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A COMPARISON OF CHANGE-ORIENTED LEGAL SERVICES IN  
LATIN AMERICA WITH LEGAL SERVICES IN NORTH AMERICA AND EUROPE.

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\*

David M. Stemer tirelessly made infinite corrections to my clumsy English writing. He and David Trubek generously helped me with most relevant editorial and substantive comments. Co-teaching a seminar with Joseph Thome on informal justice, community organization, and legal services for the poor contributed significant inputs to this enterprise. Fred Zemans (York University, Ontario) is responsible for giving me the impetus to write this piece. He and Maureen Cain (International Journal of the Sociology of Law, England) stimulated me to further develop an old draft ("Descriptions towards typologies and analysis of legal aid in Latin America", unpublished, Bogota, 1983). The faculty and staff of the Law School, University of Wisconsin-Madison, were particularly helpful with their facilities and knowledge. If, in spite of all these supportive forces, this article is still plagued with deficiencies --as it probably is--, I am the only one to blame.

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Latin America

## ABSTRACT

A structure of political and economic exclusion of oppressed, low-income people hinders most Latin American social development. Although lawyers have traditionally provided the expertise to legitimate this structure, some Latin American lawyers have recently accepted the challenge of aiding the oppressed to achieve social change.

The most complete survey ever made of Latin American legal services for the poor documents lawyers' changing attitudes. Discussion of the survey results from four Andean countries achieves two purposes: introduce English speakers to the specifics of new legal services; explore the potential and limitations of these services in Latin America.

Among the specific forces that generated new legal services after 1970 are the so-called Crisis of the Left, a commitment of some Church members to strengthening the power of grassroot organizations, ideas and money from outside Latin America, and changes in the working classes of the region.

Two different concepts of democracy also influenced the nature of new legal services and the evaluation of their success. The differences arose from the value assigned to individual freedom and the role of the state.

Although difficult to evaluate, new legal services have aided, according to the study's results, low-income peoples become better organized to make the political system more participatory in the four countries and the economic and social systems, perhaps, less exploitative.

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1 INTRODUCTION.

[1]

1.1 Purposes of this working paper: filling two parts of a vacuum.

Throughout Latin America a breed of lawyers have eagerly worked to dispel the stereotype of lawyers as elitist and supporters of the state and status quo. They have attempted to lift the veil that mystifies law. They have courageously trampled into the ground the symbols of social hierarchy and economic stratification.

These lawyers have read Marx, Gramsci, Poulanzas, Foucault, and the Latin American novelists of the sixties to eighties. They have experienced the suffering of the oppressed low-income peoples in isolated rural towns and large urban concentrations. They want to change more than simply the public's perception of lawyers. Many want to change society radically.

I want to expose the kind of work these lawyers do and explore its potential and limitations.

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1. This paper is based on a research report prepared by the Inter-American Legal Services Association, ILSA, under the sponsorship of the Inter-American Foundation. The research was coordinated by Annette P. Gonzalez, Executive Director of ILSA. Four teams carried out the research in as many countries: Chile, Colombia, Ecuador and Peru. These research teams were lead by Manuel Jacques (Chile), Fernando Rojas (Colombia), Manuel Chiriboga and Luis Verdesoto (Ecuador), and Luis Pasara (Peru). However, the particular purposes of this paper demanded a reorganization of the empirical data and a reformulation of theses and conclusions for which neither the research coordinator nor any of the national researchers are to be held responsible.

Much has been written about legal services in North America and Europe. Indeed, it is now possible to make vast generalizations and suggestive comparisons of legal services in these two regions of the world. Sharply contrasting with the number and quality of studies of legal services in North America and Europe, new Latin American legal services are a poorly studied topic. Moreover, pioneer efforts to depict new Latin American legal services share one similarity: their timid approach restricts these efforts to preliminary descriptions and dubious hypotheses. Scholars' shyness is probably due to new legal services being a relatively recent phenomena, going back 10 or 15 years at the most; they are still evolving and struggling to define their place and meaning in Latin American societies. [2]

Latin American "innovative" or "participatory" legal services

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2. A difference has to be made between accounts of legal services written before and after the mid-seventies, since "new" Latin American legal services were only created in the 1970s. For an example of previous accounts, see COMMITTEE ON LEGAL SERVICES TO THE POOR IN DEVELOPING COUNTRIES, LEGAL AID AND WORLD POVERTY(1974) A Survey of Asia, Africa and Latin America.

Recent accounts come from different sources. Legal services groups produce their own reports and publicity materials. Reports are rarely available to someone outside the legal services group or the funding agency. Funding agencies have conducted diagnosis and evaluations primarily concerned with their own projects. See, for instance, LIEBENSON, P. (1984) "Legal Services Projects of the Inter-American Foundation", Unpublished Document, March 21.

There have also been academic studies of legal services at a regional level. Cf. THOME, J.R. (1984) "New Models for Legal Services in Latin America", in Human Rights Quarterly, vol. 6, November, pp 521-538. ZEMANS, F. (1983) "Recent Trends in the Organization of Legal Services", in W. Habscheid Effectiver Rechtsschutz & Verfassungsmassige Ordnung, a comprehensive paper that contains a good section on Latin America.

are different from legal services in other regions of the world. In particular, the specificity of Latin American participatory legal services cannot be grasped from evidence, assumptions, and hypothesis primarily suitable for legal aid in advanced capitalist countries, i.e., North America and Europe.<sup>[3]</sup> Because of this specificity, it is necessary to summarize those factors that differentiate Latin American participatory legal services from legal services schemes developed in other parts of the world.

I will follow a three step procedure in order to communicate the peculiarities of the new Latin American legal services to non-Latin Americans interested in this field. First, given the incipient state of development of both legal services in Latin America and written analysis about them, it is necessary to construct a specific characterization of these new legal services (Section 2). Next, this characterization has to be compared with legal services more familiar to an English speaking reader, i.e., European and North American legal services as described and analyzed in an already extensive literature (Section 2). Drawing on the descriptive and comparative sections, the concluding part of the article will address a larger audience --both Latin

3. The most comprehensive studies of legal aid in the U.S., Canada and Western Europe are: CAPPELLETTI, M., Ed. (1981) Access to Justice and the Welfare State; BLANKENBURG, E., Ed. (1980) Innovations in the Legal Services; ZEMANS, F. (1979) Perspectives on Legal Aid: an International Survey; GARTH, B. (1980) Neighborhood Law Firms for the Poor: A Comparative Study of Recent Developments in Legal Aid and in the Legal Profession; KATZ, J. (1982) Poor People's Lawyers in Transition; COOPER, J. (1983) Public Legal Services: A Comparative Study of Policy, Politics and Practice; KATZ, J. (1985) "Caste, Class, and Counsel for the Poor", in American Bar Foundation Research Journal, pp 251-291; "Poor Clients without Lawyers: What can be done?" in Clearing House Review, vol. 19, No. 4, Summer, 1985, Special Issue.

American and non-Latin American-- with a discussion of the limits and potential of new legal services in the subcontinent (Section 3).

### 1.2 Definitions, scope, and constraints.

#### 1.2.1 Can we really speak of Latin American legal services?

Three conditions have to be fulfilled if the expression Latin American legal services is to have a relevant analytical meaning for purposes of this article. First, Latin American societies have to constitute a unit according to theoretically based criteria. Second, the criteria selected to define this unit have to aid in explaining the emergence of and common trends currently observed in Latin American legal services. Third, what we are calling new legal services have to be a significant phenomenon in a substantial number of Latin American countries.

Latin America is a heterogeneous region. It includes countries of different sizes, unequal levels of development, and varied political regimes. Rather than a single social formation, what we call Latin America is a set of different -often disconnected- social formations. History, geography, and even language and culture create barriers among the Latin Americans. With a few notable exceptions, the common denominator of Latin American history is the one imposed by the external determinations of colonial, postcolonial, and capitalist-peripheral phases.

All Latin American countries find themselves --to a greater or lesser degree-- in the periphery of the world capitalist economy and the changing international division of labor. Yet the concept of "periphery" refers only to a general location vis a

vis the nucleus of accumulation and transformation within the world capitalist system. This location is in itself a set of economic and political relations. Such relations constitute a framework for the struggles that take place within "peripheral" societies. However, they cannot account for the enormous difference in the quantity and quality of the struggles among peripheral societies.

Many scholars from Latin America and abroad have found the present common denominator of Latin American societies to be a similar situation of dependency vis a vis the U.S. or the U.S. and Northern capitalist countries.<sup>[4]</sup> In fact, anticapitalist struggles in Latin America --as well as those elsewhere-- have to sever or redefine the links with advanced capitalist economies. This is why "antiimperialism" ordinarily lies high on the agenda of Latin American revolutionary movements. The struggle against dependency appears to be one of the common threads that subjectively link the focus of Latin American anticapitalist struggles. However, the concept of dependency, in spite of its appeal as a factor connecting Latin American consciousness, suffers from the same deficiencies as the concept of periphery. Besides, it tends to divert scholarly and political attention to a supposed realm of autonomy or independence within the capitalist world. By doing so, dependency emphasizes inter-country relations rather than inter-class relations. Given this distorted emphasis, dependency can do little to explain the internal origins of new Latin American legal services or evaluate their social and political impact.

The concept of "underdevelopment" is not only weak as a

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4. CARDOSO, F.H. (1979) Dependency and Development in Latin America, Berkeley: U. of California Press.

criterion to account for Latin America as a unit but also of dubious scientific validity for interpreting differences among Latin American struggles.<sup>[5]</sup> For example, relatively low income per capita, the sectoral composition of GNP, or the proportion of rural population hardly explain the unequal development of legal services in the Latin American region. Neither does a relatively skewed distribution of income and wealth. Inequality has to be complemented by many other explanatory factors which jointly account for the funneling of social struggles through legal issues and the precise meaning of legal services in a particular society. At best, underdevelopment may account for the distinctive content of some of the social issues at stake in legal disputes. Issues such as land tenure problems, demand for adequate housing or urban public utilities can be expected to concentrate a significant portion of the work of legal aid lawyers in underdeveloped countries. But they do not account for the fact that social struggles are channeled through the legal system and legal services in some countries and not in other similarly underdeveloped countries.

Similarities among Latin American legal systems do not suffice either to explain the recent emergence of new legal services in the subcontinent or to account for their singular

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5. The concept of "underdevelopment" can also be criticized on other grounds. It suggests an order of succession or stages of development. It is particularistic in the sense that it ordinarily isolates economic factors thus preventing a holistic analysis of social relations. It pays little attention to contradictions in the production sphere. It focuses the attention on symptoms rather than causes of capitalist and precapitalist unequal development. It often elevates countries to the category of social and political actors and assumes national unity, thereby deviating attention from internal conflicts. Cf. BRENNER, R. (1977) "The origins of Capitalist Development: A Critique of Neo-Smithian Marxism", in New Left Review, No. 104, July-Aug., pp 25-92.

characteristics. True, all Latin American countries share similar legal systems which grew from a common root in the Napoleonic-Justinian tradition of the Civil Code. However, a common legal system hardly helps to explain the scope, meaning, and impact of legal social struggles. At most, it only explains the forms and manifestations of those struggles.

The new legal services we are concerned with in this article do not evenly cover the whole Latin American subcontinent. Partial evidence already available indicates that new legal services are a significant phenomenon in Brazil, Chile, Colombia, Peru, the Dominican Republic, and to a lesser extent, in Bolivia, Costa Rica, Ecuador, Guatemala, Honduras, Panama, Paraguay, Puerto Rico, and Salvador. Two major Latin American countries, Argentina and Mexico, show very little evidence of new legal services other than those aimed at the defense of human rights (this is also the case in Uruguay).

In sum, none of the 3 conditions stated above is entirely fulfilled. The new legal services we are talking about are already a significant phenomenon in some --but not all-- countries. It is difficult to precisely identify what --if anything-- currently makes a unit of the Latin American region. A partially shared history of external determinations and presently belonging to the periphery of the capitalist world are insufficient similarities to cover the significant differences in social struggles and levels of capitalist development among Latin American social formations. A generalized subjective feeling of outside oppression and an agenda of "national independence" vis a vis external powers provide impetus for unity and struggle. However, these feelings, hopes and expectations also deviate the attention away from the anticapitalist meaning of internal struggles. Finally, the theoretical connections between the specific factors that holds Latin America together and the

emergence of new legal services are also difficult to pinpoint. References to "underdevelopment" or "peripheral location" provide a context that helps to explain the contents of social and legal conflicts. However, they can hardly explain the unequal appearance of new legal services in some Latin American countries at this point in time.

Under these circumstances, we have to admit that our use of the expression "Latin American legal services" can only be justified as a shorthand for identifying the larger geographical boundaries of the phenomena with which we are concerned. Non-Latin American readers more easily grasp these geographical boundaries than they would references to specific social formations. Rather than searching for the Latin American common denominator, we have to search for those specific conditions that allow for the unequal growth of new legal services in some countries. What has to be explained is why and how social conflicts of a holistic nature are funneled through legally relevant channels. Consideration of the particular development of internal and international struggles can aid in explaining this peculiar funneling of social conflicts through legal forms.

By themselves capitalist social relations are an immense force in favor of legalizing social conflicts. But the specific forms of legalization as well as the resistance to the imposition of law as a social relation have to be historically explained. More concretely, the existence of legal services in advanced capitalist countries and Latin American countries should come as no surprise given the tendencies of capitalism to legalize social struggles. What has to be accounted for are the specific features of the struggle in and against capitalist law, the differential capacity to resist capitalist law, and the potential to create alternative social relations. These features materialize in social factors such as actors, institutions, laws,

and strategies. Clearly, in the end we might identify factors that are already present in countries as distant from one another as Chile and the Phillipines, or Brazil and India; yet, conspicuously absent in some influential Latin American countries such as Mexico or Argentina.

#### 1.2.2 Country coverage.

The empirical basis of this paper has been primarily derived from a systematic study of new legal services in the four South American countries that border the Pacific: Chile, Colombia, Ecuador, and Peru. All of them are Andean countries, which means more than a corrugated topography: it means the presence --more or less significant, depending on the specific country--of indigenous populations. This study, "Development-Oriented Legal Services in Four Latin American Countries. Achievements, Problems, and Limitations" (unpublished, 1986, cited as "the Research Study") was carried out by the Inter-American Legal Services Association, ILSA, between 1983 and 1986.

There is evidence of significant quantitative and qualitative developments of similar legal services in other countries, specially in Brazil. However, it was impossible to include these other countries in the Research Study. Although every effort has been made to include casual direct and indirect information on Brazilian new legal services, data for Brazil and other countries not included in the original Research Study are necessarily less systematic than the empirical basis available for these Andean countries.[6]

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6. This limitation notwithstanding, my opinion is that the analysis made of new legal services in the four Andean countries included in the study can be applied in its essential parts to other new legal services in the subcontinent. The social and

Legal services have also flourished in the English speaking Caribbean. Scattered evidence indicates the existence of legal services in countries like Jamaica, Barbados, Bermuda, Guyana, and Trinidad and Tobago. According to this preliminary information, legal services in the English-speaking Caribbean appear to have their own personality, at times sharing the traits of legal services in England or the U.S., at others resembling the new legal services in nearby Latin America. Indeed, recently established exchanges and institutional links guarantee a cross-fertilization between Latin American legal services and those of the English and French speaking Caribbean. In any case, an inventory and a survey of legal services in the Caribbean islands and Guyana --currently being conducted by ILSA-- will provide more systematic information and in depth analysis of legal services in the Caribbean countries.

#### 1.2.3 The meaning of New legal services.

This article deals primarily with a particular type of legal services, namely those legal services that are aimed at promoting

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political forces which account for the emergence of these legal services in the four Andean countries are also present in other countries with significant developments in this field (see Section 2.4. below). Besides, direct contacts with new legal services outside the area covered by the Research Study as well as a multiplicity of published and unpublished accounts of legal services in Brazil and elsewhere establish the basis for referring to these legal services as basically the same phenomenon we are considering. See, for instance, for Brazil, Cadernos Gajop, a publication of the Gabinete de Assessoria Jurídica as Organizações Populares (GAJOP) and Centro Luiz Freire, Olinda, Pernambuco. See specially No. 1 March, 1985, "Uma experiência de assessoria jurídica popular". For summary presentations of experiences in Brazil and most of the rest of the Latin American subcontinent, see ILSA (1984) Primera Conferencia de Servicios Legales de Latinoamerica y El Caribe, Bogota.

social, legal, economic, and political changes in Latin America.

Similar to most other legal services, new Latin American legal services focus on the poor (ordinarily small-peasants, slum dwellers, casual workers), poor minorities (indigenous communities), or otherwise oppressed sectors of the population (women, political activists). These legal services are primarily offered on a free or subsidized basis.<sup>[7]</sup> However, as the heterogeneous list of potential beneficiaries shows, the criterion for selecting beneficiaries is not exclusively (see Section 2.6. below) based on capacity to pay.

I have called these services new with a view to differentiate them from traditional ones. Although the following sections will add elements to the concept of New legal services, it seems necessary to give a preliminary idea as to what I mean by new legal services. New legal services are characterized by the following essential features:

- These groups seek to either promote or directly introduce social change. As pursued by new legal services, social change means imposing a new concept of justice. Although it is not yet precisely defined, justice is not understood in liberal/individualist terms. The new idea of justice usually means replacing all or part of the liberal legal system by a different one. This new idea of justice is based on solidarity more than competition. It seeks to

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7. Or they would be provided at below market rates in the case a market rate could be established. Since legal services in Latin America are characterized by a highly stratified & differential supply, it is often hard to establish a competitive market rate. Although there might be some degree of competition within a given stratum, monopolies and monopsonies are more likely to dominate the market of legal services in the subcontinent.

substitute real equality for formal equality. The emergent idea of justice is closely tied to current struggles for a new democracy in the subcontinent. Although the concept of new democracy has not yet been fully spelled out, it is based on a combination of collective and individual (as opposed to merely individual) freedom.

- Consequently, social change is restricted neither to reforming law by a piecemeal process nor to solving particular legal disputes. Legal services are a means for reaching a fundamental social change which results in a new concept of justice and democracy. New legal services groups may disagree as to how removed from capitalism they purport to be. The most ambitious want to fully eradicate the capitalist legal system. Others, fearful of "real socialism", limit their expectations to substituting a few socialist principles for various premises of the capitalist legal system. Still others think of legal services as transitorily helping to fully and deeply implant capitalist freedom and equality before moving into a non-capitalist society. There are also those who want to preserve bits and pieces of the capitalist legal system as long as current social and political conditions do not permit a move beyond a reformed capitalism. However, no matter how divergent their struggle against the current legal system may be, all of them think of legal services as one of the vehicles to introduce far reaching social and political changes (see sections 2.4. and 2.7. below).
- Although operating with traditional instruments, new legal services also use other educational and political tools. Legal training of beneficiaries, community development, organization and mobilization of low-income people are usually part of new legal services programs and activities.

Similarly, new legal services aim at creating parallel social and political power in the hands of minorities, grassroot, or discriminated people. Stimulating self-confidence and self-awareness, forging active participation among clients or beneficiaries, and fostering the creation of associations and organizations of working class people are among some of the most frequently sought medium term goals of new legal services programs. Lawyers and beneficiaries working together, at the same level, both learning from each other, attempt to eliminate the hierarchical position of law and lawyers. Demystification of law as a science and a critique of the impact of law in society are also means to incite grassroot people's mobilization and capacity to create their own internal rules. (see Section 2.7. below).

Contrary to new legal services, traditional legal services do not aim at changing current social and political relations. They share all the fundamental principles of the capitalist legal system. Traditional legal services ordinarily separate law from politics and restrict themselves to the legal arena. Piecemeal law reform is the closest they come to political action. The defense of (capitalist) legal institutions is an end in and of itself. Indeed, traditional legal services see themselves as contributing towards the legalization of society and the fullest application of law in practice. Equalizing citizens' access to justice and bridging the gap between law in books and law in action are means traditional services use to guarantee the hegemony of traditional law. For traditional legal services lawyers, law is a science reflecting human nature and/or citizens' consensus about social order. As any other science, law is beyond the reach of laymen. Traditional legal services lawyers ordinarily adopt a combination of hierarchical,

paternalistic, and philanthropic attitudes in their relation with clients or beneficiaries. Rather than questioning the hierarchical position of lawyers and social scientists, traditional legal services reinforce it.

Still, sometimes it is difficult to draw the line between new and traditional legal services. Surveys may be misleading. Researchers have to often go beyond interview responses to check whether activities and the organization of a given legal service group correspond or not to its purported intentions. Section 2 of this article contains some quantitative indications as to the proportions of new and traditional legal services in some Latin American countries.

In a chronological sense, new legal services are not novel. They are new inasmuch as their wider political aims contrast sharply with ordinary legal services as traditionally practiced elsewhere. Above all, they are new when compared with previously established & politically naive or (claiming to be) politically neutral legal services in advanced countries. Although new Latin American legal services also contrast with (traditional) Latin American legal services narrowly focused on legal issues, the latter are also a relatively new phenomenon, most of them dating back no more than 15 or 20 years.

Several reasons justify the special interest paid to new legal services:

- Change-oriented legal services seem to have grown at a faster pace than other legal aid programs in the subcontinent.[8]

8. According to a recent ILSA study (see Section 2.1. below), 45 out of 75 new legal services found in four Latin American

- During the last 15 years they have condensed and have put into practice some of the most persuasive contemporary ideas on an integral conception of development and social change. As such, they are all part of a larger international movement fostering a non-governmental, community approach to development and a philosophy of grassroot (or popular) participation. They may also pursue, depending on the political context and the ideological inclination of each one, Christian theology of liberation, feminist ideas rooted in anarchism, popular justice, locally grown counter-culture, working classes' autonomous organization and mobilization, constitution of counter-hegemonic blocs, or some variation of a new democracy.

- These innovative legal services (as they are often called given their inclination for creative social and political strategies) face all the problems and limitations of any ambitious political or developmental project. They have also added some problems of their own to the theoretical and political dilemmas of Latin America's radical or democratic groups. Since development-oriented legal services operate primarily within the specific areas of law and the administration of justice, they have introduced a particular set of limitations, contradictions and possibilities to the wider arena of social and economic development. They contradict themselves, for example, by using the specialized tools of the same legal system they want to either transform or eliminate.

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countries were created between 1980 and 1984. Only 30 out of a total of 73 traditional legal services were created during the same period. On the contrary, just 9 of 75 new legal services had been working before 1974 while 25 of 73 traditional legal services were in operation prior to 1974.

#### 1.2.4 Unifying the diversity of new Latin American legal services.

Again, "new" is a shorthand device to focus the attention of the non Latin American reader on the subject matter of this article, i.e., services that bring some innovative social and political dimensions to the legal services field. Besides, the use of a term as imprecise as "new" reflects the heterogeneity of the phenomena we want to analyze.

Indeed, it is difficult to find the common political denominator of new legal services beyond their shared concern for justice and democracy. Ambiguities and discrepancies appear as soon as new legal services attempt to collectively define the concept of new democracy.<sup>[9]</sup> Divergent proposals arise when trying to specify the strategies to reach the goal of new democracy. As a whole, new legal services are the meeting house of political traditions coming from different streams of thought. As such, New legal services are still a diaspora of distinct social and ideological influences, a significant social phenomena searching and struggling to establish their own identity.<sup>[10]</sup>

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9. Some groups go as far as questionning the very possibility of defining the meaning of new democracy before some examples of this new democracy have been established. This questionning parallels the old Marxist thesis about the impossibility of pre-figuring socialism under the dominance of capitalism.

10. Participants in the two regional conferences of new legal services sponsored by ILSA, one in 1981 (San Jose, Costa Rica) and another one in 1985 (Villa de Leyva, Colombia), evidenced differences in substantive concepts and methodological approaches. However, significant advances towards minimum consensus were visible at the Villa de Leyva Conference. Cf. ILSA (1984), Primera Conferencia de Servicios Legales de

Discrepancies, hesitations, and imprecisions are all to be expected given the relatively recent appearance of new legal services in Latin America. Moreover, these limitations reflect the current situation of Latin American progressive intellectuals and social movements, both passing through a stage of open search for substantive and organizational alternatives, free from the dogmatism and vanguardism characteristic of the recent past. Tolerance, humility, and coalescence replace pretension, exclusion, and isolation within Latin American social and political movements.

The Inter-American Legal Services Association and Latin American legal services groups have used other terms to refer to new legal services. Perhaps the most frequently used alternative expressions have been innovative, Strategic, popular change-oriented, participatory, and development-oriented legal services.<sup>[11]</sup> Everyone of these terms refers to features of new Latin American legal services. As such, they aid in differentiating this social phenomena from legal services in North America and Europe. However, all these denominations suffer from the same ambiguities of new legal services. Consequently, for the rest of this working paper I will primarily use the expression new legal services. "Traditional",

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Latinoamerica y El Caribe, Bogota. ILSA, Segunda Conferencia de Servicios Legales de Latinoamerica Y El Caribe, Bogota (due to appear in 1986). Similarly, two national meetings of the Brazilian new legal services (Recife and Salvador, both in 1986) made substantial advances towards consensus, consistency and conceptualization. Meetings of the same kind are now scheduled for 1986-87 for Chile, Peru, and Ecuador, as well as a regional meeting of legal services primarily concerned with the defense of women's rights.

11. ILSA has traditionally used the terms "innovative" and "strategic". See for instance the bulletin of the Association, Portavoz.

"non-innovative" or "non-participatory" will be reserved for other types of legal services programs.<sup>[12]</sup>

#### 1.2.5 The point of reference: Legal services in North America and Europe.

Although extensively studied, legal services in North America and Europe have given rise to discrepant --even contradictory-- interpretations. Discussing the validity and relevance of even the most significant readings of legal services in northern countries is beyond the scope of this paper. I will merely accept as valid, for purposes of consistency and simplicity, the characterization of legal services offered by Richard Abel in "Law without politics: legal aid under advanced capitalism", a recent and extensive article published in the UCLA Law Review<sup>[13]</sup> Abel's article will be complemented, when necessary, by reference to other major works on legal services.

Three main reasons justify choosing Abel's article, rather than some other significant contributions to the analysis of legal services.<sup>[14]</sup> First, Abel's article attempts to summarize the existent literature about this field. Second, Abel ventures theses of a general and comprehensive nature. His reasoning challenges the justification of legal aid on grounds both internal and external to the legal aid field itself. Third, his external criticism, based on broad political and sociological considerations, raises precisely some of the issues that allow

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12. For research purposes, operational definitions of strategic legal services are presented under Section 2.1.1. below.

13. Vol. 32, No. 3, February 1985, pp 474-625, cited as "Legal Aid" in this article.

14. See supra, note 2.

for a fruitful comparison of legal services in the North and Latin America.[15]

1.3 Towards the creation of an international invisible community of legal services lawyers committed to social and political change.

This article will hopefully contribute to establish the basis for fruitful exchanges between new Latin American legal services and the change-oriented branches of the legal services community in North America and Europe.

Other Northern groups and associations, besides the legal services community itself, may also find the Latin American experience relevant. As it will become clear after reading this article, Latin American lawyers involved in new legal services seem to share some of the concerns and practices of critical lawyers and activist lawyers in the North, such as the Critical Legal Studies movement and the National Lawyers Guild in the U.S., or the law and state working groups of the CSE in Great Britain. Similar concerns, if appropriately communicated, may

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15. Abel's article may suffer, obviously, from data limitations and distortions. Indeed, one of the most visible problems with his article lies in his treatment of legal aid in Latin America. In "Legal Aid", as well as in previous comparative studies of the legal profession, Abel's assertions on Latin America show a lack of familiarity with the Latin American social and political context as well as a lack of information on new legal services and the group of lawyers performing them. Cf. ABEL, R.L. (1982) "The underdevelopment of legal professions: A review article on Third World Lawyers", in ABF Research Journal, pp 871-893.

One of the purposes of this article is to correct Abel's misperceptions of the current Latin American scene, American and European scholars and activists involved in the area of legal services.

give rise to solidarity and cross-fertilization.[16]

In a similar vein, much is to be gained from sharing experiences and discussing goals and techniques between Latin American new legal services groups and those of the English speaking Caribbean and other Third World countries.[17]

Clearly, much remains to be done in terms of communication and exchanges between Latin American new legal services groups and change-oriented Europeans and North Americans connected with this field. Much has to be done also in terms of systematization and analysis of Latin American and Caribbean legal services by themselves. In Section 3 below, I present some of the most relevant basic and policy-oriented questions that come out of this article. As such, these questions remain as agenda for future research.

2 DISTINCTIVE FEATURES OF NEW LEGAL SERVICES IN LATIN AMERICA.

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16. An example of joint undertakings to produce comparative analysis and stimulate cross-fertilization is the research project currently developed by Osgoode Hall Law School (York University, Canada) and Cinep (Bogota, Colombia) on legal aid clinics in Ontario and Colombia.

17. ILSA is currently stimulating the draft of a joint policy paper by Caribbean English and Spanish speaking legal services groups. This policy paper shall be ready for distribution by the end of 1986.

2.1 A systematic research of change-oriented legal services in four Andean countries.

As the introduction shows, this article is primarily based upon the findings of a research study carried out by the Inter-American Legal Services Association, ILSA, in 4 Latin American countries: Chile, Colombia, Ecuador, and Peru.[18]

Three methodological techniques were employed by the research team: an inventory, pre-structured interviews, and case studies. Unless otherwise specified, data from the inventory and pre-structured interviews reflect the situation at the time of the survey.[19] Case studies inquired about the history of a selected group of legal services.

2.1.1 The Inventory.

For each country, the research attempted to record the existence of as many legal services for the poor as possible. For obvious reasons, the researchers cannot claim to have covered every legal services group in each country. However, they expect to have included almost 100% of the universe of new projects and institutions in the 4 countries.

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18. The research team consisted of four national groups, one corresponding to each one of the countries involved, and one research coordinator. The research coordinator was Annette de Gonzalez, ILSA's Executive Director. The heads of the national research groups were: Luis Passara and Jorge Parodi (Peru), Manuel Chiriboga and Luis Verdesoto (Ecuador), Fernando Rojas (Colombia), and Manuel Jacques (Chile). The heads of the national research groups were responsible for the contents of the national reports.

19. It was predominantly a synchronic study.

The researchers defined the universe as "existent" projects or institutions. Defunct projects or institutions were neither documented nor analyzed.

The Ecuadorian and Chilean investigators discovered that a focus on only projects and institutions limited their study. Various cases of individual private practitioners serving grassroot organizations were found in Ecuador. Similarly, the Chilean researchers registered one such a case. Since these lawyers provide counsel and representation to low-income people and actively participate in legal training for the poor and grassroot organizational activities, they were included in the statistics for Ecuador and Chile.

The bulk of the analysis is concentrated on new legal services. Cases of traditional legal services were included in both the inventory and the survey for comparative purposes. At the end, the survey included around the same number of new and traditional legal services (75 and 73 respectively). However, coverage of traditional legal services is not expected to be as thorough as that of new ones. Case-studies included only new legal services.

2.1.2 Pre-structured interview.

The four country teams used a pre-structured interview to gather information on each one of the legal services projects or institutions included in the inventory.[20]

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20. The questionnaire was originally based on a country study made for Colombia. Researchers' meeting in Lima, Peru, discussed the questionnaire following a preliminary period of use. Joaquim Falcao, a specialist from Brazil, took part in the discussion of the questionnaire. Inclusion of Brazil in the research study was being discussed at that time. David Trubek and Fred Zemans,

It took eight months to complete the survey. A total of 148 interviews were conducted in the four countries. This is certainly the most complete survey/inventory of legal services for the poor ever made in Latin America. It contains lots of systematic and comparable information.[21]

#### 2.1.3 The case studies.

Based upon preliminary survey results, the research team was aware of the existence of a wide variety of organizational forms, legal and extralegal activities, financial resources, and types of relationship with beneficiaries. Significant differences existed both within each country and among countries. Indeed, there was some basis to question whether a participatory approach was really being fostered by new legal services. Similarly, doubts aroused about the real impact of new legal services on social and political change.

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advisers to the research project, as well as Joseph Thome, a specialist on Latin American Law and Development, all made judicious criticisms of the preliminary questionnaire. After further experimentation, the questionnaire was once more corrected, then circulated among the research groups for final application. This same questionnaire is now serving as a basis for data collection with an aim at policy formulation for legal services in the Caribbean, a project conducted by ILSA.

Duration of the interview was approximately 1 hour and 30 minutes. With only a few exceptions, the interview was personally conducted by a member of the research group for each country. By personally conducting the interview, researchers collected additional materials and observed the facilities. In some cases they were allowed to look at the files and see by themselves the way the relation between lawyer and beneficiary actually works.

21. The final research report devoted 100 pages to presenting the data and analyzing only the most salient findings.

These empirical questions can be more adequately dealt with if legal services are put into social and political context. As such, a case study methodology was deemed more appropriate than a pre-structured survey.[22]

Researchers agreed to focus the case studies on the reality and potentiality of legal services for satisfying the following goals: popular participation, community development, training programs for beneficiaries, beneficiaries' organization and mobilization, and construction of alternative sources of power and social relations.

A total of sixteen case studies were carried out in the four countries.[23]

#### 2.2 Some evident peculiarities of the Latin American social, legal, economic, and political context.

Some obvious factors differentiate the social context where Latin American legal services take place from the social context of legal services in advanced economies. The most evident factors have to do with the characteristics of underdeveloped

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22. As usual, case studies should be read with caution. It is legitimate but difficult to generalize out of particular cases. Besides, not all cases deal with the above questions to the same extent. Indeed, as shown below, we only reached preliminary insights from the case studies regarding some of the most fundamental questions raised above.

23. Five in Chile, four in Colombia, four in Peru, and three in Ecuador. By groups of beneficiaries, the 16 case studies included: Indigenous Communities, in Colombia and Chile; Peasant Communities, in Ecuador, Colombia, and Peru; Urban Communities, in Chile (2), Peru, Ecuador, and Colombia; Salaried Workers, in Ecuador, Peru, and Chile; Women, in Colombia and Peru; Human Rights, in Chile.

countries. As such, they help to explain some superficial differences between legal services in advanced economies and legal services in less developed economies. However, the most visible factors cannot explain the most profound difference between new Latin American legal services and legal services in North America and Europe: Latin American new legal services aim at challenging the capitalist legal system and introducing a new social order.

Sections 2.2. thru 2.7. go deeper into the inner forces that account for more fundamental differences. This section deals with some of the most obvious contextual differences between Latin American legal services and legal services in the Northern hemisphere:

- The levels of absolute and relative poverty as well as an unequal distribution of income make access to legal counsel and administration of justice scarcer and more selective in Latin America. The labor market is still highly stratified; thus, preventing the emergence of an extended "middle class" that shares the values and compromises of a social pact. Lack of national integration sharply contrasts with the axiomatic assumption of a homogeneous society in advanced capitalist countries. This assumption is fairly common among scholars concerned with access to justice and legal aid in North America and Europe.[24]
- Cultural factors also make new legal services more necessary in Latin America. Ignorance about the most elementary human rights, lack of confidence in the state apparatus, and lack

24. See, for instance, FRIEDMAN, L. (1981) "Claims, Disputes, Conflicts and the Modern Welfare State", in M. Cappelletti, Ed. Access to Justice and the Welfare State.

of self-confidence that prevents people from going to court are among the most widely shared characteristics of Latin American low income communities. Significant numbers of people do not take part in the official legal system, or, for that matter, in the official economy.[25]

- Elite education and rigorous social stratification have traditionally assigned Latin American lawyers a political role and a hierarchical position that make them neglect the legal interests of low income people.[26]

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25. Lack of economic, social and political integration has been extensively documented in Latin America. This observation has constituted a fertile ground for a wide variety of theoretical approaches ranging from "dualism" to "marginality", "informality" and the "parallel" or "underground" economy.

26. Cf. LYNCH, D.O. (1981) Legal Roles in Colombia; PEREZ PERDOMO, R. (1981) "Jurists in Venezuelan History", in C.J. Dias et al., Eds. Lawyers in the Third World: Comparative and Developmental Perspectives; FALCAO, J. (1984) "Lawyers in Brazil", Unpublished paper prepared for the meeting of the Working Group for Comparative Study of Legal Professions of the ISA Research Committee on Sociology of Law, Bellagio, Italy; ABEL, R. L. (1982) "The Underdevelopment of Legal Professions: A Review Article on Third World Lawyers", in American Bar Foundation Research Journal, Summer, No. 3; LYNCH, D.O. (1983) "Hundred Months of Solitude: Myth or Reality in Law and Development?", in American Bar Foundation Research Journal. It should be noticed, however, that this distinctive feature of Latin American lawyers has been changing during the last 15 years. I have observed elsewhere that those scholars who do not take into account recent changes in legal education and the composition of the legal profession cannot understand how and why Latin American lawyers played a decisive role in the emergence and orientation of new legal services in the region. Cf. ROJAS, F. (1982) "Descriptions towards typologies and analysis of legal aid trends in Latin America", Bogota, Colombia (unpublished paper). Also, PALACIO, G. and ROJAS, F. (1985) "Critica", in Portavoz, Bogota, No. 3 (a review essay of R. Abel's "The Underdevelopment of Legal Professions: A Review Article on Third World Lawyers").

- Consequently, Latin American legal services, more than their European or North American counterparts, have to overcome more rigid social, economic, and psychological barriers that prevent practical equality vis a vis the administration of justice. Substantive and procedural equality among individuals is, of course, one of the most fundamental premises of the capitalist legal system. Overcoming this barrier of inequality constitutes the technical and financial challenge faced by Latin American legal services. Since a response to this challenge implies an acquiescence in the capitalist legal system, the response becomes one of the sources of the contradictory nature of new legal services in Latin America.
- However, different from North America and Europe, the Latin American problem of limited access to justice cannot be treated as a purely technical one.<sup>[27]</sup> Income barriers, professional monopolies, and cultural hindrances all call for public policies aimed at insuring equal access to legal services. Intimately connected with long-entrenched social structures, the question of inequality in practice acquires prima facie a political character. Yet intervention by the state and political parties is not forthcoming. The authoritarian nature of some Latin American political regimes prevents any attempt to guarantee basic constitutional rights or ascertain legal equality among citizens. Lack of resources and strong political and professional pressures have prevented democratic governments

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27. According to Abel, apolitical accounts of legal aid prevail in the literature. Abel, however, is basically drawing his conclusions from studies of North American and European literature. Cf. ABEL, R.L. (1985) "Legal Aid", Op. Cit. pp 475-485.

from granting the subordinated classes the legal tools to defend themselves. The Latin American welfare state never reached the quality and extension of public goods and services that their Northern counterparts did. These differences explain why the new Latin American legal services, by adopting political, economic, and human rights as their banner, automatically place themselves in opposition to the State. Or the services threaten the state apparatus and the political system by putting themselves in the place of the usual administrative and political channels that provide public services. The obstacles to obtaining better access to justice are compounded by low income people's apathy --and even mistrust-- of both, the Parliament and the Administration. A vicious circle is created: the political machinery does not respond to what is clearly a political problem.

All the above economic, cultural, and political constraints provide the general context where the battle for Latin American legal services is fought. This context partly explains why the new Latin American legal services have not taken root within the state apparatus. Contrary to their European and North American counterparts, Latin American legal services have grown within Non-Governmental Organizations (NGOs) that define themselves as different from --when not in opposition to-- the State. Admittedly, non-governmental legal services occasionally join efforts with state agencies for particular programs that can only produce short-term economic benefits for the communities being served. They cannot oppose redistributive public programs without running the risk of isolating themselves. Other times, new legal services associate themselves with progressive political parties. This association --when it occurs--further evidences the immediate political nature of creative legal

services in Latin America and the sort of political and institutional tensions they necessarily face. But, as I will indicate in the following sections, their overall conceptual and strategic approach to development is alien to the idea of a patronizing government or a clientelist political party.

2.3 A brief account of historical "waves" in Latin American Legal Services.

We have only been able to reconstruct a diffuse picture of the history of legal services in Latin America. A division can be made, on the basis of limited information, between the periods before and after 1970. The first period is characterized as legal aid for the indigent. Legal aid was scarce, probably more scarce than it is today. Legal services were provided on an occasional basis by concerned private practitioners or by lawyers hired by the Church, charitable foundations, or local city councils for a specific legal case.

The second period is characterized by a higher degree of institutionalization. The state more actively participated in the legal services field. Even some privately-held corporations created legal aid foundations. Church related entities kept providing legal services. However, the political split of the Catholic Church, visible since the late 1960's, divided Church-related legal services in traditional and participatory. The same division is evident among Church related legal services of Protestant denominations.[28]

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28. The presence in Latin America of --mostly U.S. based-- protestant groups has been growing during the last 15 years. Relatively well funded, these groups have targeted low income people in rural and urban areas. Many of them preach extremely conservative politics.

In Colombia, for instance, the state established small-scale agencies with full-time salaried lawyers to deal with the indigent. However, state-provided legal services have not reached the extent or the high degree of institutionalization achieved in the Northern countries. State provision of legal services never constituted a serious challenge to private practice nor did it in any way threaten the monopoly of the profession. Neither were legal services considered a basic right poor people might claim from the state like education or medical care. Since legal services were not a right of the people nor a major government undertaking, questions like accountability and responsibility in decisions made by these services were not raised. As can be expected in this context, lawyers have not felt the pressure to lobby for a judicare system where legal aid would be provided by private practitioners. Different from northern countries, the dilemma between judicare and staff systems never arose in Latin America.[29]

Also during the second period, new organizational developments came about as a result of a proliferation of new legal services programs and projects. Although foreign agencies usually financed the projects for a short-term, they were executed by lawyers who expected to institutionalize them into permanent programs. Without exaggerating, one could interpret this second period as one when lawyers felt a vocation to permanently institutionalize every project. Committed lawyers, who ordinarily had some short-lived experiences of their own in the fields of community development, political mobilization, or legal services for minorities or the poor, saw this foreign interest in

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29. Cf. CAPPELLETTI, M. and GARTH, B. (1981) "Access to justice and the welfare state: An introduction", in M. Cappelletti (Ed.) Access to justice and the welfare state, vol. 1.

these fields as an opportunity to build up stable programs. They expected to devote themselves on a permanent and full time basis to a social and political cause to which they had been attached for years. Some lawyers were both project leaders and salaried staff of the projects. By imposing some accountability rules and requiring more responsiveness to beneficiaries' needs, foreign agencies also contributed to further institutionalization. Although organizational arrangements differ from case to case, funding agencies, beneficiaries, and external evaluators took some part in the conception, design, implementation, control, or evaluation of the project.

Let us now briefly turn to Western/Northern Europe and North America in order to establish a basis for comparison with legal aid institutional developments in Latin America.<sup>[30]</sup> The specialized literature has usually accepted Cappelletti's thesis of 3 "waves" or predominant ideas and programs in the development of legal services in Northern countries: first, legal aid for the indigent; second, public interest law for diffuse interests; third, legal aid as an alternative to formal courts.<sup>[31]</sup> After experiencing accelerated growth for two decades, resources for legal services have either stagnated or declined in the last few years. This latter trend is frequently interpreted in the light of public spending cuts and dismantling of the welfare state, either as a result of economic crisis or as a part of a larger political movement in favor of the private sector, or --more frequently-- as a combination of both processes.

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30. We restrict the comparison to Western/Northern Europe because there does not seem to be similar legal aid developments in Belgium or any of the Mediterranean European countries.

31. As summarized by ABEL, R. L. (1985) Op. Cit., p 480 in footnote 12.

This account of legal aid institutional developments in advanced Western economies and Latin America -- although extremely sketchy-- allows us to underline the following differences between the two regions:

- Latin American legal services, either new or traditional, have not achieved the degree of institutionalization reached by their North American and European counterparts in the sixties and seventies. On the one hand, state subsidization, lawyers' gratuities, and other voluntary schemes have always been subject to shortage of funds and capricious decisions. On the other hand, new legal services are ordinarily subject to short-term financing. Besides, lack of state support -- and sometimes official repression-- jeopardizes the stability of new legal services.<sup>[32]</sup> Still,

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32. The only current major exception to this panorama of uneasy relations between governments and new legal services seem to be the support provided by the Brazilian government to Brazilian legal services from mid 1985 to mid-86. Under the stimulus of the so-called apertura, or transition to bourgeois democracy, the Brazilian Ministry of Justice transferred funds to both new and traditional legal services. Legal services groups submitted proposals and requested funds from the Ministry. The Ministry, in turn, evaluated and allocated funds according to rather open, non-discriminatory criteria. The only visible discrimination operated against services for indigenous communities, since the new civilian government --like its military predecessors-- still perceives in these communities a potential threat to internal security and develops policies accordingly. Sometimes these funds reached substantial proportions of the total budget of a given legal services group. However, it does not seem that the Brazilian new legal services compromised with the government or sacrificed their political independence as a result of this financing. Surprisingly for Latin American standards of political behavior, the Brazilian government does not appear to have put any pressures on legal services groups for purposes of either party support or debilitating the groups' substantive postures. How long this governmental approach may last and how far it can go is still difficult to evaluate.

significant institutional differences separate innovative from traditional legal services in Latin America

- The boom and decline of legal aid movements in the North is closely associated with the rise and fall of the welfare state. Legal services in Latin America expanded both quantitatively and qualitatively as a result of forces other than domestic public policies. This is particularly true of new legal services, the fastest growing branch of the legal aid tree in the subcontinent as well as the most creative one. Correspondingly, Latin American new legal services have been relatively immune to the rather universal trend towards reductions in the size of the public sector. Although budget restrictions in advanced economies might eventually affect the size and number of new legal services in Latin America, their impact has still not been felt.
- The --rather vague-- purpose of "legal aid for the indigent" dominated the first wave of legal aid developments in Northern countries as well as in Latin America. It still pervades a substantial number of legal aid schemes in advanced capitalist societies. On the contrary, the legal aid for the indigent model of legal services never reached in Latin America the size and institutionalization it achieved in the North. When recently adopted in Latin America, the use of this model has only been the explicit goal of government and university sponsored legal aid services and corporation-financed programs. The Church, which in the first half of the century associated itself with charity and philanthropy in legal services, is now split, providing both new and traditional legal services.
- The public interest law firm has never taken root in Latin America. Nor have legal services focussed primarily on law

reform. Public-interest law firms assume common interests and social homogeneity. Laws, in turn, are usually impersonal and universal in nature. New legal services do give priority to collective interests. However, the collectivity is ordinarily a well-identified, individualized community or group of beneficiaries rather than an anonymous group of individuals within the society. A given association of peasants, a particular indigenous community, residents of certain urban slums, or a federation or confederation of labor, are all typical examples of beneficiaries of new legal services.[33] Careful selection of beneficiaries is required since direct lawyers' involvement in the daily lives of the beneficiaries is deemed an essential ingredient of organizational development. For the same reasons, so-called class actions are not a frequently used tool by Latin American new legal services. Only those services aimed at dispersed individuals or groups with specific needs, such as those providing services to women or indigenous communities, devote some of their energies to constitutional and legal reform.[34] Although all groups participate --to a greater

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33. More than 60% of new legal services found in the Research Study work primarily with a given community or association. Most of the remaining 40% aim at groups with specific needs: women, political prisoners, or prisoners in general. On the contrary, more than 60% of traditional legal services aim at vaguely identified segments of the population at large such as "any poor person". Thirteen out of 16 cases selected by the national researchers, for in-depth analysis within the Research Study, were new groups servicing well identified communities or associations.

34. In the Colombian case, for example, legal services focusing on women's rights have actively participated in drafting bills and doctrinaire platforms, either on their own or in association with the political parties. Similarly, legal services for

or lesser extent as part of their innovative political activities-- in conceptualizing and promoting basic human rights for working classes as a whole, most of their resources are devoted to working with localized collectivities.[35] Traditional legal services, are aimed at vaguely defined sectors of the population; but they do not actively participate in lobbying and law-reform efforts due to their close association with governments and dominant interests.[36]

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indigenous communities have undertaken major efforts to collect and systematize a scattered legislation and to present law-reform proposals to the government and Congress.

35. This search for a new declaration of human rights bears little resemblance to those declarations of principles inspired by the French or the U.S. revolutions. Neither can they be identified with the Universal Declaration of Human Rights of 1948. Although new legal services groups may share some elements of these --fundamentally liberal-- principles, most of them are deliberately looking for alternatives to liberal legal systems. As part of their fundamental differences with capitalism, the new Latin American sketches of human rights usually go beyond formal equality and individual freedom and assign priority to collective provision of essential goods. They also conceive an alternative rationale for resource allocation, other than contracts, market forces, and the realm of commodities as a whole. Efforts at drafting a non-capitalist declaration of human rights are particularly fertile in contemporary Brazil, as a result of new legal services attempt to influence the drafting of a new Constitution. See, for instance, OLIVEIRA, L. (1986) "Movimentos de defesa dos direitos humanos no Brasil. Notas para uma resenha", Recife. Unpublished paper presented at the XVI Latin American Congress of Sociology, Rio de Janeiro, March. But they are also present in other countries. See, for instance, JACQUES, M. (1985) "Hacia un Uso Alternativo del Derecho. El Caso de Chile." Unpublished document prepared for the Research Study, an ILSA conducted research. See specially "Elementos para el Diseño de un Servicio Legal Transformador", pp 9-13. ROJAS, F. (1984) "Derechos humanos y critica social en America Latina", Working Paper, Bogota: Cinep.

36. According to the Research Study, new legal services made twice as many law reform efforts as traditional services.

- Contemporary legal services in both Northern countries and Latin America seek to create alternatives to the court system. However, similarities in this respect are misleading since they conceal deep differences between legal aid models in the two regions. The movement towards informalism in advanced capitalist societies has been fueled by a combination of forces ranging from community interests to a diagnosis of court inefficiency and an ideology of privatization and opposition to state intervention.[37] As such, this movement is supported by a conglomerate of heterogeneous interests --such as big corporations, conservative political parties, and academic technocrats. Informalism in Latin America, although not exempt from political ambiguity, is predominantly a movement towards democratization. Informalism provides the opportunity for people to express themselves and validate their own legal systems, both substantive and procedural ones. Since there was never a significant state intervention in legal aid, informalism cannot be associated with privatization. Indeed, some of the groups and interests whose informal way of handling disputes is now being recovered have never been represented in courts.[38]

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37. "Privatization" does not seem to be an English word. However, contemporary social scientists use it frequently to signify the current trends towards transferring resources and control from the public to the private sector.

38. The contrast between the politics and the political meaning of movements towards informal justice in the U.S. and elsewhere has already been suggested --although on the basis of case studies other than those concerning Latin American legal services. Cf. ABEL, R.L. (Ed.) (1982) The politics of informal justice, 2 vols., New York: Academic Press. For criticisms of the movement towards informal justice in the U.S., see Abel's article "The contradictions of informal justice" (vol. 1, pp 267-320). Also, AUERBACH, J.S. (1983) Justice without Law?, New

2.4 Contemporary social and political forces shaping Latin American legal aid institutions.

The peculiar purposes, problems, dilemmas, and achievements of new Latin American legal services cannot be related to those of traditional legal aid programs, either in Latin America or elsewhere. Both types of services have grown under capitalism. However, only the former try to challenge one or more premises of the capitalist legal system. Specific social and historical factors explain how these ambitious legal services came about in Latin America.

Recent legal aid developments in economically advanced countries seem to be the joint product of two main forces: state policies and progressive lawyers or bar associations. Latin American new legal services, in turn, are the meeting place of a variety of forces and social phenomena peculiar to the recent history of the subcontinent. Four major trends characterize the complexity of these forces:

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 York: Oxford University Press, and ABEL, R.L. (1985) "Informalism: A tactical equivalent to Law?", in Clearing House Review, vol. 19, No. 4, Summer, Special Issue "Poor Clients without Lawyers: What can be done?". See also, NADER, L. (Ed.) (1980) No Access to Law: Alternatives to the American Judicial System, New York: Academic Press, and STUART, H. (1984) Private Justice: Towards Integrative Theorizing in the Sociology of Law, London: Routledge & Kegan Paul. The potential for informal justice in Latin America (although not specifically in Latin American legal services) has been explored in the contexts of "community courts", "popular justice", and "revolutionary justice". Cf. SALAS, L. (1983) "The Judicial System of Post-revolutionary Cuba", in Nova Law Journal, vol. 8, pp 43-70. SPENCE, J. (1979) Search for justice: neighborhood's courts in Allende's Chile, Boulder: Westview Press. LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS (1985) Nicaragua: Revolutionary Justice, New York: LCIHR.

- A restatement of political theory and professional practices, as part of what has come to be known as "the crisis of the left".
- The commitment of some members of the Church to serving the poor and strengthening grassroot power.
- Foreign ideological and financial support.
- Transformations of the subordinated classes.

I now briefly consider each one of these major trends, discussing their role in the rapid growth of new legal services in the subcontinent. The first one, the so-called "crisis of the left" can be better grasped if divided into three parts: professional support for the most urgent needs of subordinated classes, new ideological bases for evaluation of legal services, and alternative paths to new democracy.

2.4.1 The specificity of the crisis of the left in Latin America: professional and intellectual support for subordinated classes' daily needs.

[39] Beginning in the 1970's, contingents of intellectuals

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 39. The crisis of some leftist intellectuals during the 1970's is popularly known, in Latin America and elsewhere, as the "Crisis of Marxism". The so-called "Crisis of Marxism" has been the subject of a heated debate over the last 6 to 7 years. European authors like C. Castoriadis, J. Baudrillard, F. Claudio, C. Lefort, or R. Bahro (From Red to Green: Interviews with New Left Review, London: Verso/NLB, 1984) have contributed to diffusing the idea of the crisis of Marxism in Latin America. Perry Anderson, perhaps the most controversial figure within this debate, has emphatically rejected the idea of a crisis. Cf. ANDERSON, P. (1979) Considerations on Western Marxism, and (1984) In the Tracks of Historical Materialism, London: New Left Books. Latin Americans have taken sides on this debate. Most have

and professionals fighting for social change reviewed impartially the previous Marxist-inspired positions they had shared for most of this century.[40] This critical self-examination lead to new

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supported the idea of a crisis of "classic Marxism" and have found refuge within the vaguely defined --but apparently more creative-- boundaries of so-called Western Marxism. See, for instance, SORJ, B. et al. (1985) "Nota Critica. Perry Anderson e o Marxismo Europeu", in Contexto Internacional, No. 1, January-June. CHAUI, M. (1982) "Notas sobre la crisis de la izquierda en Brasil", in Nueva Sociedad, No. 61, July-August. MOULIAN, T. (1982) "La Crisis de la Izquierda", in Revista Mexicana de Sociologia, No. 2. Others have defended the current relevance of Marx --although not necessarily along the lines of Anderson. Theirs is basically a critique of the Leninist tradition, as distinct from the liberatory potential of Marxist critique. See, for instance, DE ROUX, F. et al. (1983) Marx. In Memoriam, Bogota: Cinep, specially the contributions by V.M. Moncayo and F. Rojas.

40. For obvious reasons, it is difficult to evaluate the proportion of Latin American critical intellectuals that have reconsidered their postures in accordance with this new wave of political and theoretical thinking. It is always difficult to judge a panorama of intellectual trends, particularly in Latin America, given the diversity and dynamics of social process and the lack of widely circulated and accepted journals. In any case, those who have reviewed their previous Marxist-inspired positions seem to be the most vocal and prolific writers. Many of them are associated in one way or another with CLACSO, the Latin American Council for the Social Sciences. Therefore, the CLACSO-oriented journal, Critica & Utopia is a good reference to start looking for this self-criticism. Nueva Sociedad, the social democratic journal based in Caracas, has also published a number of articles along the same lines. The Revista Mexicana de Sociologia, perhaps the most traditional and most comprehensive journal of Latin American sociology and political science, has kept a more balanced distribution of articles on the topics of "Crisis of Marxism" and crisis of the left. Teodoro Petkoff's influential book Proceso a la Izquierda (Barcelona, 1976) constituted a pioneer step in self-criticism. On the other hand, CLACSO has always been more influential in the Southern Cone of Latin America than anywhere else. It has also been an institution very much disconnected from activism, and Church movements and social movements in general. Consequently, CLACSO does not embrace all contemporary forces (and perhaps not even the most significant ones) for social change in the subcontinent.

political ideologies that directly or indirectly support the new Latin American legal services, sometimes through invisible and unconscious ways. It is therefore relevant to enumerate how the left self-criticism has come to support political practices such as new legal services.

1. The new Latin American Left[41] condemned ideological dogmatism, party sectarianism, and intellectual vanguardism.[42] These condemnations opened the

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Besides, some Marxist-oriented intellectuals from all over Latin America have always maintained some distance from the theories and practices that are now under siege. Others, usually those associated with Communist parties, have preferred to stick to their previous political and scientific beliefs.

41. Once more, new is just a shorthand for purposes of simplicity and expediency. I expect to supply some elements for the readers to judge by themselves what is new among leftists in the 1980s.

42. See, for instance, NUN, J. (1984) "El otro reduccionismo", in Zona Abierta, Madrid, No. 28. GARCIA, H.P. (1983) "Vanguardia iluminada y organizacion de masas", in Nueva Sociedad, No. 64, Jan-Feb. MIRES, F. (1982) "Retaguardias SIN Vanguardias", in Nueva Sociedad, No. 61, July-August. Similar to developments among the European left, the so-called "Crisis of Marxism" was fueled in Latin America by a censure of Eastern European socialism and a dissatisfaction with Western Communist parties. Theoretically, it was characterized by strong criticisms of prevailing interpretations of the "dictatorship of the proletariat", and the separation of state and civil society. Like censures were applied to the privileged position assigned to the party and the unionized working class within the Leninist-inspired strategies. As such, the so-called crisis of Marxism was rather a critique of "Real-Socialism" as practiced in Eastern Europe. It was also a rupture with the dominant interpretations of Lenin's theory of the party and the state. As distinct from the European "Crisis of Marxism", the Latin American revision of leftist theory and practice stimulated the creation of lots of different variants of relations between Church, professionals, and middle-income and grassroot people. It also put special emphasis on a critique of isolated guerrilla struggles and other Messianic type of strategies which often lead to apathy among and desintegration of popular movements. As such, it was a departure from the guerrilla movements that

possibilities for professionals' non-doctrinaire work with low income people. They also raised the potential and political status of concrete experiences in the field, such as those of new legal services.

2. The new Latin American left initiated a rapprochement with the working class, now redefined to include not only the salaried proletariat but all low-income people.[43] Although trade unions are still among the beneficiaries of legal services, more than 70% of new legal services now target other socially and economically discriminated groups such as urban communities, peasant communities or associations, indigenous tribes, domestic workers, or women in general.
3. Relations between professionals and intellectuals, on the one hand, and low income people, on the other, were reconstructed on a more equal basis. Professionals now pay more respect to the immediate needs of grassroot communities and support their strategies for survival.[44]

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dominated the politics of Argentina and Uruguay in the late sixties and early seventies. Cf. WEFFORT, F. (1984) Por que democracia?, Sao Paulo. Also, PETKOFF, T. (1976) Proceso a la Izquierda, Barcelona.

43. By extending the concept of the working class, Latin Americans adjusted the theory to the transformations of capitalist social relations in the latter part of the Twentieth Century. See, in this connection, GORZ, A. (1983) Adieu au Proletariat, Paris: Maspero. This book by a writer also drawn into the debate on the "Crisis of Marxism", has been translated into Spanish and widely read in Latin America. See also, ROJAS, F. (1986) "Is Information Technology a Capitalist Tool for further Subordinating Workers?", Working Paper # 1-6, Institute for Legal Studies, Law School, University of Wisconsin-Madison, March.

44. Abandonment of the dichotomy political struggles-economic struggles was part of the general rejection of Leninist-oriented

Consequently, a space was opened for lawyers to jointly work with grassroot people in community development or any other organizational purpose.[45] By the same token, the placement of professionals and subordinated classes on equal footing invigorated the actions of new legal services aimed at demystifying the scientific and hierarchical claims of law and lawyers in society.

4. Workers and intellectuals try to find the seeds of social change within their daily struggles, not in externally imposed party ideologies. Committed intellectuals substituted Research & Action and Participant Observation for more glamorous methodologies claiming to be either "truly revolutionary" or "scientifically neutral". Critical thinking about daily problems has gained recognition within the academia and attempts are made at harmoniously combining it with abstract critical thinking. Social movements and manifestations of social forces at all levels, ignored in the past as a result of the exclusive role of the party and the salaried working class within the Lenin's inspired revolutionary strategy, are now either valorized or at least recognized as relatively autonomous and fundamentally independent from theoretical

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politics. Similarly, struggles to achieve satisfaction of immediate or basic needs were vindicated. On the contrary, party struggles were demoted, reducing the importance of the revolutionary potential that was previously attributed to them as a matter of faith.

45. The most frequently cited purpose of new legal services in the Research Study was to provide support for the organizations created by low-income people. Indeed, all 75 new legal services included in the survey listed this objective. Only 30 groups listed the second most frequently cited objective, i.e., "to facilitate access to justice".

impositions.[46] Again, recognition of the politics of daily life set up the basis for more solid and more realistic joint undertakings between lawyers and beneficiaries of new legal services.[47]

2.4.2 The specificity of the crisis of the left in Latin America: a variety of ideological bases for evaluating new legal services.

The revision of Latin American critical theory was not uniform. Although agreeing to support new forms of social struggles, the people involved in this revision were influenced by different national realities and divergent ideologies; thus giving rise to distinct interpretations of what new social struggles (new legal services among them) actually mean.

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46. An infinite number of possibilities for progressive social action are now recognized in Latin America. A recent study of new social movements in South American countries listed movements as diverse as the "Mothers of Plaza de Mayo and the rock movement in Argentina, the "quebra-quebra" in Brazil, and the "movimientos civicos" in Colombia, etc. Cf. CALDERON, F. (Ed.) Nuevos Movimientos Sociales en Suramerica, Mexico: Siglo XXI (due to be published in 1986). See also KARNER, H. (1983) "Los movimientos sociales: revoluciones de lo cotidiano", in Nueva Sociedad, No. 64, Jan-Feb. EVERS, T. (1983) Movimientos Barriales y Estado. Luchas en la Esfera de la Reproduccion en America Latina Bogota: Cinep. EVERS, T. (1982) "Os Movimentos Sociais Urbanos: o caso do 'Movimento do Custo de Vida", in J.A. Moises et al. Alternativas populares da democracia: Brasil anos 80, Petropolis: Vozes, CEDEC. MIRES, F. (1983) "Alternativas de organizacion y poder popular", in Nueva Sociedad, No. 64, Jan-Feb. SINGER, P. and BRANT, V.C. (1980) O povo em movimento, Petropolis: Vozes/CEBRAF.

47. Contemporary Latin American sociolegal research also reflects this preference for ordinary legal topics such as the study of police behavior and misdemeanors. See, for instance, PINHEIRO, P.S. (1982) "Policia e crise politica: O caso das policias militares", in A violencia Brasileira, Sao Paulo: Brasiliense; OLIVEIRA, L. (1985) "Policia e classes populares", in Cadernos de Estudos Sociais, Recife, vol. 1, No. 1, Jan-June.

Fundamental agreements on the revaluation of social and political actors other than unions and parties hide differences about the significance attributed to new social movements. Indeed, the new left has exposed previously ignored sources of strengths and weaknesses among Latin American critical intellectuals. Divergent theoretical positions lead to distinct evaluations of legal services in the region, thereby affecting their legitimization and support. The following list of points, therefore, illustrates how divergencies among the new left lead to different perspectives for the evaluation of legal services.

1. Different from Leninism, new abstract critical thinking finds primary sources of inspiration in any of the following two major currents of so-called New Marxism or Western Marxism, or in eclectic combinations of both of them: the humanist perspective of Lukacs and Frankfurt schools, and Gramsci's views on the strengthening of civil society.[48] The discourse of the Frankfurt school as well as that of Lukacs and his descendants has been extensively used to support Latin American struggles for human rights, independently of their capitalist connotations. Gramsci and Gramsci's disciples such as L. Coletti have provided theoretical bases and revolutionary legitimization to activities (such as those of new legal services) aimed at increasing the power of grassroot organizations in all dimensions of social life. Jointly with Gramsci's, Lukacs' theses are invoked in efforts to create countercultures, as some new legal services attempt to do on the basis of

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48. A rather comprehensive reference in English is GRAHL, B. and PICCONE, P. (Eds.) (1973) Towards a New Marxism, St. Louis: Telos Press.

working classes' endogenous legal cultures.[49]

2. New critical thinking also finds inspiration in French structuralism and post-structuralism. However, influences from these two schools have pointed in different directions.[50] Post-structuralism prepared the way for anarchist feminism and formulated some devastating critiques of all forms of domination, including the prison and legal systems as a whole. Widely influential among Latin American critical criminologists, the post-structuralist works of Michel Foucault also seem to

49. For examples of this Latin American rediscovery of the political importance of culture, see MIRES, F. (1984) "Cultura y Democracia", in Nueva Sociedad, Caracas July-Aug. BARRAZA, X. (1980) "Notas sobre la vida cotidiana numa ordem autoritaria", in L. Maira et al. América Latina: novas estratégias de dominacão, Rio de Janeiro: Vozes.

50. Some Latin Americans borrowed ideas from --or further elaborated the thesis of-- Louis Althusser, perhaps the most widely read French Marxist structuralist. However, the French based Althusserian school reached the peak of its influence in Latin America by the late sixties and early seventies, before the rather generalized revision and rejection of Lenin actually took place in the subcontinent (from mid-seventies on). Indeed, more than Althusser or Balibar, it was Michel Foucault's post-structuralist work on the nature of power which had manifest influences among Latin Americans searching for radical alternatives to subtle forms of capitalist power during the late seventies and early eighties. Nicos Poulantzas' early Althusserian analysis of the state, extensively read in the late sixties and early seventies, was replaced in the eighties by the late Poulantzas' work State, Power, and Socialism (London: New Left Books, 1982) --apparently in favor of Parliamentary Democracy. Still, I would argue that Poulantzas' last book can be read more in line with his other works on the state. Whatever the case, what matters at this point is that Poulantzas' last book has been effectively and extensively read in Latin America as supporting bourgeois democracy. See, in this regard, JESSOP, B. (1985) Nicos Poulantzas: Marxist theory and political strategy, London: MacMillan.

have indirectly fortified the ideas of community development and community self-determination in opposition to and with exclusion of the state. Different from Post-structuralism, the late structuralist works of Poulantzas, in which he went to great length to polemize Foucault, are more concerned with political developments within the sphere of the state.[51] Poulantzas' late works, apparently arguing for a more genuine, representative democracy, seem to have been influential among those Latin American new legal services groups emphasizing equal access to state apparatus and more participatory forms of state control.[52]

3. Other streams of critical thought, such as the --mostly German-- School of Derivation or School of the Logic of Capital, the Italian Autonomistas, or the Italian School of Alternative Law, never circulated widely in Latin America. Consequently, it is hard to trace any distinctive influence of either one of these schools on new Latin American legal services. However, since some ideas from these schools are intensively debated among restricted circles of Latin American critical lawyers, they have been influential in academic discussions or political evaluations of the new legal services phenomenon.[53]

51. Indeed, these works can be read as a rejection of the dual power strategy that seems to underlie some new legal services groups.

52. Forty per cent of those new legal services surveyed in the Research Study have among their objectives the facilitation of access to justice.

53. See, for instance, URIBE, V.M. (1984) "New dimensions of legal critique and the practice of law", paper read at the International Seminar on Critical Trends and Alternative

4. As a whole, Poulantzas and Foucault, as well as Gramsci, Horkheimer, and Habermas have all simultaneously affected the development of a new Latin American Left --and, indirectly, the constitution of new legal services. Their influence indicates that the new left and new legal services are integrated by partially divergent ideological forces, forces that have not had an opportunity to selectively digest the diaspora of contemporary ideological influences.

2.4.3 The specificity of the crisis of the left in Latin America: different paths to a new democracy.

The so-called crisis of Marxism has brought the conceptualization of democracy to the forefront of theoretical and political debates. Distinct from 15 years ago, many --if not all-- Latin American critical intellectuals now support the idea of a new democracy, applicable to every level of social life.

"In the sixties, the central theme of intellectual political debate has been the revolution... This perspective acquired such force that even the Christian Democrats proposed a 'Revolution in Liberty' as a governmental program in Chile. If revolution is the articulating crux of Latin American discussion in the 60's, in the 80's, the central theme is democracy... After the authoritarian experience, democracy appears more as a hope than a problem..."[54]

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Practices in Law", Bogota, Cinep (unpublished). Also, QUINONES, J.R. (1985) "Aproximacion al desarrollo de la critica marxista del derecho en Colombia", unpublished paper, Bogota, Cinep.

54. LECHNER, N. (1985) "De la Revolucion a la Democracia. El debate intelectual en America del Sur", in Opciones, Santiago de Chile, No. 6.

Nevertheless, no consensus exists as to the form and contents of this new democracy. Roughly speaking, Latin American thinkers may be divided into two major groups in this regard: Those who favor a more authentic bourgeois democracy and those who aim at replacing bourgeois democracy with non-capitalist forms of equality and freedom. Both groups differentiate themselves from liberal democracies. Also, both purport to expand the sphere of politics to all dimensions of social life. The central differences between them lies in the political and historical value assigned to bourgeois (individual) freedom and the role attributed to the state in each one's political strategy. Let us briefly explore the latter difference.

Those who stand for purifying bourgeois democracy want to strengthen the organizations of civil society in order to construct a more legitimate state. They argue against authoritarian or otherwise exclusionary forms of capitalist political regimes. On the contrary, those who aim at replacing bourgeois democracy want to create or stimulate popular power outside the realm of the state and politics as defined by bourgeois mechanisms of representation. This group developed a long-term strategy of people's dual power, a perspective that at some points intersects with and at other points follows a course parallel to that of traditional political parties and forms of public representation. Rather than expanding civil society, those who seek to replace bourgeois democracy aim at abolishing the dichotomy state-civil society.

More than on any other topic, contemporary debates on the form and contents of new democracy have provided ideological impetus to new legal services. However, these debates have also tainted new Latin American legal services with one ideological color or another, depending on which of those two democratic proposals is

more influential in each particular group.[55] The scope, impact, interpretation, and evaluation of new Latin American legal services depend to a large extent on which side these new legal services and outside evaluators take. Consequently, in exploring the two sides of the intellectual debate on new democracy, I will make explicit some of the features of new legal services that correspond to each one of them.

Current arguments in favor of a reformed bourgeois democracy come mainly from Argentina, Uruguay, Chile, and Brazil, countries that have struggled for a long time with dictatorial regimes.[56] From the point of view of party politics, this

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55. Since new legal services groups are formed mostly by activists --rather than intellectuals-- contemporary debates on the meaning of new democracy have not usually permeated the field of legal services in a conscious way. As Hannah Arendt has indicated, the theoretical and political meaning of pioneer struggles goes beyond the rather restricted scope of the claims and consciousness of their supporters. Cf. ARENDT, H. (1979) Entre o passado e o futuro, Sao Paulo: Perspectiva.

Besides, differences in ideological colors are not currently emphasized nor have they prevented cooperation and solidarity among Latin American new legal services. Still, in most specific instances, one can distinguish the particular inclination of each new legal services group within this debate.

56. See, for instance, LACLAU, E. and MOUFFLE, Ch. (1985) Hegemony and Socialist Strategy: Towards a Radical Democratic Politics, London: Verso. Translated by W. Moore and P. Cammack. Unfortunately, most recent references on the subject have not been translated into English, including the most significant ones. Cf. LECHNER, N. (Ed.) (1982) Que significa hacer politica? Lima: Desco. ARAVENA, F.R. (1982) Autoritarismo y alternativas populares en America Latina, San Jose: FLACSO, EUNED. PORTANTIERO, J.C. (1983) "Transicion a la democracia en Argentina: un trabajo de Sisifo?", in Cuadernos de Marcha, Mexico, July. DE IPOLA, E. and PORTANTIERO, J.C. (1984) "Crisis social y pacto democratico", in Punto de Vista, No. 21, Buenos Aires. ANDRADE, R. "Sociedad, politica, sujeto -variaciones sobre un viejo tema", in Critica & Utopia, No. 8, Buenos Aires.

branch of the new Latin American left is very close to current social democrat positions. However, it adds individual features of its own to the old European Social Democracy. Some of these show a distinctive influence from Gramsci, Lukacs, the Frankfurt School, and even C.B. Macpherson's theory of democracy or J. Rawls' theory of social justice. Others have to do with the specific historical and political context of Latin America, specially with regard to the Latin American populist tradition.[57]

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WEFFORT, F. (1984) Por que democracia?, Sao Paulo. MIRES, F. (1982) "Retaguardias sin Vanguardias", in Nueva Sociedad, Caracas, No. 61, July-August, PP 35-54. FLISFISCH, A. (1983) "El surgimiento de una Nueva Ideologia Democratica en America Latina", in Critica y Utopia, Buenos Aires, No. 9. BOBBIO, N. (1983) "Quais alternativas a democracia representava?" and "Por que democracia?", in Qual Socialismo, Rio de Janeiro: Paz e Terra. One of the few references in English is PORTES, A. (1984) "From dependency to redemocratization. New themes in Latin American Sociology", in Contemporary Sociology, September. I cannot explore here the apparent connection between this new idea of democracy and the particular evolution of political regimes in countries like Brazil and Argentina, or the connection between this idea, Gramscism, and the Latin American tradition of populism. Neither can I relate minutely the differences and similarities between the emerging concepts of "new democracy" and liberal democracy.

57. Populism, as used in this context, means a political strategy aimed at incorporating into the political arena groups or classes that had not been part of it. These same groups are ordinarily the main electoral support of populist governments. The current Latin American emphasis on coalition of political parties, capable of tailoring a new social pact and a new Constitution, illustrates this "populist" attempt to bring all groups and classes into a new social contract. It is intended to do away with extreme social differentiation. It is based on the premise that Latin American marked heterogeneity leads to social antagonisms and exclusionary political regimes. Obviously, this new social pact is expected to include groups of citizens that were not part of the traditional social democrat alignments or New Deal pact between the state, trade unions, and managers. In this sense, the current governments of Alfonsin in Argentina, Betancur in Colombia, Sarney in Brazil, and Garcia in Peru can be

Judging from their proposals this branch of new Latin American democracy can be characterized by the following five features:

1. It is neocontractualist insofar as it aims at reconstructing the social contract. The new contract should be widely participatory in order to provide continuous political stability. Since there is no tradition of widespread participation, the current political process has to create the necessary conditions for participation from scratch. Two conditions are essential, given the Latin American tradition of excluding groups of citizens from the political process. First, political groups previously excluded have to be transformed in new (collective) political subjects. Second, the (constitutional) rules permitting and stimulating participation have to be established.<sup>[58]</sup> These two conditions taken together indicate that the first priority of this political project is to expand the scope of the spheres of politics to later institutionalize both.

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considered populist.

58. Fulfilling this dual challenge at the same time is, for this group of Latin American thinkers, the greatest political and institutional challenge of contemporary Latin America. Cf. LANDI, O. (1982) "Crisis y Lenguajes Políticos", Estudios CEDES, Buenos Aires (unpublished). LECHNER, N. (1985) "De la revolución a la democracia. El debate intelectual en América del Sur", in *Opciones*, No. 6, Santiago. ANDRADE, R. (1982) "Sociedad, política, sujeto -variaciones sobre un viejo tema", in *Critica & Utopia*, Buenos Aires, No. 8. ROUQUIE, A. et al. (1984) Como renascem as democracias, São Paulo: Ed. Brasiliense. Clearly, a contradiction arises from the simultaneous need to create the subjects that are going to participate in the new social contract and dictate the Constitution that is going to rule over the new subjects. More likely than not, this contradiction is resolved when the spheres of the state and politics are imposed over the new subjects.

2. It is pluralist in a distinctive sense. It is based upon the premise that conflict is an essential ingredient of continuous democratic pluralism. This form of new democracy aims at constituting the basis for national unity. However, national harmony does not require the elimination of conflicts among collective subjects. National unity is not based on the idea of homogeneous citizens or groups of citizens. National integration is the outcome of divergent social, cultural, and economic interests actively participating in a political process in accordance with commonly accepted rules.
3. It is collective in that political subjects are primarily socially defined groups rather than individuals. However, economics is no longer the only factor nor even the main criterion to define social groups. Social, political, and ideological behavior are not predetermined by economic positions.<sup>[59]</sup>
4. It is reformist, inasmuch as it hopes to bring about socialism by means of a series of reforms. "Deepening bourgeois democracy" is the common denominator of these series of reforms. In this sense, it claims to be "realist" and "pragmatist" as opposed to utopian conceptions of both socialism and the transition to socialism.
5. It is populist inasmuch as it aims at incorporating in the social decision making process the options and criteria developed by ordinary people in their daily lives.

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59. Cf. LACLAU, E. (1978) Política e ideología en la teoría marxista, Madrid.

Undoubtedly, this proposal for a reformed bourgeois democracy has influenced, to a greater or lesser extent, most new Latin American legal services. Those groups more clearly influenced by this political project are more likely to be characterized by the following features:

1. Using legal services to create conditions of real, equal access to justice administration, the state apparatus, and the political process as a whole.
2. Emphasizing the defense of civil liberties and individual human rights
3. Promoting grassroot people's more active involvement in legal and constitutional reform.
4. Training and working together with low income people to enable them to formulate their own claims and proposals through the (newly constituted) political channels.<sup>[60]</sup>

Other Latin American radical intellectuals purport to promote a more original type of democracy. Although just sketchily delineated, this new democracy would be based upon real --as opposed to formal-- equality. It would substitute collective freedom for individual freedom. It would institute more direct forms of representation and control on the part of the people. Above all, it aims at constructing a non-capitalist democracy

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60. See, for instance, the agenda of legal struggles for political democracy suggested by GOMEZ, J.M. (1985) "O testamento de uma heranca: direitos humanos, autoritarismo e transicao a democracia na Argentina", in Contexto Internacional, Rio de Janeiro, No. 1, Jan-June. Or that proposed by OLIVEIRA, L. (1986) "Movimentos de defesa dos direitos humanos no Brasil. Notas para uma resenha", paper presented at the XVI Latin American Congress of Sociology, Rio de Janeiro, March 2-7.

that would open the possibilities for collective allocation of resources, distant from market rules and capital accumulation dictums.<sup>[61]</sup> Eclectic combinations of Christian groups and radical intellectuals loyal to the most pristine critical power of the Marxist tradition are usually behind this new set of legal services.

Different from proposals for a reformed bourgeois democracy, this stream of critical thought can be characterized as follows:

1. It attempts to constitute and strengthen sources of power other than the state and the political parties. Indeed, it often argues for the autonomy of these alternative forms of political power and political organization vis a vis the parliament, the Administration or the political parties. It is suspicious of state apparatus and traditional (bourgeois) forms of representation. In this sense, it disperses the political power and the political process. Its quarrel with the capitalist state goes beyond the type of government a country has at a particular time in history. Rather than expanding participation in the state and providing further legitimization for the ideology of contractualism, this stream seeks to create parallel power, almost independent from the direction of the state. It has faith in grassroot power as the only reliable source of social change.
2. It not only discovers politics in ordinary life; it reinforces these political expressions wherever it uncovers them outside the political arena, an arena too narrowly

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61. See, for instance, JACQUES, M. (1985) "Hacia un uso alternativo del derecho. El caso de Chile", unpublished document.

defined by the Constitution and one that is distinct from economy or ideology. It does not accept the reduction of areas susceptible to social control implicit in the (capitalist) separation of politics and economics. Nor does it accept the imposition of "invisible economic laws" of capital accumulation. Indeed, this radical conception of democracy does not consent to any constraints on people's will. Its difficulties with the capitalist legal system (including the Constitution) go well beyond the specific contents of the law.

3. It is also pluralist. However, more than an emphasis on individual or group differentiation, this stream of democratic search aims at creating a "new person". Although not yet rigorously defined, the new person is likely to be more concerned with solidarity than with differentiation.

This proposal for a new type of democracy has also influenced to a greater or lesser extent most new Latin American legal services. Grassroot organization and mobilization appear to be the dominant goals of those legal services groups prone to this political approach:

"The themes ... of the creation of a popular subject; and the definition of its protagonistic role; the character of its structuring beyond a pure organizational activity; linking the popular with the national; ... the consolidation of territory as a space for local power; the search for truly representative and direct forms and channels; the redefinition of the role of political parties; the creation and re-creation of the everyday manifestation of authentic culture and popular identity, etc., etc., are permanently present in a theoretical/practical fashion throughout the majority of the grassroot organizational efforts, in its multiple encounters and prominent tasks of re-defining the theoretical matrix and another body of principles for a society of the

present with a sense of the future".[62]

2.4.4 The influence of the Church: In search for real equality, collective freedom, and the new person.

The new attitude of critical professionals and intellectuals coincided with the primacy given to social justice by the Latin American Catholic Church and other religious denominations. Out of its concern for social justice during the last two decades, some members of the Church have either supported or actively involved themselves in struggles against capitalist exploitation and authoritarian regimes. This new attitude of some members of the Church forms the second major force behind the emergence of new legal services in the subcontinent.

The extent and commitment of Church involvement in liberatory struggles varies from country to country. The forms and significance of Church involvement also varies from country and from one branch of the Church to another. The Brazilian Church, for instance, is deeply involved --at all levels of the Church hierarchy-- in theoretical production, grassroot organization and mobilization. Besides, the Brazilian Church has demonstrated that it is committed to long-term/structural social change and not only changes in the type of government or political regime (from authoritarian to democratic, as it has recently happened in Brazil).[63] Just a minority of the Colombian Catholic Church,

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62. JACQUES, M. (1985) "Hacia un uso alternativo del derecho. El caso de Chile", unpublished paper, Santiago.

63. This does not mean that the Brazilian Church is indifferent to the nature of the political regime. Indeed, the Church itself was a significant force in bringing down the military governments of 1964-85. Rather, the Church does not compromise its social and political goals for the sake of supporting a specific government.

on the contrary, is committed to structural social change. Indeed, the majority of the Colombian Church restricts its reformist efforts to claims for employment, more equal income distribution and --timid-- support for human rights and civil liberties.

The scope of Church-related organizations has now moved beyond the Church itself. Associations of priests, nuns, and Christian lay people are now frequent in the subcontinent. One of the most prominent ones (and one of the hardest hit by Church internal repression) has been known in several countries as Christians for Socialism. These associations are a meeting place where Christians and Marxists establish the bases to work together and learn from each other theories and methodologies for social change.<sup>[64]</sup> The idea of constructing a dual power of the poor and for the poor, parallel to that of the state and traditional politics, seems to be the most fundamental agreement between the two.

The distinctive feature of Church supported services is the emphasis on grassroot organization. More than any other social or political organization, the Church is deeply committed to achieving the organization of low income people, preferably without the intervention of external agents. Organization of subordinated classes, usually named "organizaciones eccliales de

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64. The Papal encyclical *Pacem in Terris* (1963), theoretical advances within Theology of Liberation, and the Latin American Episcopal Conferences of Medellin and Puebla established the doctrinal grounds for an intimate association among priests, nuns and the poor as well as exchanges between Marxism and Catholic Theologians. As expected, the change-oriented branch of the Church and committed professionals quickly created associations aimed at providing material and intellectual services to grassroot people while at the same time stimulating organization, participation, and mobilization.

base", is an integral project which includes social, economic, and political goals. However, it is not tied to any specific political party. Neither is it connected with the state. Moreover, it may be either an organization opposed to the state or an organization which occasionally works together with the public sector in state-supported projects. But it has no organic links with any of the ordinary actors in the political process. It usually operates through so-called non-governmental organizations.

As a whole, this new praxis, aims at creating the new people capable of producing a new social order. It is an intimate association of religion and struggles for changing social structures of domination.<sup>[65]</sup>

The specific influence of the Church on the new Latin American legal services is a consequence of the Church's emphasis on respect for grassroot people's feelings and needs. Since the Church gave priority to the immediate as well as to the structural problems of the poor, Church-supported or Church-connected legal services reflect, more than others, a concern for empowering grassroot people to carry on by themselves their own legal and political battles. In particular, this group of legal services usually exhibit the following features:

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65. See, for instance, BIGO, P. (1976) The Church and the Third World Revolution, trans. J.M. Lyons, Maryknoll, N.Y.: Orbis Books. BRUNEAU, T. (1974) The political transformation of the Brazilian Catholic Church, Cambridge: Cambridge University Press. EAGLESON, J. (Ed.) Christians and socialism: documentation of the Christians for socialism movement in Latin America Maryknoll, N.Y.: Orbis Books. BOFF, L. (1981) O Caminhar da Igreja com os oprimidos, Rio de Janeiro: Codecri. ROSA, P.G. (1985) Marxismo, Comunismo e Cristianismo - Desafio ou Dialogo?, Sao Paulo: Cidade Nova, 1985.

- Lawyers and other professionals cannot impose beliefs, values, or political positions on the beneficiaries of legal services. Lawyers cannot even impose a preferential inclination for legal means. It is up to the beneficiaries to evaluate and decide which legal strategies are more conducive to their own goals. In this role, lawyers work together with socially and economically discriminated groups. They cannot move faster than beneficiaries or assume leadership that prevents the beneficiaries' own legal and political development.
- The role of lawyers is to provide a service in accordance with the decisions and expectations of grassroot people. In fact, lawyers are expected to become a technical branch of the groups being served. Lawyers throw light on the options and consequences of given actions. The community or group of beneficiaries decides the path to follow. At most, lawyers and other professionals play the role of one member of the group or community in the decision making process. The intellectual superiority of the lawyer is thereby demystified.
- Lawyers are expected to share the hardships of beneficiaries. This is the only way to fully understand their options and dilemmas. The barefoot lawyer is often invoked as the appropriate model for legal services lawyers.
- In order to effectively control legal services, beneficiaries have to be trained in law. Different from theoretical or abstract training, paralegal training must adopt the practical and experimental techniques of popular education. Paralegal training is expected to demystify the "scientific" superiority of legal knowledge. It is also

expected to unveil the class-character and exploitative nature of contemporary legal systems.

- Beneficiaries' organizations have to be internally democratic. Legal services lawyers must attempt to make sure group decisions do reflect the collective will of the group. Keeping this in mind, legal services lawyers must stimulate meetings and other collective decision-making opportunities. Similarly, legal services lawyers must keep a delicate balance between non-interference in the internal affairs of the group of beneficiaries and checking the real degree of leaders' representativity.

#### 2.4.5 External ideological and financial influences.

In addition to the left's restatement of political theory and the Church's commitment to strengthening grassroot power, a third critical trend has aided in advancing new legal services. It consists in the commitment of foreign aid to change and social justice.

Derived mostly from European churches and state agencies, the philosophy behind this type of aid focuses on the creation of a new democratic order. Based upon a diagnosis of Latin American governments (and some times of Northern governments as well) as exclusionary --when not authoritarian--, these funds are specifically committed to promoting oppressed people's social and political participation at all levels.

The group of agencies supportive of new Latin American legal services is ordinarily staffed by highly committed people with definite ideas about social change and political development. Although more pragmatic and less theoretically oriented than their Latin American counterparts, positions and recommendations

adopted by the staff of these foreign agencies ordinarily reflect a deep concern for "authentic" democracy and some eclectic --when not selective-- incorporation of Marxist critiques of capitalist exploitation.

Conceptualized outside Latin America, the ideas behind these foreign funds found an already sown field among Latin American progressive lawyers and change-oriented Church.[66] One of their most significant contributions to the formation of new legal services in Latin America has been their emphasis on the rights and liberatory potential of women and indigenous communities.

When church-connected, these foreign agencies exhibit the advantages of belonging to fairly independent branches of different churches. This independence allows some of them to work together in "ecumenical" undertakings. When dependent on

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66. Peru seems to provide the most fertile field for foreign development funds allocated to new legal services. Progressive professionals were driven out of the Public Administration by the military and civilian governments that came after Velasco. These professionals immediately searched for new ways to participate in the country's social and political processes. They also knew of the availability of foreign funds for social change in Peru. As a result, they gave a tremendous impetus to the Peruvian NGOs working in social reforms and social services. It is estimated that more than 100 NGOs for different social purposes were created in Peru during the 1970's.

Bilateral or International development agencies were more concerned with Peru's social and economic situation than with other South American countries. This special interest in Peru probably reflects the fact that the economic crisis of the seventies and early eighties hit Peru --and to some extent Bolivia-- more than any other country in South America. As a result, the availability of foreign funds for Peruvian NGOs devoted to social change seems to have been greater than for the other three countries included in the Research Study. Cf. PASARA, L. (1985) "Los grupos 'innovadores' de servicios legales en el Peru: estudios de caso", Lima: unpublished paper, pp 5-6.

state support, these foreign agencies tend to adopt positions of a social democrat inspiration.

Foreign agencies usually recommend the creation of NGOs controlled by poor people as an essential requirement to strengthen oppressed people's internal solidarity and social power. Conversely, new Latin American legal services can hardly expect to receive even complementary financial contributions from domestic state agencies or traditional strongholds of political and financial power in the countries where these services operate.

#### 2.4.6 New Social Movements.

Latin American social movements and grassroot organizations make up the last essential trend in the the rapid process generating new legal services.

Trade unions, peasant associations, indigenous communities, neighborhood organizations, and even women's movements existed before legal services. They had a unique tradition of mobilization to fight for long-standing legal claims to land, housing, public utilities, and equality in general. What seems to be new is their present capacity to associate themselves in wider movements of universal coverage, movements that focus on far reaching social issues.[67] It is a capacity that seems to emerge out of two current and profound readjustments: restructuring of the economy and recomposition of the labor

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67. EVERS, T. (1985) "Identidad: la faz oculta de los nuevos movimientos sociales", in Punto de Vista, vol. VII, No. 25, Buenos Aires, December, pp 31-41. BOSCHI, R.R. and VALLADARES, L. (1983) "Movimentos Associativos de Camadas Populares Urbanas", in Movimentos coletivos no Brasil urbano, Rio de Janeiro: Zahar.

market and the work force.[68]

It should be noted that, with only the exception of some women's movements and the struggle for women's rights, there seem to be more differences than similarities in the organization and mobilization of legal services users between Latin America and the economically advanced societies. The major difference being the tendencies of Latin American social movements to contextualize their own situation in a global picture and to raise far-reaching social, economic, and political issues which ordinarily go beyond the limits of a specific dispute.

#### 2.5 Peculiarities of new Latin American legal services in terms of legitimization, support, stability and evaluation criteria.

##### 2.5.1 Institutional legitimization.

Differences between the four major trends shaping legal services developments in Latin America and the forces influencing legal services in economically advanced countries help to explain the differential degree of institutional stability and legitimization legal services enjoy in each region. Attempts to give power to grassroot organizations and channels for popular participation in Latin America inevitably challenge the prevailing balance of power. Legal services in the North express a public need; they even give rise to a national consensus. For Latin America, innovative legal services necessarily generate controversy, limited support, and opposition from powerful groups.

68. Cf. MINGIONE, E. (1983) "Informalization, restructuring and the survival strategies of the working class", in International Journal of Urban and Regional Research vol. 7, pp 311-339.

##### 2.5.2 Criteria and techniques for evaluating legal services given their lack of official support and institutional stability.

Differences in legitimization account for differences in the focus of studies and evaluations of legal aid in each region. Studies of legal services in the North, where legal aid is generally thought of as public services designed to satisfy a public need, usually adopt a public administration perspective. As with any other public concern, efficiency analysis and administrative performance are perhaps the dominant topics among legal aid studies in economically advanced countries. Similarly, when institutional stability is at jeopardy, as has been the general case during the last few years, the dominant feeling among legal aid scholars is one of shock and defense of a public good which might be condemned and allowed to disappear.

Accounts of legal services in Latin America, on the contrary, cannot take social consensus for granted. Legitimation, institutional stability or commonality of interests cannot be assumed. Researchers and evaluators are forced to consider those social and political forces that either oppose or promote new legal services. That legal services have to be evaluated in this context of struggle is inescapable. Ups and downs are axiomatic. Basic research and policy oriented evaluations of new legal services have to give primacy to adequately explaining the rise and decline, achievements, limitations, and uncertainties faced by inherently weak institutions whose lives depend on a delicate national and international balance. Instability is assumed; the struggle for survival is considered congenital to institutions that live on the verge of permanent break-up.

Given a hostile environment, survival itself becomes an indicator of achievement, thus giving rise to a new source of

self-legitimation. Different from legal services in northern countries, this self-legitimation is based on the relative isolation and autonomy of NGOs rather than on public needs and public goods theory. Since NGOs are relatively free from political interference and hierarchical control, and are aimed at holistic purposes, new legal services tend to look at themselves as a self-legitimizing exercise. Through this exercise they create their own power basis. Insulating legal services from the state, political parties, and the legal community is a necessary condition for the success of new legal services. At the same time, this insulation creates a vacuum. Procedures for controlling and evaluating cannot penetrate. Peer evaluation and associations of legal services at all levels offer a substitute for outside control while providing the basis for solidarity, enrichment, and mutual stimulation. However, competition for scarce funds seems to have prevented a full-scale development of these two strategies among some new legal services.[69]

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69. According to the Research Study, most legal services, either oriented towards social change or not, work in relative isolation, with very little contact with peer groups.

For reasons pertaining to their recent past or current national political experiences, the Brazilians and the Chileans are more prompt to create national networks and associations. Peruvians, Ecuadorians and Colombians seem to be less inclined to institutionalize cooperation among the legal groups in each country. In any case, there is a need to design alternative evaluation techniques. Evaluation might be performed by the users or beneficiaries, or by peer NGOs. In the first case evaluation itself becomes one more opportunity for popular participation. In the latter case all legal services organizations involved in the evaluation process benefit from the exercise. ILSA presently promotes the creation of local, national, and regional (Latin American and Caribbean) associations. It is also working on the design of participatory and horizontal evaluation models.

Although efficiency and effectiveness are also questions raised with respect to new legal services in Latin America, these questions are usually given secondary consideration when compared with the --priority-- issues of organizational & community development, beneficiaries' participation and self-confidence, and overall social and political impact. This is to be expected since the initial diagnosis leading to the creation of new legal services indicated that the real obstacle oppressed groups encounter is not their inability to hire a lawyer. On the contrary, the obstacle is how to achieve social change, a goal that reduces the importance of cost-benefit analysis in evaluating legal services.

Consequently, the new legal services' own criteria to evaluate themselves are characterized by an implicit combination of some of the following features:

- Monetary costs are not given appropriate weight since the whole financing scheme lies entirely outside market evaluations.
- Social and political benefits --though intangible-- outweigh legal results.
- Small-scale projects are attributed an invaluable experimental character.
- Lawyers' opportunity costs are not given appropriate weight; their time is considered part of a political commitment.

New legal services are based on two premises: (1) social development is hindered by an inherited structure of political and economic exclusion of oppressed groups; (2) disorganization, skepticism, mistrust, apathy, lack of participation and absence of self-confidence abound in these same peoples. Similarly,

those involved with new legal services assume that these services --besides providing immediate relief for some legal needs-- have the potential to make a dent in long-entrenched traditions of exclusion and discrimination. Social and political impact --rather than performance in legal services delivery-- become the appropriate measure of institutional achievement.

**2.5.3 Strategies, evaluation, and control of services that have numerous objectives.**

Multiple objectives, one superimposed on the other, characterize new legal services. Efficient provision of legal services, grassroot organization and community development, building up minorities' self-confidence, training paralegals, and opening new channels for social and political participation are among the goals most frequently desired by new legal services. All of them fit the more general purposes of promoting new social justice, ameliorating class oppression, racism, and sexism, and advancing a new concept of political democracy.[70]

Fulfilling all these purposes to the same extent and at the same time is practically impossible. Establishing priorities, balancing out different objectives, and designing appropriate strategies thus become an essential task --although a very complex one-- of new legal services. Evaluation and control of such a complex set of goals and strategies --some of them producing intangible results-- is an equally challenging undertaking. Appropriate methodologies have to be designed for new legal services. These methods not only have to promote equal access to justice administration and the legal system accross sex, race, and class boundaries, but also serve as a means for

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70. See 2.6.2. below.

building-up alternative fortresses of political power.[71]

The Research Study found that multiple purposes have created a challenge to traditional evaluation techniques. Case studies revealed the following correlation: The more change-oriented a legal service group is, the more it is likely to resent simple evaluation techniques geared mainly or exclusively at measuring legal performance and results. Formulation of acceptable evaluation methodologies, adequate for multiple goals (legal, social, economic, and ideological) of legal services projects, has thus become a necessity.[72]

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71. Part of the difficulty lies, of course, in the fact that some groups fear they may suffer political or economic repression if they openly communicate all their purposes. However, the Colombian and Peruvian case studies carried out for the Research Study indicated that the difficulties in establishing suitable evaluation techniques would be significantly overcome if the following two conditions were met:

- Drafting and circulating guidelines for project evaluation. However, concrete evaluations have to be tailored to specific project purposes, and community and country circumstances.
- Making very explicit the long- and short-term goals, the feasibility of and the conditions affecting each one of the project goals, the critical path of activities and intermediate purposes, and the methodologies capable of reaching each one of the intended purposes of every new legal services project. Dividing the project into several sub-projects might be an appropriate, intermediate tool.

ILSA is currently implementing these and other recommendations aimed at enabling legal services groups and funding agencies to cope with the problems derived from multiple purposes projects and programs.

72. However, case studies also indicated that, in spite of this difficulty, multiple purposes have not yet been an obstacle to obtaining funds from foreign agencies committed to social development. Yet the pressure is there. If suitable methodologies, capable of fulfilling the expectations and

#### 2.5.4 Financial problems as a source of institutional instability.

Given the lack of domestic support from powerful groups, Latin American legal services committed to social change usually adopt a strategic combination of austerity, self-discipline, and a heroic type of attitude, on the one hand, and increased dependency on foreign funds and support in general, on the other.[73] Clearly, both strategies further prevent institutional stability and development.

Foreign contributions are the main source of financing for new legal services. Domestic contributions pay for traditional legal services. Indeed, the whole movement of new legal services cannot be explained if dependence on foreign funds is overlooked. The number of legal services groups, their independence vis a vis domestic governments and the legal profession, the number of lawyers hired, the connection with other research and action organizations working along the lines of popular participation and holistic development strategies --these are features that cannot be explained unless the links with foreign funds devoted to social change are taken into account from the outset.

Financial independence is not ordinarily on the agenda of

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bureaucratic requirements of both sides, are not conceived and implemented soon, well-intentioned staff members of development agencies might be forced to switch their support to more narrowly focused, traditional legal aid programs and projects.

73. According to responses given during the Research Study, lack of financial resources was found to be the single major difficulty legal services face. Excessive demand and lack of skilled personnel were also frequently cited as problems.

Latin American legal services. The international funding agencies, however, ordinarily require some sort of local financing and beneficiaries' contributions. This requirement serves a double purpose: it implies users' or --at least-- local evaluation of the benefits of legal services; it helps to make legal services a self-sustainable effort, less dependent on foreign funds.

New legal services feel that they comply with their own invisible institutional statutes by remaining independent of powerful local groups. Dependence on international support from one source or another becomes inescapable. Since foreign-funding agencies and new legal services lawyers often share some philosophical principles for development, lawyers like to believe both types of entities are part of one and the same worldwide campaign, thereby minimizing the implications of dependency. Institutional stability depends largely on continuous outside support. Since short-term financing or project financing are not usually complemented by medium-term and institutional financing, financial instability becomes a major source of institutional instability. Yet, seeking to avoid intermediaries and to reach low income people as directly as possible, international development agencies prefer short-term/project financing in order to avoid either excessive or permanent bureaucratization of legal services. After all, the theory of non-governmental organizations claims that these groups are not only participatory in nature, but more efficient and effective than the heavy bureaucratic apparatus of the modern state.

#### 2.6 The particularities of Latin American users of legal services.

We indicated above that beneficiaries' organizations constituted one of the peculiar factors of Latin American new legal services. This section summarizes the main distinctive features of those Latin America grassroot organizations.

#### 2.6.1 Criteria to select users of new legal services.

The survey findings confirmed that most new legal services purposely serve selected collectivities. On the contrary, the same source indicated that 70% of traditional legal services provide expertise to any poor person, regardless of their individual or collective character.

Users of new legal services are not chosen at random. When a legal services program starts, a long-term relation is going to be built up between lawyers and grassroot groups or communities. Such a relationship can only flourish in the context of a common understanding about the nature of the project and a minimum affinity regarding social postures and political expectations. Since beneficiaries often actively participate in the design, administration, or control of the project, legal services groups carefully select them. Selectivity is a key factor, totally absent in government programs for massive and indiscriminate legal aid for the indigent, that produces more success for new legal services. Although most of the beneficiaries are either very poor or sexually oppressed, measures of capacity to pay ("means tests") are not among the principal screening criteria. Class actions are not excluded; however, new legal services are not particularly interested in dispersed or anonymous beneficiaries.[74]

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74. Neighborhood clinics in particular are not exempt from individual requests for sporadic legal services. Casual clients

#### 2.6.2 Political and organizational development as a prerequisite.

When asked what groups they primarily work with, new legal services listed 162 groups, distributed as follows: 43 were trade unions and workers' associations; 35 were peasant groups and indigenous communities; 26 were neighborhood groups; 20 were women groups; 12 were human rights groups; and 26 were groups or organizations of a mixed nature.

Community cohesion, organizational development, on-going mobilizations, or some degree of self-confidence and political awareness are some of the most frequently used criteria to select a group of beneficiaries. Other criteria would prove inadequate since the participatory nature of the project requires that both lawyers and users advance at the same time. Lawyers cannot impose their own strategies or points of view. Neither are users allowed to completely deviate the project from its original goals. The required symbiosis of users and lawyers brings into existence potential frictions between the two, creating a new source of institutional instability for new legal services. The more organized beneficiaries are, the more likely they are to have their own social and political agenda. Conversely, the more committed lawyers are to social change, the more likely they are to attempt imposing their own project rhythm and political views

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bringing minute problems or immediate concerns to the attention of the clinic staff are inevitable. Consultations which are largely irrelevant from the point of view of grassroot development are equally unavoidable. People looking for individual psychological relief often knock at the door of legal services offices. However, new legal groups quickly learn to transfer those cases to institutions primarily designed to take care of them. Government programs, and university legal, medical, and psychological services have been created precisely to take care of such cases. Church staff may also relieve the anguish of distressed individuals.

on the community they serve. Reconciling the goals of building grassroot autonomy and maintaining the project free from political interference is not an easy task. Drawing the line between traditional political methods and genuine new forms for building grassroot power is an endless --sometimes subtle-- exercise.

#### 2.6.3 Local, small-scale projects and limited coverage.

Few legal services claim to have national coverage. More frequently legal services serve one or several cities or rural areas.[75]

Selectivity and focus on community development are contributing factors to the rather small-scale of Latin American new legal services. Indeed, if seen within the universe of potential beneficiaries or the total number of cases being handled by the court system, the coverage provided by new legal services is not far reaching. Deliberate selection of beneficiaries excludes most possible claims to having selected a statistically representative sample from the universe of potential beneficiaries.

Even more problematic for new legal services, the number of cases handled by government programs or university-trained legal services is usually larger than the number actually taken care of by new legal services. Although there is not sufficient empirical evidence, preliminary data suggests that caseload per full time lawyer or dollar invested in legal services is larger

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75. Ecuador has a larger proportion of rural legal services than any other country. This can be expected given the relative proportions of rural and urban population in the four countries under study.

in traditional legal services than in participatory ones. This should be expected: new legal services have to fulfill more difficult and meaningful purposes than traditional legal services.

The number of cases handled, although a valid indicator if appropriately contextualized, cannot be taken as an absolute indicator of efficiency or achievement among new legal services. Moreover, new legal services probably produce multiplier and demonstration effects of invaluable proportions for entire communities. New legal services can usually be seen as "pilot projects" with an experimental character. As such, the whole society learns from them. In economic terms, these services produce invisible externalities of a qualitative nature.

Geographical distribution of potential beneficiaries does create technical problems for new legal services and further restricts their quantitative coverage. Of the four Andean countries included in the Research Study, Chile and Peru tend to concentrate new legal services in the capital of the country. In Colombia, although similarly concentrated in the major cities, there are innovative experiments of federation and decentralization. Ecuador is perhaps the country with best geographical distribution of legal services, covering both urban and rural areas.

Current efforts at geographical decentralization raise the total and per capita cost of new legal services and accentuate their localized/particularistic nature. At the same time, servicing isolated communities ordinarily requires a lawyer-in-residence. In this case, lawyers are more fully integrated into community life. Besides, sharing daily life with the community appropriately tests lawyers' commitment to

participatory development through grassroot approaches.[76]

Regional and intra-country heterogeneity further requires a rather local & small-scale approach to new legal services, specially those aimed at rural communities. Local culture and economic diversity, racial and social specificity, as well as a tradition of particular --often isolated-- struggles provide the basis for unity and community self-confidence. Centuries-old forms of communication and organization, or recently formulated endogenous social rules supply examples of non-capitalist legal systems, thereby stimulating a creative imagination about endogenous, community or collective, non-liberal legal order. Numerous experimental or permanently institutionalized forms of parallel legal systems, informal justice, and popular tribunals in Latin America --regardless of their success or failure-- illustrate how the law can capture and liberate the potential of grassroot people's struggles to control their own legal environment.

However, social segmentation hinders the formation of potentially larger communities as much as it makes groups aware of their common needs at a smaller-scale. It has only been recently, when the urban population has quantitatively surpassed the rural population, and capitalist transformations are breaking down the old barriers of labor market segmentation, that the basis for grassroot movements of universal coverage has developed.

76. As a matter of fact, European and Canadian development agencies often require that professionals live in the communities they serve as an essential component of a development project.

#### 2.7 Searching for an appropriate organizational form.

As stated above, institutionalized legal services are a relatively new phenomenon in Latin America. This is particularly true of new legal services, the overwhelming majority of them having been created during the last decade. Data from the Research Study indicates that 87% of new legal services began during the mid-1970s with about half of them starting in the last five years. On the average, traditional legal services tend to be older.

New legal services are not the outcome of a rigorously developed plan. They blossomed like wild berries in open fields, when the appropriate social, political, and ideological combination of factors created a favorable climate. When these factors change, the legal movement tends to readjust. If changes are substantial and unfavorable, the new legal services movement may eventually die.

Lacking a rigid prestructured format and being relatively young and dynamic, new legal services are still defining their organizational and institutional shape.

The following paragraphs present a summary of the organizational features of Latin American new legal services in terms of institutional framework, goals, personnel, activities, and relationship with beneficiaries.

##### 2.7.1 Institutional Framework: The Size and Structure of Legal Services Groups, Projects, Programs, and Organizations.

Most new legal services are part of a major institution which provides other services for the poor. This is also true of

traditional legal services since they are usually connected to law schools, the state, or the more traditional branches of the Church. Out of a total of 75 new legal services, 41 were branches of a larger institution, usually a non-governmental organization devoted to studying and aiding the working classes. Twenty-one of those 75 were either primarily or exclusively dedicated to legal services, and 5 were individual lawyers mainly devoted to providing legal services for the poor on a free or subsidized basis.

This integration of legal services with institutions of a larger scope comes as no surprise since new legal services grew from wider social and political movements that use interdisciplinary tools to carry out comprehensive strategies. As for traditional legal services, their connections with governments, churches, and universities are the outcome of state policies and a Latin American tradition in which the Church often substitutes for the State.

Insertion of new legal services within non-governmental organizations of a wider scope are a peculiarity of Latin American legal services which produces advantages and disadvantages for legal services themselves:

- Integrating legal services within a larger institution provides a political umbrella, facilitates national and international contacts, guarantees minimum financial stability, raises the chances of continuity, produces economies of scale, and heightens the quality of the program by introducing complementary services and controls to those already provided by the lawyers themselves and the beneficiaries. Non-governmental organizations of wider scope and larger size possess more technical qualifications for multipurpose programs and are more capable of assuming

and accepting internal and external evaluation and criticism. Besides, they are more accountable in terms of financial and political control. They are also relatively free from dependence on any one personality and from personality conflicts. Generally, insertion of legal services projects within larger and far-reaching institutions strengthens the stability of legal services programs. It is particularly useful in view of the small size, local dimension of most new legal services.

- Connecting legal services to interdisciplinary organizations, while convenient in terms of institutional strength, runs the risk of diffusing legal services into a whole series of parallel or complementary activities. Moreover, independent, small-scale legal services offer some advantages that are ordinarily lost when legal services programs are made part of a larger institution:

- \* Small legal services projects are usually free from bureaucratization and self-perpetuation attitudes.
- \* Small, independent legal services are also responsible for extending the coverage of new legal services to areas and beneficiaries large institutions do not usually reach.
- \* Independent legal services programs are directly run by committed lawyers who conceive the project in the first place and link themselves to the beneficiaries.
- \* Small-scale legal services organizations are free from some of the diseconomies of scale already visible in some of the largest Latin American research and action organizations.

In sum, the case studies conducted during the Research Study indicate that integrating legal services within a larger institution is particularly appropriate for medium and long term projects or for projects characterized by a holistic or more comprehensive approach to social change, free from restrictions imposed by disciplinary boundaries. Small-scale, independent legal services, on the other hand, seem to be the most suitable organizational structure for short-run, well-defined, and precisely located projects; ones that focus on law itself and require a lot of creativity and dedication from the lawyers' staff.[77]

#### 2.7.2 Specific development purposes of Latin American participatory legal services.

According to the research Study, a clear cut difference separates the purposes of new from those of traditional legal services. Support for grassroot organizations is the primary goal of new legal services while aid to the indigent prevails among traditional ones.

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77. The case studies indicate that the current allocation of legal services programs and projects between primarily large, broad interdisciplinary institutions and primarily legal services organizations does not follow the above criteria. Actual institutional distribution of legal services projects between both types of organizations seem to be made in a rather haphazardous way. ILSA is currently emphasizing the comparative advantage of each type of organization and recommending appropriate combinations of them for the region. In particular, ILSA has directed its efforts at identifying local, national, and world-regional areas where services are more urgently needed, yet not being provided. It also promotes more interaction between large and small legal services groups. This interaction can encourage large-scale organizations to provide technical assistance and institutional protection to small-scale legal services without absorbing them or destroying their independence and creativity.

Different from legal services elsewhere, Latin American new legal services do not reach their overall goals by creating the necessary conditions to insure equal access to law. True, gigantic economic, cultural, and political barriers prevent equality before the law and the administration of justice. However substantial, these barriers to equality in law in action are not the only political challenge faced by new legal services in Latin America. The political character of new legal services is restricted neither to opposing a particular governmental regime nor to serving as a substitute for the state and its services.

Latin American new legal services have their own criteria for evaluating achievement, ones which include goals other than the service itself. These goals comprise global social and political development purposes. To meet these goals, new services for Latin America have to be political. As used here, political means a philosophy of social and economic development. It is a holistic conception of social organization, one that is likely to challenge the very premises of the legal and constitutional order. It is therefore necessary to examine the particular goals of new legal services in Latin America.

- New Latin American legal services aim at strengthening grassroot power. In this sense, legal services do not compete with the state or political parties. They seek neither to represent others nor to funnel the energy and creativity of low-income people via the state apparatus. They challenge the existent social structure neither by disputing its sources of electoral power nor by manipulating the same tools traditional political parties do. New legal services continuously search for alternative expressions of people's power. They take a parallel route to transform the political system. Theirs is a long-term project. Because

of the temporal frame, results are necessarily diffuse --often including fatigue and short-term frustration.

- Grassroot power is strengthened by people participating in decision making at all levels affecting their social life. Participation begins at the most elementary levels of the family and the local community and proceeds up to the most general levels of decision making and conflict resolution. For participation to effectively take place, it is necessary to strengthen self-confidence, aspirations toward sexual and economic equality, and community life. People forming the grassroot movements also need to develop more consciousness about basic needs and human rights and formulate clearer ideas about what a direct democracy looks like. Popular participation and community development in search of a new type of participatory democracy thus become a goal of new legal services. Legal services play a double role as part of this global development strategy: they are a means for insuring equality and satisfying basic needs; they promote participation, organization, self-confidence, and community solidarity.
- Direct grassroot people's participation in legal services programs cannot be restricted to minute administrative duties and policy decisions. Participatory legal services should be a hands-on experience of minority or grassroot control of resource allocation --land, savings, the labor force, and public utilities. Democratic community decisions should replace the rules of the market as well as the basic assumptions and laws of contracts. General and impersonal rules are likely to be replaced by particular decisions that take into account the relative situation of the parties involved. New rules and decisions are likely to assume a state of initial inequality rather than formal equality

among parties in conflict. This assumption exemplifies how the most fundamental premises of legal liberalism are challenged by the premises and programs of new legal services. Indeed, new legal services expect to promote the creation of an alternative legal system.

- New legal services usually assume that grassroot people do maintain their own legal system. Endogenously grown legal systems are expected to better fit the values and relations of low-income people than the imposed official legal system. Thus, new legal services ordinarily rescue and underscore grassroot people's own legal culture since it is expected to embody the potential for an authentic alternative legal system. New legal services try to protect low income people's own decision making process for conflict resolution among themselves, away from courts and the official legal system. Lawyers conduct their own legal anthropology studies of indigenous people. Legal services groups for women emphasize the non-adversarial approach of women to conflict resolution as well as women's dissatisfaction with the whole legal system. Neighborhood legal clinics praise the efficiency of informal popular tribunals in handling misdemeanors and applying social sanctions of a constructive character. Rather than imposing official legal rules, legal services lawyers actively promote mediation and community decision as a means to capture the so-called Informal Justice practiced by the community when it is not forced to deal within the official legal system. New legal services achieve, therefore, another of their goals by fostering low-income people's capacity to develop their own rules for conflict resolution and by stimulating self-confidence in being able to resolve their conflicts.

- Latin American legal services do try to create the necessary conditions for "equal justice" or "equal access to justice". They also work for parity between litigants. The need for legal services is such that often lawyers have to relegate other purposes in their daily work. Only a few groups participate in law reform efforts to improve poor people's access to the administration of justice. However, change-oriented lawyers cannot be optimistic about ever reaching this goal under present social and economic structures. For example, coverage of legal services for the poor, either participatory or otherwise, is very limited in all countries. Moreover, restricted access to justice and legal counseling is an inherent characteristic of class societies, in particular those where the welfare state and distributional policies never reached the bulk of the poor. Unequal access to justice is neither an inevitable nor a neutral or technical result of economic development. For these reasons, the problem of inequality before the law cannot be solved in isolation, independently from a comprehensive strategy for social and economic development. Consequently, most Latin American new legal services consider aid for the indigent a means and an opportunity for the organization and social transformation at a local scale as much as an essential ingredient to ameliorate beneficiaries' well-being. These two purposes, if successfully balanced, might give rise to economies of scale and produce demonstration and multiplier effects that extend coverage beyond today's limited numbers.
- Most new Latin American legal services not only attempt to keep a delicate balance between law and politics, but also try to discover the political nature of law. They do not try to divorce law from politics. Most legal services

programs include an educational component that --besides training beneficiaries to become paralegals-- contains a critical perspective of the official legal system. Some of the programs are careful to systematically discuss the limits of conflict resolution when the legal outcome has a positive sign for grassroot people.<sup>[78]</sup> There is hardly any room for legitimization of the official legal system. These attitudes explain why, contrary to legal aid developments in the Northern Hemisphere, Latin American legal services are more concerned with development than with law reform. Lawyers are not as much fascinated by piecemeal law reform (even if cumulative) as they are by social transformation of particular groups or communities. In this sense, they resemble more closely politicians and social workers than lawyers themselves. The public interest law firm never took root in Latin America, in spite of its obvious advantages in terms of impact, coverage, and publicity. Although most Latin American legal services groups actively participate in preparing reform proposals aimed at improving procedural justice, reform of legal processes is not their main goal. It could be argued, accordingly, that new legal services are low-profile organizations.

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78. These legal services groups emphasize the exceptional character of a particular agreement or judicial decision when the (positive) outcome is attributable mainly to unique political circumstances. Even when legal services contribute to specific law reform, lawyers carefully demonstrate how limited an achievement it represents, since the reform is still immersed in a global legal system which does not favor the development purposes being pursued. They make a deliberate effort to establish the links between specific law reform and the whole substantive and procedural legal system, efforts that strengthen the search for alternative legal systems.

Summing up, new legal services in Latin America work to change fundamental political relations. Fulfilling the promises of legal liberalism functions merely as a necessary means to satisfy basic needs, promote community organization, and foster self-confidence among community members while trying to construct an alternative legal system. Yet, legal services groups realize that significant structural constraints hinder the fulfillment of the promises of legal liberalism. These groups search for an answer to a major contradictory policy question: How can lawyers effectively elevate grassroot people's welfare, guarantee equal rights for minorities, and promote a new social order that reflects these groups' conception of development, while using the technical tools to work selectively within the present legal system? I shall come back to this question on Section 3 of this article.

#### 2.7.3 Personnel. Relevant particularities of the Latin American legal profession and legal services lawyers.

Let me first address the issue of professional composition of new legal services groups. Specific considerations about the type of lawyer that integrates these services are presented in the latter part of this section.

There are about 230 lawyers working full-time for 75 new legal services in the four countries included in the Research Study.

The total figure for casual and permanent (both, part-time and full-time) lawyers is approximately 1,000. However, more than one-third of change-oriented legal services programs do not even have one full-time lawyer and 37% of them can count on only one lawyer. This information confirms the assertion previously made about the relatively small size of most new legal services programs and projects.

On the average, Colombian legal services groups receive substantially more of lawyers' time than legal services in the other three countries. This may be due to the higher degree of institutionalization of Colombian new legal services when compared with Chile or Ecuador.

More than 95% of those lawyers working for new legal services in Colombia, Ecuador, and Peru are paid for their work. This figure contrasts sharply with the remuneration change-oriented lawyers in Chile receive. Less than 30% of them are paid for their work. The low figure may be explained by the fact that 66% of all Chilean legal programs do not have any full-time lawyers. Lack of full-time lawyers and apparently weaker organizations may be attributable to the less than favorable political conditions new legal services face in Chile.

Broadly speaking, external financing (that is, financing that is not internally generated by the project) guarantees some sort of salaries for lawyers. Usually funds come from international development agencies. The proportion of beneficiaries' contributions or other local sources of funds is very limited.

The Research Study only pulled together some scattered information on lawyers' salaries. This evidence, when complemented by the researchers' own experience and casual observations, provides the basis to formulate some preliminary hypothesis regarding the relative wages of lawyers working for new legal services vis a vis the rest of the profession. Externally financed new legal services projects tend to pay staff lawyers, on the average, either slightly below or in accordance with market rates. Leaders of externally financed projects and distinguished individual lawyers providing subsidized legal services for the poor tend to earn less than their opportunity

cost.[79]

More than one third of new legal services have part-time lawyers. Part-time lawyers may serve as a link with the legal profession since, besides doing change-oriented legal services, they are likely to practice law.[80]

Few new legal services hire casual lawyers. This can be expected since these services require both commitment and development-oriented training from lawyers.

New legal services make limited use of law students. A total of 128 law students or persons who had some legal training served the 75 new legal groups found in the four countries. This is a very small figure when compared to the potential number of law

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79. This is all very subjective since there is no such a thing as "competitive market rates" for lawyers in Latin America. The supply side of legal services is highly stratified, constituting in fact several different markets. A significant number of lawyers may be unemployed, underemployed or in a situation of disguised unemployment while a few practicing lawyers earn some of the highest incomes in the country. Moreover, I have formulated the hypothesis that the mere fact of working for new legal services marginalizes these lawyers from the more traditional branch of the profession. Cf. ROJAS, F.(1982) "Descriptions towards typologies and analysis of legal aid trends in Latin America". Bogota, Colombia (unpublished paper).

80. It may also be a symptom of underemployment on the part of legal services lawyers. However, no definite conclusion can be reached until further evidence is collected about the real market opportunities open to lawyers linked to new legal services. Again, it may very well be that young lawyers implicitly opt to be out of the legal mainstream --thereby reducing their chances to potentially participate in the most lucrative legal markets-- by the mere fact of practicing law in forms that result unacceptable to the dominant economic and political interests in the country.

students that might work for legal services.[81] Idealistic young law students, open to social critique and critique of the profession, offer a large potential workforce for expanding legal services, if they can be adequately trained and stimulated. Indeed, some law students perform participatory legal services for free, as evidenced by the fact that only 73% of the law students or law-trained persons without professional degrees working for new legal services received any form of payment.

However, both universities and legal services groups are responsible for the low number of law students involved with legal services. With a few exceptions, new legal services have been suspicious of university-controlled programs. Their primary goals are services and social change rather than professional training. Bringing law students into the service may either disrupt or slow down the internal process of political development. It might also jeopardize the quality of the service.

Law schools, in turn, have usually feared or resented the critical and interdisciplinary approach that change-oriented programs use in legal training and practice. Still, there seems to be room for some mutually beneficial cooperation between new legal services and law schools willing to confront law in books with law in action. Legal services have to provide an adequate space for law students in the process of political and professional formation. They also have to aggressively recruit law students. Law schools, in turn, need to grant academic

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81. Although generally restricted by law or the bar association, law students are ordinarily allowed to carry out certain routine legal tasks.

recognition to students working for new legal services.[82]

As expected, new legal services make use of paralegals selected from the group of beneficiaries. Traditional legal services make no use of paralegals.

Training beneficiaries so that they can defend themselves and augment their self-confidence is an essential part of the so-called "grassroot" approach to social and political development. The training process does not immediately challenge the monopoly of the Latin American legal profession. For example, beneficiaries of new legal services have been traditionally excluded from the legal services market for economic, cultural, or political reasons. Successfully training paralegals from low income communities may, nevertheless, erode some law schools justification of exclusiveness: the maintenance of "scientific rigor".[83]

However, the number of paralegals (39 in the 75 programs in the four countries) served by new legal services was still very small at the time of the survey. Several hypothesis may explain this rather limited use of beneficiaries as paralegals. One might reasonable argue that there has not been enough time to train paralegals since most new legal services were recently created. Similarly, the rather small size of most legal services projects may prevent them from systematically devoting resources

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82. Again, ILSA is currently working on schemes aimed at institutionalizing links between progressive law schools and new legal services.

83. It can be argued that training paralegals, as well as the net impact of new legal services as a whole, reduces the costs of reproduction or socialization of the working classes. This --more fundamental-- criticism of new legal services is discussed under Section 3 below.

to training community members. A third hypothesis would contend that lawyers fear paralegal training might make them superfluous to the community and development agencies. None of these hypotheses has yet been rigorously tested.

Judging from this limited use of paralegals, Latin American new legal services cannot presently take advantage of hypotheses and recommendations designed for the U.S. legal services community. For example, increasing use of paralegals in the U.S. tends to permanently reduce the costs of delivering legal services. Similarly, growth in the use of paralegals might keep a practice "outside of the law", thereby preventing control or regulation of arbitrary actions within that practice.[84] Clearly, none of these hypotheses can be applied to new legal services in Latin America, at least for the time being.

As also expected, given their interdisciplinary approach, new legal services make more use of professionals from other disciplines. Seventy-eight per cent of new legal services make use of professionals other than lawyers: primarily economists, social workers, and psychologists. Just 49% of traditional legal services resort to professionals other than lawyers, usually in conjunction with programs that train university students in social sciences.

To generalize about the professional composition, new legal services primarily include lawyers, either by themselves or in association with other professionals in programs and institutions of wider scope. One might then ask where do these lawyers come

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84. MENKEL-MEADOW, C. (1985) "Nonprofessional Advocacy: The 'Paralegalization of Legal Services for the Poor'", in Clearinghouse Review, vol. 19, No. 4, Summer 1985, Special Issue, "Poor Clients Without Lawyers: What can be done?", pp 403-411.

from, specially given the stereotype of Latin American lawyers as aristocrat, otherwise elitist, or, in any case, servile to the dominant interests in each country?

I have made above two different --apparently contradictory-- references to Latin American lawyers. First, I referred to the elitist legal education, high income, and social origins of the Latin American Lawyer during the first 60 years of this century as two of the obstacles poor people face during a search for justice. Unequal access to justice is then compounded by the highly technical-formalistic character of Latin American legal systems. Formalism provides, in turn, a firm basis for a professionally controlled monopoly. It also apparently legitimates lawyers' claims to hierarchical positions within society.[85]

Then I referred to a new type of lawyer as one of the major factors responsible for the emergence of such a peculiar phenomenon as new legal services. Motivated by the general social and political climate, and often by courses given at the university by critical professors, this group of lawyers has criticized the social role of the traditional lawyer. They have proposed, in practice, alternative models of the role a professional committed to justice should play. They willingly share knowledge, organizational skills, political expectations,

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85. LYNCH, D.O. (1983) "Hundred Months of Solitude: Myth or Reality in Law and Development?", in American Bar Foundation Research Journal, No. 1, pp 223-239. LYNCH, D.O. (1981) Legal Roles in Colombia, New York-Upsala: International Center for Law and Development. LOWENSTEIN, S. (1970) Lawyers, legal education, and development: An examination of the process of reform in Chile, New York: International Legal Center. THOME, J.R. (1979) "Legal and Social Structures and the Access of the Latin American Rural Poor to the State Allocation of Goods and Services", in Research in Law and Sociology, No. 2 (Spitzer, Ed.).

and even ways of life with grassroot people.[86]

How can we account for the present coexistence of these two different types of lawyers? Studies of the Latin American legal profession indicate that significant differences exist from country to country. Participation in the national experiences of populist-reformist regimes such as Peron in Argentina, Getulio Vargas in Brazil, or Velasco in Peru, imprinted some social concerns and political awareness on the behavior of bar associations as well as the orientation of law schools in those countries.[87]

Lawyers' participation in "modernizing" experiences such as those of the Brazilian dictatorship during 1964-1985 led them to adopt more instrumental legal reasoning (as opposed to formalistic legal reasoning).[88] In Peru, the government organized by Velasco in 1968 imposed a set of reforms aimed at distribution and nationalization of economic resources, and mobilization and participation of low-income groups. It was a mobilization induced and organized by the state, sometimes called "mobilization from above". As such, it was different from the type of mobilization new legal services seek to promote.

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86. LYNCH, D.O. (1978) "Lawyers in Colombia: Perspectives on the Organization and Allocation of Legal Services", in Texas International Law Journal, vol. 13, pp 199-220. THOME, J.R. (1984) "New Models for Legal Services in Latin America", in Human Rights Quarterly, vol. 6, November, pp 521-538.

87. FALCAO, J. (1984) "Lawyers in Brazil", paper prepared for the meeting of the Working Group for Comparative Study of Legal Professions of the ISA Research Committee on Sociology of Law, Bellagio, Italy, July, 1984 (unpublished, first draft).

88. GARDNER, J.A. (1980) Legal Imperialism: American Lawyers and Foreign Aid in Latin America, Madison: University of Wisconsin Press.

However, the Velasco reforms challenged some traditional Peruvian institutions associated with the dominant classes that want to preserve an unjust social order. The administration of justice and the legal profession were among the social institutions questioned by the Velasco government. No doubt, this government stimulated the emergence of new critical social and political forces, the new legal services lawyers among them. Opposition to dictatorships at different times has stimulated lawyers' social and political consciousness.

However, by and large, the Latin American legal profession remained fairly distant from the interests and demands of low-income people. More often than any other profession, lawyers occupied the highest hierarchical positions in Latin American societies.

Probably the single most influential factor in the emergence of a new type of lawyer, shared by most countries in the entire region, has been the growth in the number of law graduates. Proliferation of law schools and evening law programs have allowed the entrance of medium and medium-low income classes into the legal profession. Internal stratification of the profession, occupational differentiation of lawyers according to law schools or income level, and some degree of unemployment have been consequences of the accelerated increase in the number of lawyers during the last two decades. Another consequence has been the political radicalization --and even unionization-- of lawyers and judges. Growing concern for law in action and social justice also visibly reflects the explosive growth in the number of lawyers.

Similarly, critical lawyers and critical legal teaching have

also flourished.<sup>[89]</sup> Of the four Andean countries included in the Research Study, the role of critical legal teaching is most evident in Peru. Many new legal services lawyers in this country graduated from the Catholic University. Beginning in 1967, the Law School of the Catholic University changed the curriculum as well as the contents and methodology of courses which, under the inspiration of the North American contrast between law in books and law in action, led to the formation of critical lawyers in Peru. This contrast was quickly complemented or superseded by more critical schools of thought which eroded the previously unchallenged reign of natural law and positivism.<sup>[90]</sup>

Given the existence of these two types of lawyers, what is the professional profile of typical new legal services lawyers? They are not necessarily the unemployed ones nor graduates of the least prestigious law schools. Indeed, a majority of them seem

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89. Besides many local or national groups, three working groups of regional Latin American coverage have been researching for the last few years the areas of law and sociology, and critical legal studies. The CLACSO (Consejo Latinoamericano de Ciencias Sociales) working group on Law and Social Sciences, based in Buenos Aires, has existed for some eight years now. Besides stimulating other forms of regional exchanges, this working group has held four Latin American conferences. The Latin American group of critical criminologists has also been very active in exchanges and publications during the last 10 years. The third group is "Critica Juridica", a joint effort of Universidad Autonoma de Puebla and Universidad Autonoma de Zacatecas (Mexico) under the dynamic leadership of Oscar Correas. Operating for some 3 years now, they publish the journal Critica Juridica. Revista Latinoamericana de Politica, Filosofia y Derecho.

90. The impact of North American inspired reforms on legal teaching was less evident in Brazil, Chile, and Colombia. Cf. GARDNER, J.A. (1980) Legal Imperialism: American Lawyers and Foreign Aid in Latin America, Madison: University of Wisconsin Press. LYNCH, D.O. (1983) "Hundred months of solitude: myth or reality in law and development?", in American Bar Foundation Research Journal, pp 223-239.

to have graduated from elite traditional schools. What distinguishes them is a critical attitude towards traditional forms of practicing law. Their views are primarily a critique of the legal profession. It is both a moral and a political critique of a profession that remains blind to inequality and injustice. From a cultural viewpoint like Habermas', one can see that they communicate their rejection of the profession through minute symbols: informal dress, adoption of working class forms of speech, or casual (as opposed to formal) manners. Some of them even chose to isolate themselves from the rest of the profession, constituting a small ghetto for socialization and mutual stimulation. Although not necessarily articulate in political theory, new legal services lawyers share some of the same criticisms of the legal and political system other Latin American critical social scientists have.

#### 2.7.4 Legal and extra-legal activities. Types of legal issues undertaken by strategic legal services.

The types of legal issues new legal services engage in are not particularly different from those assumed by other legal services in Latin America or elsewhere. As usual, legal counsel is the most frequent service legal groups provide, followed by representation in courts, police or administrative agencies.

Mediation has not been a privileged activity of new legal services groups. The Research Study ranked it among the least frequent activities these groups undertake. This might be due to the fact that new legal services ordinarily serve low-income individuals or communities in conflict with government, high-income individuals, or corporations. Disputes among people of different social classes seem to be less prone to mediation or private transaction than horizontal conflicts such as family or

neighborhood disputes. Indeed, as stated above, Latin American experiments with popular tribunals and informal justice have taken place among people located at the same level of income and social strata. Similarly, mediation and arbitration schemes are fairly common among corporations.

Conversely, the low priority assigned to mediation indicates lack of concern for intra-community conflicts. Consequently, activities of new legal services aimed at community development do not seem to include the promotion of informal mediation schemes. Only those legal services that set a high value on endogenous or alternative ways of handling disputes among grassroot people assign priority to promoting and studying informal justice among beneficiaries.

New legal services focus primarily on such issues as land tenancy conflicts, claims to housing and public utilities, labor law disputes, and human rights problems. Traditional legal services are principally devoted to criminal and family matters.

There are indeed marked differences between new and traditional legal services regarding extra-legal activities. Emphasis on popular education and paralegal training, sociolegal research, and organizational activities are distinctively characteristic of new legal services.

All new legal services offer seminars and workshops to the beneficiaries. Seventy per cent of them produce teaching materials and promote community organization while 63% participate in law reform efforts. Nearly half of them undertake social science research. None of these activities are performed by a majority of traditional legal services.

Case studies indicate that the willingness of legal services groups to participate in law reform efforts is primarily a

function of the political regime and the way governments see grassroots organizations. Broadly speaking, governments do not feel threatened by women's organizations. Legal services groups for women's rights ordinarily enjoy more space in which they can maneuver with law reform issues than peasants or indigenous communities. Similarly, legal services groups often become frustrated and abandon their law reform proposals when faced by an exclusionary political regime unlikely to give any serious consideration to their initiatives.

Law reform efforts often create opportunities for several local, national, or regional legal groups to jointly work and develop solidarity ties among themselves. This has been, to a limited extent, the case of legal services groups working with indigenous communities throughout Latin America. Such cooperation is also becoming a reality among legal services groups defending women's rights or human rights in general.

### 3 REALITY, POTENTIAL AND LIMITATIONS OF NEW LEGAL SERVICES IN LATIN AMERICA. A QUALITATIVE EVALUATION.

I have indicated in the preceding sections that Latin American legal services are not a single/homogeneous phenomenon. I have adopted throughout this article the dichotomy new vs. traditional legal services as the most politically and socially relevant criteria to differentiate legal services.

I have also pointed out two other major divisions among legal services in the subcontinent. First, I observed how specific country situations may imprint different significances on legal services that appear to be one and the same phenomenon (Section 1). Second, I delineated --for analytical purposes-- the

continuum of new legal service into two distinct types: (1) those that are more supportive of the forms and ideals of bourgeois democracy, and (2) those that purport to abolish all forms of exploitation, in particular capitalist and capitalist-articulated forms of exploitation.

The peculiarities of each country add one more differentiating factor. Arguably, evaluation criteria should be specific for every type of legal services and the particular political context of every country or social formation. However, I will make abstraction of country differentiation and particularities of each legal services group. I will focus on formulating and applying general guidelines for evaluating new legal services.

These guidelines fall into two different categories. One is technical; the other one is basically theoretical. "Technical" guidelines examine the capacity of new legal services to reach the goals intended by legal services organizations. "Theoretical" guidelines explore the social meaning and political potential of new legal services according to an (abstract) analytical criterion. That is, "theoretical" guidelines look for the (structural) social meaning of legal services independently from the intentions of legal services groups.

#### 3.1 Elements towards technical evaluation of new legal services.

The new Latin American legal services intend to reach three groups of goals:

- To promote low-income people's organization and mobilization.
- To change, replace, or undermine the present legal system.

- To stimulate the creation of a new legal system or, more generally, a new social order.

I will briefly examine to what extent new legal services fulfill these goals and what potential exists for satisfying them in the future.

### 3.1.1 Are new legal services conducive to low-income people's organization and participation? The case of community development

New legal services seek to stimulate the formation of trade unions, women's organizations, urban movements, or peasant and indigenous people's associations. Such goals are ordinarily inserted within a wider strategy of creating new political organizations and new ways of doing politics. They are ordinarily referred to as "participatory" or "grassroot-oriented".

This new way of doing politics requires widespread participation and direct, revocable representation. It is based upon expanding and strengthening civil society to the point of breaking down the dichotomy state-civil society. Grassroot organizations are constituted as separate and independent from the state and sometimes alien to it. This new form of politics conveys, however, a social and political meaning different from the current capitalist waves of "neoconservative privatization".

New legal services and the grassroot organizations they try to stimulate are to be kept as separate from traditional political channels as possible. Traditional forms of party representation are deemed part of the mechanisms of class, sexual, and racial oppression that prevail in the subcontinent. Two sets of questions arise from this attempted separation:

1. Can a distinction be made between traditional ways of doing --and controlling-- politics and participatory politics? Is it possible to exclude ideology, sectarianism and (political) party lines so that they do not interfere with new legal services? Latin American new legal services groups do not always find it easy to remain independent from political parties. Nor do their personnel always want to be independent from political parties. Indeed, most legal services groups are subject to lobbying efforts and pressures from radical political parties wishing to channel their proselytism through NGOs. Such an outcome is inevitable: legal services organizations are a mechanism to fight for social justice. Nevertheless, new legal services have to remain faithful to their purposes of expanding (authentic) participation and inventing innovative ways of direct, unlimited politics.[91] This makes their relation to political parties difficult, even contradictory.

Evidence from those cases examined during the Research Study indicates that some groups have been more successful than others in drawing the line of separation between grassroot organizations and traditional politics.

- Legal services in Chile and Colombia are particularly cautious of interference by party politics. These two countries are going through a stage of deep skepticism about the traditional role of the political parties.
- Legal services in Ecuador and Peru show more inclination to

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91. In words of Marshall Berman, they want to make "... the street and the demonstration primary symbols of modern life". BERMAN, M. (1984) "The signs in the street: a response to Perry Anderson", in New Left Review, vol. 144. See also his book, All that is solid melts into air, New York: Simon and Schuster (1982).

affiliate themselves with political parties, often in a disguised way. Parties, specially leftist ones, are very much alive in these two countries.

- Although not included in the Research Study, casual observations of Brazilian legal services indicate that they may be located between the cases of Chile and Colombia, on the one hand, and Ecuador and Peru, on the other. As a matter of fact, a Brazilian restatement of politics seems to be formed by two opposing forces: (1) the grassroot organizations, including Church-supported organizations, that aim at constituting independent political forces and new political channels; (2) the political parties stimulated by the climate of political "apertura" that has controlled the most visible forefront of the political scenario during the last few years.

2. Given the participatory approach to organizations and the relative autonomy of these new, non-governmental organizations, what are the appropriate techniques for control and evaluation? The techniques should be different from traditional (bureaucratic) ways of control and evaluation. They also have to take equally into account the tangible and intangible goals sought by new legal services. The specific questions are: (1) can control mechanisms be incorporated into legal services programs?; (2) which group or agent is in the best position to exercise control --beneficiaries, funding agencies, other legal services groups, a combination of the three, or each one intervening at a different point in time? Evidence from those cases included in the Research Study indicates that new legal services have not yet devised alternative non-bureaucratic means for control and evaluation. The same observation applies to other dimensions of administration and organization. Although new legal services have so far enjoyed substantial independence

from external agents, they have not yet devoted enough efforts to the internal creation of alternative administrative and organizational forms.

Besides grassroot participation, new legal services often present the goals of organization and mobilization as "community development" or "community participation", specially when beneficiaries are residents in the same geographical area. Community development and community participation combine the features of low-income people's organization with those of creating the basis for a new democracy and democratically running the legal services. Let us then examine the current reality and the potential of new legal services for promoting the general goals of community development and community participation.[92]

To what extent do legal services in the four Andean countries actually promote community development? The cases examined during the Research Study indicate that legal services do provide a good opportunity for community development and community participation efforts. By raising collective expectations and mobilizing communities, new legal services stimulate community cohesion and self-confidence.

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92. For purposes of this article, I will take the notion of community development for granted. I cannot discuss here the social and political origins of the notion of community development. Neither can I explore the reasons for new legal services' rapid --and to a large extent unqualified-- adoption of this terminology. My hypothesis is that --as far as Latin American legal services are concerned-- this is a "compromise word", one of those vague and fancy development notions that one way or another are acceptable to most if not all political ideologies. As such, it satisfies the ideological and bureaucratic requirements of funding development agencies while still providing legal services groups with enough room to configure their own organizational purposes.

However, few groups are actually concerned with precisely defining appropriate methodologies for community development and community participation. The groups deal even less with establishing participatory models of universal validity. Rather than defining participatory models, legal services groups decide on a course together with the community, taking into account beneficiaries' organizational experiences and expectations. It is a trial and error process in which the goal of community participation is often relegated, in favor of more urgent legal and economic needs. Similarly, measuring the effectiveness and efficiency in reaching these goals is often postponed, even underestimated as a methodological tool. There is indeed a methodology, but it is tailor-made to the particular features of the beneficiaries and the relationship legal services lawyers are capable of constructing with them. Lawyers often introduce unforeseen changes in their approach to community participation, as required by a rapidly changing relationship with the beneficiaries.

Consequently, the likelihood of achieving participation, organization, and community development as a whole depend to a large extent on the community or the beneficiaries selected at the outset of the project. Still, some groups, particularly those more influenced by religious commitment, feel that disorganized communities or those with a low level of political development should not be excluded from new legal services projects. Thus, the goals of community development and beneficiaries' participation become a long-term process, often diffused among more immediate undertakings.

Which legal services models are more conducive than others to grassroots development? Two extreme-types of new legal services were found in this regard. More professionally oriented legal services are primarily concerned with solving the legal conflict

at hand. More socially oriented legal services subordinate the goal of conflict resolution to that of community development and organization. In spite of their differences, these two types are not as distinct as they seem to be. The former are respectful of community decisions which may jeopardize the legal outcome of a particular case. The latter are aware of the fact that community mobilization and self-confidence are in jeopardy when legal decisions deny the claims and expectations of grassroots communities.

Clearly, any new legal services group has to keep carefully balancing these two alternatives. As for the question of do legal services aid community development, the answer is yes, as long as the groups walk this fine line and consider a community's cohesion and stability. Community participation must be seen as a process of gradually building up stable community organizations. Intended beneficiaries of legal services should participate in the design as well as in subsequent stages of legal services projects. Similarly, the legal service itself must be as efficient and high quality as possible.

### 3.1.2 Are participatory legal services effectively promoting an alternative legal system?

Latin American New legal services and critical lawyers ordinarily assume that exploited or otherwise discriminated groups embody the potential for a non-exploitative social order. Either as a result of remnants of non-capitalist modes of production or as presently created by low-income people in the relations among themselves, the seeds of alternative (generally non-commodified) relations exist somehow hidden and dominated in Latin American societies.

Given this assumption, the relevant questions are:

- Is it possible to empirically find and document "the working class point of view" hidden behind dominating capitalist social relations? [93]
- Are new legal services actively seeking to unearth the non-exploitative social order that lies repressed beneath the surface of capitalist domination?
- Are new legal services capable of carrying out this critical-anthropological exercise?
- What should be the balance between resorting to the official legal system, on the one hand, and promoting informalism, popular administration of justice and endogenous legal culture, on the other?

No significant efforts to construct an alternative --more democratic-- legal system were found in the Research Study. Perhaps the only exception were legal services working for women's rights. These groups are beginning to make a deliberate attempt to introduce a women's (feminist) point of view into the law.

No new legal services group in the four countries included in the Research Study has yet investigated endogenously-grown legal culture. For the time being, new legal services share and promote different degrees of criticism of the legal system. But they fail to come out with their own proposals. This shortcoming

93. "The working class point of view" is a convenient expression since it has an intuitive appeal. As used here, it also corresponds to the concepts and terminology developed by the Italian Autonomistas during the 1970's.

seems to limit the capacity of legal services groups to raise domestic support among potentially sympathetic people concerned with social justice.

Part of the problem is due to the fact that new legal services ordinarily do not become involved with internal conflicts among beneficiaries. They are usually called on to defend beneficiaries against external threats. Consequently, legal services lawyers barely come in contact with communities' own ways of solving disputes. [94]

### 3.1.3 Are new legal services helping to change, replace, or undermine the present legal system?

New legal services' inclination to participate in law reform efforts seems to be a function of the openness of a political regime as well as the relation between law reform and promotion of beneficiaries' organization.

As to replacing or undermining the present legal system, evidence from case studies led to the construction of two ideal types of new legal services groups: one more pragmatic, the other one more doctrinaire. Pragmatic legal services willingly compromise their long-term goal of implanting a new concept of justice in view of short-term legal gains or institutional survival. Doctrinaire groups assign absolute priority to long-term social goals and political strategies, specially the goal of introducing a new concept of social justice and the

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94. ILSA is currently promoting the study of legal cultures and informal law. ILSA's assumption is that bringing the communities' point of view to law reform forums may enhance the potential for domestic support as well as raise the beneficiaries' consciousness and self-confidence.

strategies of organization and mobilization.

In practice, new legal services fall somewhere between these two extremes. If entirely pragmatic, the social and political goals of new legal services become diffused and the legal service transforms itself into a traditional one. If purely doctrinaire, new legal services run the risk of loosing the support of beneficiaries and --consequently-- jeopardizing its own ultimate social goals.

This is why those new legal services that emphasize the goal of replacing or eliminating the current legal system are particularly limited. Indeed, they find themselves in an uncomfortable, contradictory --and often personally stressful-- position. On the one hand, keeping their loyalty and links --at least their initial links-- to the community depend on their providing a quality, result-oriented legal service. On the other hand, these groups of legal services, more committed than others to social change and new justice, realize they have to fight against the continuation of the very legal system they use as a tool to install a social order based on real equality (as opposed to formal or legal equality) and solidarity.

### 3.2 Elements for a theoretical evaluation of new legal services.

In spite of lawyers' intentions and complementary organizing and mobilizing activities, the legal service is by itself essentially conservative, no matter what legal services lawyers do about it. Legal services, specially new legal services, tend to funnel conflicts through the legal system. Thereby, legal services tend to reinforce the submission of subordinated classes to rules that --although equal and impersonal in nature-- invisibly oppress those who do not exercise control over economic or political resources. Moreover, at this level of abstraction,

the legal capitalist oppression operates independently of the contents of law.

It can also be argued that, by legalizing social conflicts, new legal services unwillingly --and often unconsciously-- contribute to the constitution and reproduction of subordinated classes. Indeed, legal services can be an effective socializing instrument.

When confronted by these theoretical considerations, the new legal services lawyers most committed to social change give a uniform response: they instrumentally use law to perform activities different from legal advice and representation and to reach structural, non-legal results. Since low-income people are submitted to the prevailing legal system anyhow, little political harm can be done by using the legal system to provide them some immediate relief and contribute to creating conditions capable of overturning that legal system.

This response is based on two assumptions: (1) the constraints and determinations of the capitalist legal system can be compared to the instrumental use of law; (b) the instrumental use of law outweighs the (social) costs of funneling struggles through the legal system. If these two assumptions are true, new legal services can be said to produce a net positive effect towards the introduction of new concepts of justice in society. In any case, it is necessary to further explore these assumptions in order to establish the liberatory potential of new legal services vis a vis the capitalist legal system.

If we move one step further, we find still another major roadblock for the theoretical evaluation of new legal services. Let us assume that legal services are in fact conducive to overturning the current social order. The next question is, what



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social order do new legal services want to establish?

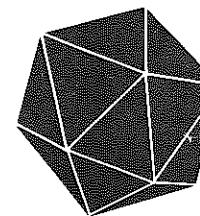
Those more inclined to expanding contemporary forms of democracy have little difficulty in answering: a better social order is generally thought of as more participatory and more oriented towards satisfaction of real (basic and otherwise) needs of the population.

Those more ambitious in terms of political utopias will hesitate before answering. The source of their difficulty is how to conceptualize an alternative social order that is not yet in existence. Will the new social system be based on equality for all or on the recognition of disparities and individual freedom? If not the state as main political actor, what will be the decision-unit of the new social order? If markets and commodities are deemed to be at the root of capitalist exploitation and accumulation, what types of exchanges will replace them? What forms of cooperation and division of labor (if any) will prevail?

Confronted with the latter questions, new legal services lawyers may legitimately answer that these problems are beyond their scope. They may be valid academic concerns. But prefigurating a new society is too much of a burden for lawyers that have enough problems in the field and sufficient personal and political contradictions to keep them busy. Besides, prefiguration of new societies may not be a valid or legitimate undertaking for anybody.



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A COMPARISON OF CHANGE-ORIENTED LEGAL  
SERVICES IN LATIN AMERICA WITH LEGAL  
SERVICES IN NORTH AMERICA AND EUROPE

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