexts, which represents an indirect but concrete success attributable to the reforms.

2. Arbitrary police violence and lack of trust

- 28 A further reason for the high level of impunity in Latin America is institutional violence, especially on the part of the region’s police forces,⁴³ which are known to frequently abuse their discretionary powers in the context of checks, interrogations and so forth. In particular, there are reports of mistreatment and unlawful arrests, demands for bribes and discrimination based on skin colour and gender.⁴⁴ Many victims of crime do not report incidents for fear of further reprisals.⁴⁵ Fear of corrupt police and other officials can also lead to a failure to report crimes as doing so is seen as ultimately being a fruitless exercise. The police thus significantly contribute

42 So-called ‘Operation Car Wash’/ ‘*Operação Lava Jato*’; cf. thereto Kai Ambos, Marcos Zilli and Paulo Sousa Mendes, *Corrupção. Ensaios sobre a Operação Lava Jato* (Marcial Pons/ CEDPAL 2018).

43 Duce and Pérez Perdomo (n 7) 80.

44 Bergman (n 14) 217, 233.

45 Duce and Pérez Perdomo (n 7) 80; Bergman (n 14) 217.

to the lack of public trust in law enforcement authorities.⁴⁶ In turn, the resulting lack of willingness to report offences contributes to impunity, as law enforcement authorities are not even informed about alleged crimes.

The scale of the problem is even more evident in cases where women are the victims of crimes. The population's already low level of trust in the police is particularly evident when assessed from a gender perspective: in Mexico and Argentina, for example, women trust the police 20 % less than men; in many other Latin American countries, a similar situation can be observed. This stands in stark contrast to the United States and Europe where women, on average, have more confidence in the police than men.⁴⁷ This state of affairs in Latin America has developed over several decades where re-victimisation and a repetition of the original crime are genuine fears if a report is made, which leads to ever more crimes going unpunished and impunity prevailing.⁴⁸ According to UN Women, impunity for acts of violence against women in Latin America has reached worrying levels, with access to justice, which first and foremost means seeking effective recourse via the police, being a major obstacle. In the case of sexual offences in particular, it is thought that only a fraction of such crime is reported to the police as it seems that victims' fear of arbitrary police violence or low trust in the law enforcement authorities outweighs a desire to bring perpetrators to justice. Against this background, it is hardly surprising that the number of rapes reported is very low in most Latin American countries, especially in El Salvador (6.0 per 100,000), Guatemala (3.8 per 100,000) and the Dominican Republic (2.8 per 100,000), well below the (already low) global average of 19.1.⁴⁹ Although it is not possible to establish the precise number of unreported sexual offences, it is generally agreed that the number of reported crimes falls well short of the number actually committed.⁵⁰

Even though the region's low level of public trust in criminal justice has a negative impact on the issue of impunity, it should be borne in mind that there are considerable differences within Latin America both in the prevalence of police violence and in the way it is perceived by the local population. While arbitrary police violence has, for example, reached

46 Duce and Pérez Perdomo (n 7) 80–6.

47 Bergman (n 14) 236–7.

48 Muggah and Aguirre Tobón (n 22) 38.

49 UNODC, 'Homicide and other criminal offences' (2016).

50 Muggah and Aguirre Tobón (n 22) 38.

shocking proportions in Mexico and Brazil and led to a significant loss of public trust, the situation in Chile is much less worrying.⁵¹

- 31 Although some Latin American countries have taken measures to strengthen the legitimacy of their criminal prosecution authorities and regain citizens' trust, it must be noted that criminal justice systems in the region have not yet found adequate means to effectively combat impunity. Furthermore, as long as impunity persists at its current levels in some of Latin America, law enforcement authorities will continue to be perceived as a part of the problem rather than a part of the solution.⁵²

IV. Conclusion

- 32 The ground-breaking reforms of the 1990s laid a promising foundation for the region's States to introduce criminal procedures based on the rule of law that enable crime to be addressed through an effective and improved prosecutorial system. These reforms opened the door to institutionally strengthen criminal justice systems and respect the rights of all parties to proceedings within the framework of an accusatory procedural model. However, the reforms have not yet been implemented in full, as paradigmatically illustrated by the example of pretrial detention, which is still imposed far too frequently. Threats to public safety have paved the way for efforts to establish something of a counter-reform movement, with procedural rights becoming a pawn in populist proposals seeking quick solutions. Criminal justice thus faces major challenges, especially given there is a lack of existing preventive mechanisms to fight rising crime rates. Widespread corruption and the invasive influence of organised crime have led to the structural overload of criminal justice systems in some States while institutional violence, especially by the police, persists and greatly weighs on public perceptions and trust. All of this culminates in widespread impunity, undermining the efforts of State prosecution agencies and diligent individuals working throughout the various criminal justice systems.
- 33 Some of these shortcomings could be remedied, or at least alleviated, by the consistent enforcement of the newly introduced laws and through institutional changes (e.g. relieving the burden on the courts). However, overcoming the structural deficiencies mentioned above, corruption, the

51 Bergman (n 14) 216–7.

52 Duce and Pérez Perdomo (n 7) 85–7.

influence of organised crime and the lack of public trust, requires far-reaching measures that usher in profound change. In essence, a fundamental shift in not only thinking but also institutional culture is needed within criminal justice systems across much of Latin America. In retrospect, the recent successful prosecution of one of the biggest corruption scandals in the history of Latin America, which directly affects a large number of countries throughout the region, could prove to be an important first step in this direction.

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