

**FIFTEEN YEARS OF JUDICIAL REFORM IN LATIN AMERICA: WHERE WE ARE  
AND WHY WE HAVEN'T MADE MORE PROGRESS**

**Linn Hammergren  
Democracy Fellow  
USAID Global Center for Democracy and Governance**

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Since the early 1980s, national governments, judicial leaders, civil society organizations and a variety of external assistance agencies have engaged in regionwide efforts to reform Latin American justice sector<sup>1</sup> institutions. Often building on movements that had begun decades earlier, this concerted attention to the problem of sectoral performance and to the ways it might be improved has produced changes in the sector's legal framework, organization, and budgetary resources in a majority of countries; generated a growing number of externally supported reform programs; and involved an increasing variety of external, regional, and national actors in debates over the roles to be played by the judiciary and other sectoral entities (police, Public Ministry, the private bar, legal aid societies, etc). It has also produced visible changes in how many of these entities operate and in some cases measurable improvements, and has dramatically augmented our knowledge of the factors shaping and thus the constraints on their performance. Clearly had we known fifteen years ago what we know today, we would have done things somewhat differently and at least arrived where we are in far less time.

The experience and the accumulated knowledge have hardly diminished the interest in or the debates over reform. The amount of national and international funding devoted to the sector

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<sup>1</sup>I am using this term to signify a variety of public and private sector entities and the formal and informal rules governing their conduct. At a minimum this would include the courts, public prosecution and defense, police, prisons, the private bar, law schools, and various civil society groups. Any traditional or alternative dispute resolution systems could also be incorporated. Specific reforms usually target only a portion of the entire set, and some (but generally not in Latin America) have expanded their scope to encompass regulatory agencies, legislatures (in their law drafting role), a wider variety of substantive legislation, and affected groups in the private sector.

continues to grow while the number and types of problems addressed expands as well. Some observers have in fact suggested we are reaching a point of diminishing returns -- too many funds chasing too many objectives with a resulting reform agenda that no set of national institutions could possibly realize.<sup>2</sup> Although the current situation does not encourage it, we have arguably reached a stage where a certain amount of reflection and reordering of priorities is desirable.

Fifteen years may have been excessive for what was accomplished, but experience does demonstrate that reform is inherently slow, complicated, and conflictual. Whatever consensus initially informs it will hardly be sufficient to guide the multitude of issues and choices it inevitably raises or to incorporate the many new actors demanding a stake in the proceedings. Such apparently simple concepts as judicial independence have in practice proved much less straight forward and introduced far more fundamental debates about the role of the various branches of government, their individual and collective accountability to their citizens, and the values their actions should uphold. The initial agreement on the need to eliminate judicial poverty has now raised issues about how much societies should spend on justice, and who should pay the bill. Demands for more resources have also led to questions about the returns on these investments and how they should be measured. It has been suggested that the frequent complaints about the lack of progress in reform may be based on unrealistic expectations as to what could be accomplished -- better courts will not eliminate crime or societal conflict, nor can they more than marginally affect gross social inequities. Clearly Latin American societies were not served well by their court systems nor did they serve the latter adequately. However, a marked improvement on both counts is only a necessary but not sufficient condition for addressing more basic social ills.

Still, even accepting these limitations on what reform can do, and acknowledging the unresolved issues as to what it should do, there is considerable room for improvement in the design and implementation of the current and next generation of reforms. It will, as is argued below, require better use of the knowledge we have acquired, a more adequate definition of and agreement on objectives and strategies, and a greatly enhanced coordination among those attempting to further them. The rest of this paper aims at some specific recommendations, first reviewing the underlying problems, then discussing the evolution of approaches to define and resolve them, and finally turning to areas where more attention is needed. The principal focus is the judiciary, as the central actor in the justice system, and the one whose reform has proved most difficult to define. Many of the lessons and recommendations, however, are more widely applicable, encompassing the entire gamut of organizations and institutions included in any justice (as opposed to judicial) reform program.

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<sup>2</sup>This has been most marked in post-conflict countries like Guatemala where by one observer's count, foreign donors are currently competing to invest almost \$200 million in a justice sector which will have enormous difficulty absorbing it usefully.

### **The Challenge of Judicial Reform**

Judicial reform is hardly an issue unique to Latin America, either in its objectives or in the difficulties it faces. Judiciaries perform a series of vital functions for any political system -- law definition,<sup>3</sup> conflict resolution, and social control -- and where they fail to perform them according to citizens' needs and expectations, there are a series of negative social, political, and economic consequences. Often their failure encourages the creation of alternative mechanisms and practices. These alternatives may resolve the immediate problems of individuals and groups, but their partial, nonauthoritative nature tends to erode social consensus, decrease predictability, and discourage more complex forms of interaction. Private or communal enforcement of rules and agreements is inevitably restricted in its reach and decreasingly appropriate for larger social units. Extralegal pressure to force judicial decisions may serve individual interests but over the long run devalues the decisions themselves, undercuts judicial legitimacy, and eventually threatens that of the entire political system. This is equally true whether the contested issues involve private individuals and groups, or governmental actors and agencies.

The very factors which make judiciaries essential also impede efforts to transform their operations. At one level, the challenges posed by judicial reform are remarkably similar across different legal traditions and even across countries at different stages of socio-economic development. All institutions are conservative, but those in the legal sector are so by explicit purpose as well as by implicit function; their ultimate authority and their contribution to the maintenance of a legitimate order lie in their lesser vulnerability to short term fluctuations in social preferences and the relative power of social groups. Hence some lag between their performance and changing demands and expectations is almost inevitable. Not surprisingly, these same characteristics permeate the internal perspectives and preferences of their members, even in areas more peripheral to their main responsibilities. Judiciaries are never the leaders in adopting modern management techniques or new technologies, and it is not uncommon for them to be decades behind the rest of the public sector in this regard. Arcane personnel practices, procedural requirements, and even equipment are the norm not the exception. The computer, the fax, or more efficient methods for recording data are usually adopted late and only after considerable hand wringing over their "legality."

Professional roles and self-image are another constant across systems. The civil law judge may be a career bureaucrat, but she shares with her common law counterpart an independent, craftsman's approach to her work which conflicts with such basic management techniques as standardization of procedures, organizational guidelines for prioritizing attention to tasks, or quantified output targets. Furthermore, judges traditionally are kings (or queens) in their

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<sup>3</sup>By now it is acknowledged that judges do "make" law even in countries where this is not formally their function. However, law determination may be a more acceptable term, suggesting that the law making process (wherever it formally resides) is not completed until judiciaries have decided how and where statutory and other law will be applied and interpreted.

courtrooms and frequently reject the notion of officially<sup>4</sup> delegating even logistical decisions to professional managers or of sharing support staff. Professional formation and a tradition of judicial independence (however much violated in fact) also conflict with measures to monitor performance, to increase intra or extra-judicial accountability, or to deal openly with disciplinary and ethical issues. No profession likes to air its dirty laundry in public, but judges, to their collective detriment, seem particularly reluctant to do so.

Finally, many institutional vices or distortions are commonly encountered across legal traditions. Judicial corruption, a retreat to legal formalism (deciding to the letter but not the spirit of the law) in the face of external threats, and decisions skewed by partisan or other biases are frequent complaints, especially in societies undergoing rapid and fundamental change. While often initiated by nonjudicial actors, as a way to cut individual transaction costs, they can become part of the informal organizational culture and thus embedded in a network of vested interests which will oppose their elimination. Certainly, the opportunities for, forms, and incidence of corruption vary widely, but there is no judicial system where it is unknown.

Not surprisingly, there is thus substantial similarity among the types of measures suggested to improve individual and organizational performance -- higher budgets and salaries; more personnel, equipment and infrastructure; rewriting of substantive, procedural, and organizational laws; reorganizations, including both the elimination and addition of specialized jurisdictions; training for judicial and administrative personnel; the adoption of modern administrative practices and techniques for individual courtrooms and entire judiciaries; the introduction of new categories of judicial and administrative staff; revised judicial appointment systems and qualifications for candidates; and the introduction of performance and ethical standards and monitoring and disciplinary systems.

Differences between and within major legal traditions do produce certain patterns -- path dependencies<sup>5</sup> -- in their natural evolution and reform preferences. The latter appear as a greater reliance on some measures rather than others and variations of detail in the specific interventions, the overall models adopted, and the means for their introduction. Judicial training, for example, is a universal remedy, but its recommended content, format, and integration into appointment and career systems vary considerably. Most reforms attempt to increase the merit element in appointments, but what is meant by merit is still debated, even within individual systems. How countries define problems and what they deem acceptable remedies also affect reforms. US advisors working in Latin America in the early 1990s found their local counterparts were often less concerned with reducing delays than with measures to combat corruption and increase judicial independence. While Latin Americans were interested

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<sup>4</sup>Of course, unofficial and even illegal delegation is a common problem, but aside from denying its existence, judges usually prefer to retain formal control.

<sup>5</sup>This term, like the use of principal/agent analysis, is borrowed from the institutional economy framework as developed by North.

in adopting more adversarial criminal proceedings (which they perceived as more effective and less susceptible to abuse), they were less receptive to the concept of plea bargaining which many US jurists regard as critical to their success. While ADR has now achieved nationwide acceptance, even five years ago many Latin American judges and lawyers saw it as an abomination, arguing that it threatened judicial integrity and basic due process rights.

It is the means for introducing change, however, that seem to vary most consistently between civil and common law traditions. The latter's tendency to establish the judiciary as a truly independent branch of government has placed greater reliance on the judiciary itself for introducing and implementing these changes. In the U.S., the legislature occasionally mandates reforms, but leaves it up to the courts to design and apply them. In the civil code tradition, a less independent, and frequently more politically penetrated judiciary has often given the impetus to the executive branch. Interestingly, this tends to be true whether the judiciary is managed by the executive branch (via the Ministry of Justice) or when it has responsibility for its own governance (through the Supreme Court). This, as we will see, has frequently produced conflicts in Latin American systems because of their judiciaries' historical, and undoubtedly idealized, aspiration for a more U.S. style autonomy and because of a long tradition of extensive if usually illegal executive intervention in court affairs.

These conflicts raise a final dilemma which in one form or another confronts all judicial reform efforts. Even reforms managed by a nonjudicial agency, and certainly those headed by the judiciary, usually combine two goals, greater efficiency and efficacy, and greater independence. Both internally (at the level of individual judges) and externally (in relation to other political and economic forces), the judiciary is usually not conceived as a command system. Individual judges and judiciaries are expected to carry out their functions in compliance with the law, rather than because of the instructions of a superior or extra-judicial actor. As the Latin American case suggests, the two goals are related in that the judiciary's lesser efficiency and efficacy are commonly blamed on external intervention. Nonetheless, whatever the difficulties of making an organization and its members either more efficient or more independent, accomplishing both at once is extraordinarily challenging.

### **The Problem of Judicial Reform in Latin America**

Although technically within the civil code family, Latin American judiciaries also show common law influences; constitutional arrangements (a definition of separation of powers which in a majority of cases gives the judiciary, not the Ministry of Justice, responsibility for its own governance, administrative management, and internal appointment system) and some specific practices (judicial review, occasional use of juries) often imitated US models. This mixture and the broader historical and societal setting gave a unique twist to Latin American institutional patterns. Almost two centuries of independent national development have also separated them from subsequent European trends and added additional idiosyncratic traits -- for example a marked deprofessionalization of many of the region's judiciaries accompanying the emergence of mass based political parties and their colonization of the appointment process, a career system honored in the breach as entering administrations replace most of the bench with their own

followers,<sup>6</sup> the late and usually incomplete adoption of specialized judicial training programs, the virtual disappearance of the Public Ministry in a few countries and its near eclipse in most others. As a consequence, Latin America's judiciaries have tended to be less functionally relevant and at the same time more politically penetrated than their European counterparts. While they have sometimes been manipulated by the powerful, they have just as often been ignored. Lacking a politically or economically significant clientele, at least as regards their formal functions, they have become nests of secondary vested interests relying on survival strategies that range from intentional irrelevance to abject subservience to the power holders of the day.

With some exceptions, the general pattern has been a series of vicious cycles: irrelevance produces further neglect and the inadequacy of formal channels encourages reliance on informal ones, either within the judiciary or outside of it. Neglect meant lower salaries and budgets and thus poorer services, less qualified personnel, and more vulnerability to corruption. Where taking a case to court meant interminable delays and arbitrary decisions, those who could, bought their judgments or found alternative ways to resolve their conflicts. These arrangements met the needs of traditional, highly stratified societies. They become increasingly inconvenient under conditions of more dynamic economic growth, social diversification, and more inclusionary mass based politics. The greater number and variety of conflicts, increases in crime and new kinds of criminal activity, and a lesser ability to limit exchanges to well known acquaintances make the informal systems less reliable and increase the demand for more efficient and effective judicial performance. Ironically even corruption becomes less predictable and "enforceable." Those who once relied on it for their dealings with the formal system may find themselves demanding "honest" judges.<sup>7</sup>

A demand for change is a necessary but hardly sufficient condition for reform. First, the dissatisfied may not be driven by the same complaints or the same vision of a better system. This makes it hard to reach agreement on specific improvements and to maintain support for their enactment. Participants may exit a reform alliance when initial changes satisfy their most urgent needs or indicate the likelihood of a net individual loss if the program continues. Once

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<sup>6</sup>There are a few countries which have developed true judicial careers and others which demonstrate less drastic turnovers, sometimes because the jobs were so unattractive that alternative candidates were hard to find. The latter was said to be the case until recently in Guatemala. Whatever the advantages a judgeship offered, high levels of civil violence made it a very dangerous position to accept, meaning that those willing to stay on the bench were usually allowed to do so. In neighboring Honduras the turnover was far higher, and the entrance of a new national administration (and Court) often meant the replacement of the entire bench.

<sup>7</sup> A recent World Bank survey thus found Bolivian investors less concerned with judicial corruption than with its unpredictable outcome. Similarly, anecdotal evidence in the Dominican Republic suggested that economic actors became interested in judicial reform when their attempts to buy decisions brought less certain results.

they get higher budgets and salaries, judges may stop pressing for change, especially if it means a loss of additional revenues from bribes or the imposition of more stringent performance standards.

Second, solutions have to be designed, and the most obvious ones may not be the most appropriate. The traditional, institutionalized remedies -- new laws, higher budgets, more courts, or massive judicial purges -- have not worked any miracles and occasionally have made things worse. As any number of examples indicate, higher salaries don't of themselves produce less corrupt, or more legally accurate decisions, while the threat of purges may only encourage personnel to accelerate their illegal use of office while they in fact hold it.

Third, institutions, no matter how dysfunctional, attract vested interests. While no one may have a stake in the entire system, each of its elements has its supporters who will oppose or work to undermine change. Because institutional change is inherently complex, and usually slow, it affords considerable opportunity for deviations along the way. For all of these reasons, although virtually all Latin American countries have begun some sort of judicial reform, most remain far from complete. While their judiciaries have changed, the extent of their improved performance is highly debatable. Furthermore, in a number of cases, a countermovement, among the judges, lawyers, political and economic elites, and sometimes the public, can also be detected. This is different from the resistance initially offered to reform, and is instead based on the inadequate or unanticipated consequences of the first programs.

### **The Experience of Latin American Judicial Reform in Latin America**

In dealing with the dilemma of reform, Latin America has passed through at least two phases and may now be entering a third. The first could be termed the mechanistic approach, characterized by the introduction of a series of discrete measures intended to resolve specific problems of output. The second, a systemic or technical-institutional approach, sees poor performance as a consequence of entire sets of interdependent practices which must be transformed en masse. Several years experience with this approach and its highly mixed results are currently encouraging its reexamination. This may lead to further refinements or to a third generation of reforms, based on still a different appreciation of the dynamics of planned change. The stages are in some sense cumulative -- the transition upwards has not involved discarding the earlier solutions, but instead redefined the conditions for their success.

For most of its independent history, Latin America's approach to reform has been largely mechanistic, attempting to rectify shortcomings in judicial performance through isolated innovations. These often imitate measures introduced earlier in Europe or the United States. Reform most often meant rewriting laws -- to bring them into conformity with "modern" trends and occasionally to resolve more specific concrete problems. The region has seen veritable waves of law reform, the most recent of which began in the 1960s with the model code movement.<sup>8</sup> However, the impact of legal change was often minimal. New codes when enacted

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<sup>8</sup>For a discussion, see Llobet, Maier.

were never fully put into practice; compliance with their mandates was often merely formalistic or symbolic. Full implementation required organizational and other resources not existing in the adopting country, a better understanding of their contents on the part of legal professionals and the public, and a different set of values and incentive systems.

Donor assisted reforms, beginning in the 1960s with the Law and Development Movement<sup>9</sup> and in the 1980s with USAID's Administrative of Justice Programs<sup>10</sup> introduced a broader set of innovations, but suffered from the same limited vision and consequent systemic constraints. Most of these programs recognized the greater dimensions of the problem, but they still placed enormous faith in the selective addition of a few missing elements -- commonly training programs, new administrative systems, enhanced investigative tools, and techniques for evaluating evidence. In coordination with Latin American reformers they also worked to increase judicial budgets, defining some of the problem as the judiciary's traditional poverty, and to reduce partisan control of appointment systems. Although indigenous reformers were less adamant as to the efficient use of new resources, both parties agreed that more was better and that less executive intervention in both financial administration and appointments would increase judicial independence and thus eliminate a major constraint on performance.

The emphasis on judicial independence was the first element of a turn to a systemic reform strategy, one which recognized that additive solutions would not go far in isolation. Problematic behavior usually had multiple causes all of which had to be addressed. Thus the second round of donor assisted reforms (USAID's post 1990 projects and those of the World Bank and IDB) adopted more comprehensive, integrated strategies, attempting to work simultaneously on various aspects of judicial organization, procedures, laws, and external linkages. In USAID's criminal justice reform projects,<sup>11</sup> legally driven procedural change became the motivating theme, around which the formerly isolated interventions were organized. If judiciaries could not adequately deal with crime, encouraged impunity, and perpetrated their own human rights abuses, this was partly because their legally defined procedures were inadequate, but there were other causes. Their professional and administrative staff was poorly trained and lacked basic skills; their appointment and personnel systems rewarded political contacts not merit; their administrative systems were antiquated, inefficient, and vulnerable to corruption; professional and administrative staff were underpaid, poorly equipped, and lacked job security; and their clients (private lawyers and the public) had expectations (usually based on past experience) that did not encourage professional, objective decisions and actions. Thus, if legally mandated changes were to take hold, all these other elements had to be addressed as well.

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<sup>9</sup>See Gardner.

<sup>10</sup>See Alvarez for a discussion of the early programs. A critical analysis of the results is found in GAO..

<sup>11</sup>The articles in National Center for State Courts provide an excellent overview of the various elements.

The visible changes and partial improvements in the operations of Latin American judiciaries over the past decade suggest the systemic approach has had some success. Human rights abuses have declined; individual countries have reduced case backlogs and times for resolving at least some types of cases; more clients are being attended; judges appear more knowledgeable of the law, less arbitrary in their decisions, or at least less flagrant in their abuses; some courts have begun to remove corrupt and incompetent judges and administrators; countries characterized by extensive impunity have begun to try prominent citizens and officials; and judicial governing bodies (Supreme Courts or judicial councils) appear to be taking their jobs more seriously.

Still the advances have been uneven, both within and across countries. Some of the largest, most ambitious donor programs seem to have produced the least measurable progress -- USAID's program in Colombia (supporting an extremely ambitious national restructuring of the entire justice sector) or the World Bank's Venezuelan project are arguably two examples, although in both cases participants argue that it is too early to make this determination. Even in countries which seem to have done more, observers have questioned the quality or long term significance of their accomplishments. The new programs, as designed and implemented, often seemed driven by extraneous or counterproductive criteria, sometimes openly contradicting the accumulated lessons of earlier experience. More laws were rewritten, but attention to their intrinsic quality or the conditions for their effective implementation continued to receive short shrift. Monies were spent on infrastructure, equipment, or massive training programs, but appointment systems continued to be ruled by personal and partisan contacts; disciplinary and evaluation systems are nonexistent or underutilized, backlogs accumulate, and delays increase. Higher budgets, and greater judicial control of administration and financial management have sometimes produced still more opportunity for questionable use of resources, while the introduction of judicial councils has often transferred undesirable practices from the courts to the new entities. Efforts to depoliticize the appointment of Supreme Courts have not produced noticeably better candidates and have often meant a shift from one-party control to multi-partisan colonization. More independent courts or councils have sometimes escalated conflicts with other branches of government leading some citizens and many politicians to question the wisdom of their greater autonomy.

The interpretation and analysis of these situations have only just begun and the immediate conclusions vary widely. Skeptics argue that the new approach is not all that different from what preceded it and that its apparently greater success has other explanations. Many of the visible improvements can be attributed to other causes: larger judicial budgets, the weight of years of reform attempts, increased pressures from exogenous sociopolitical change,<sup>12</sup> or the improved design of their component elements based on the accumulated lessons of past experience. Since the new systemic programs are of necessity much larger, it is also not clear whether it is a better strategy or just more, individually improved interventions that are responsible for the change.

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<sup>12</sup>For a discussion, see Correa, who also emphasizes that the substantial change in the sector is not necessarily all "reform" or the result of reform efforts.

Larger programs increase the chances of hitting the right elements, but if these are relatively few, the rest of their investment may be superfluous. Moreover, this kitchen sink approach to reform also runs the risk of ignoring the critical interventions and thus, despite sizable investments, producing no significant improvement at all.

Its defenders argue that the systemic strategy does represent a qualitative change, that it does account for the real improvements achieved, and where its results have been less dramatic, it at most requires a little retuning. On the one hand, it may simply need more time; organizational and technical changes will have an impact on behavior if not as rapidly as had been hoped. New laws take time to be effectively implemented. Judges with computers and better filing systems will eventually adopt a new approach to their work. Courts or councils with management information systems will begin to use them to monitor performance and plan organizational development. On the other, the problem may lie in an inadequate attention to technical details -- in conjunction, the various elements will have the desired impact, but only if they are adopted in the correct form. From this comes a search for the best model for a judicial council, appointment process, training program, procedural law, or computerized information system.

For still a third group, however, the reliance on a broad spectrum of largely technical interventions is still not enough. Aside from its possible waste of resources on less productive activities, the systemic strategy has been criticized for failure to prioritize its elements, its consequently unsystematic approach to change, and specifically, for its at best indirect attack on the underlying problem -- the interests and incentives that lie behind poor performance -- either leaving it untouched or allowing its transfer to the "reformed" structures. Even ten years ago, skeptics argued that making discrete repairs to a fundamentally flawed system might make the flaws more egregious. New laws and organizations will simply allow the old vices to emerge in different places. Training programs could teach the wrong values, better information systems could be used to exert more pressure on individual judges, and increased funding for equipment and infrastructure would allow greater opportunity for kickbacks. Few of these worst case scenarios have been realized,<sup>13</sup> but the mix of remedies has often appeared to focus more on the superficial or second order problems than the basic complaints.

The past decade of reform efforts has expanded understandings of the nature of judicial weakness, the institutional factors encouraging it, and the variety of interventions which can alter the prevailing constraints. However, the utility of this knowledge hinges on its effective and

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<sup>13</sup>There are nonetheless sufficient minor examples and still more dramatic cases from other kinds of reform programs (see for example, Conroy, Murray, and Rosset on the unintended effects of agricultural development policy in Central America) to demonstrate that the fears are not merely fanciful. Most of the new, apolitical judicial councils have retained a highly partisan cast in their role in the appointment system as have the European examples on which they are based. Higher investment and operating budgets have produced their share of scandals -- either in mismanaged contracts or their utilization for the private or political agendas of those (including justices) handling them.

purposeful application. The reform process itself and donor participation in it introduce their own disincentive system especially as regards the two most frequent criticisms - waste and misdirected efforts. Donors need to produce programs; judicial leaders and political elites will always accept more resources. Where the two interests most readily coincide may not be where change is most critical.

Purely cultural impediments to better reform design deserve more attention; they may be more difficult to overcome than simple corruption. A well-intended ally who backs an illogical remedy is harder to deal with than one motivated by personal gain. Local authorities often opt for poorly designed mechanisms because of cultural biases or a lack of familiarity with better alternatives. The number of courtroom and prisons designed by architects who didn't understand their special requirements is one of many examples. The job often goes to a friend of the powerful, but the choice may lie as much in ignorance as in any intended personal advantage. When laws are approved with no consideration for costs of implementation, or merit systems are based on apparently irrelevant criteria, this is lack of experience, not personal benefit at work. In as inexact a science as judicial reform, there is still much room for informed differences of opinion, but this makes it still more important to take advantage of what we do know.

Misdirection of efforts are also likely when the logical national leaders -- the Supreme Court, a judicial council, a Ministry, the political elites, or a specially created "project implementing unit" -- are a part of the problem, either because they themselves benefitted from the existing situation, began with or developed a different agenda for the changes, or simply lacked the motivation, skills, or power to make it work. Reforms that did advance most often did so because of unique circumstances -- an unusually progressive Court or Chief Justice, an executive actor who adopted this as his cause, or a very intrusive donor community. These circumstances were not only unique, but fairly ephemeral. The Court changed, the minister left office, or the donor departed, and the impetus again disappeared

Institutional change is not only slow; it is also inherently unpredictable and messy. Anyone who thought they could design a comprehensive reform program to be implemented in five years was not living in the real world. However, excessive delays in some cases, massive investments with minimal or the wrong results in others, and the fewer instances of appreciable success do suggest that reforms must be more systematic as well as systemic in their focus, and that it may be time for a third generation approach, one which is more selective in what it attempts and how it attempts it, which prioritizes and sequences types of change, and which more closely examines the external and internal incentive systems it utilizes and attempts to alter. Before addressing these issues, the following summary of some lessons of experience is offered.

1. Over a decade of experience with donor assisted reform in Latin America has generated a good deal of knowledge about the institutional constraints on judicial performance and about the impact of various kinds of reform mechanisms especially as they shape the behavior of individual organizational members. If we don't always know what works best, we can at least identify the potential benefits of and the problems to be avoided in introducing training programs, career systems, new laws, or administrative mechanisms.

2. Experience also suggests that there are no silver bullets. Effective institutional change works through a variety of interrelated mechanisms and depends on their joint influence rather than the impact of any single one. Nonetheless, more is not always better, and an effective strategy has to prioritize and sequence its elements.

3. In the design and implementation of reform programs, the very institutional constraints targeted for elimination are likely to impede progress.<sup>14</sup> Aside from the obvious problem of endemic corruption and thus the threat that reforms will be misused or directed to private gain, these include factors like weak planning and management skills, a lack of understanding or appreciation of nontraditional disciplines and technologies, excessive reliance on relational networks as opposed to merit or expertise in selecting staff, and a formalistic or principle driven rather than instrumentalist or results based approach to goal setting.

4. These constraints are particularly critical as regards the question of whom should direct the reform. Even when special units are set up for this purpose, they and their members are likely to be hindered by these same shortcomings, and if they are not, they frequently don't survive long.. Project implementations offices are notorious for being staffed by poorly qualified friends and relatives of those who selected them, and for being more concerned about pleasing their patrons than about maximizing reform progress.

5. Not all differences have technical solutions and even those that do are usually linked to subjective preferences. A better understanding of how to train judges, or even how to link training to specific behavioral changes can still not resolve some fundamental questions as to what that behavior should be. We know ways to increase judicial independence, but have yet to arrive at a definition of how independent a judiciary should be. We can calculate the costs of different levels of judicial service, but the ideal level itself is a value choice. Thus cross-national comparisons of the percentage of budgets spent on justice are illustrative, but hardly definitive.<sup>15</sup>

6. Judicial reform is political, not in the sense of partisan preferences, but because it like politics is about the authoritative allocation of values or who gets what, when, and how.<sup>16</sup> Whatever its long range impact, over the short run it will produce winners and losers -- justices or ministers who lose the benefits of controlling appointments, individuals whose ability to buy or sell judgments is curtailed, or those otherwise affected by the changing rules of the game.

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<sup>14</sup>This in fact became the official justification for Peru's current reform program which has been much criticized for its erosion of judicial independence. As President Fujimori noted in confronting his critics, "when we begin a reform, we don't consult with its targets."

<sup>15</sup>See Dakolias for a discussion.

<sup>16</sup>This is hardly a novel appreciation. For one recent statement, see Pastor, pp. 52-3.

### **Some Specific Areas for Further Attention**

Obviously, one impediment to success is our inability to reach some very basic agreements about objectives and purposes. The current treatment will not attempt to advance them. Rather it focuses on areas for incremental improvement, ways we can do better what we have already decided we want to do. In the course of effecting these improvements, the more transcendental issues should, however, be kept in mind -- since there is always the danger of resolving them unintentionally and to wholly undesirable ends. Moreover, as reforms progress, these issues will eventually emerge. This appears to be the case in the countries which have advanced furthest or attempted the greatest changes. Colombia may well be an example of the second category -- the uneven progress, unanticipated consequences, and escalating costs of the 1991 reforms are likely to force attention to the basic issues earlier rather than later, as participants and ordinary citizens recognize the trade-offs implicit in the extremely ambitious and not entirely consistent agenda.

#### **Better Utilization of Accumulated Knowledge**

Although fifteen years of experience with reform has helped develop a substantial body of knowledge about what works and what doesn't at the level of usual activities,<sup>17</sup> two somewhat contradictory tendencies discourage its adequate use. The first is a desire on the part of many participants to reinvent the wheel -- to deny that their problems have anything to do with those found elsewhere and thus to demand that new solutions be developed for their special circumstances. Tailoring responses to national realities is important, but a failure to look first at others experience and to consider adopting what is useful has wasted resources and often produced solutions that are different but no better than the available models. The phenomenon is especially common in the design of complementary (i.e. nonjudicial) services and information systems and to some extent in the drafting of new laws.<sup>18</sup> An opposing but equally damaging tendency is unfettered imitation -- the adoption of "successes" without much attention to the special circumstances allowing them to work, or without an examination of what that success really signified. This latter point is particularly important -- those who have lived with judicial councils, adversarial criminal procedures, or alternative dispute resolution are often amazed by the inherent virtues ascribed to these systems by those promoting their adoption elsewhere.<sup>19</sup>

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<sup>17</sup>I have discussed these lessons at length in four "manuals" written for USAID on judicial training, code reform, institutional will, and the formation of reform constituencies. See Hammergren (1998, a, b, c, d). The articles in National Center for State Courts (1996) are also relevant.

<sup>18</sup>Actually, this is a case where both tendencies often coexist -- a model or foreign law is imitated but with little concern for what others experience teaches about the difficulties it may also impose.

<sup>19</sup>The European experience with councils, the presumed model for the Latin American adoption, has not been very positive. See Rico, Ibáñez. An increasing number of US jurists

Justice like every other discipline has its fads, and they rarely turn out to be as effective as their immediate popularity implies.

These two tendencies, often apparent in the same programs, are shared by all reform participants, including major and minor donors and the technical advisors they bring to the work. In the latter cases, they are particularly puzzling and harmful. Donors and external advisors are presumed to have a more global view and thus a command of the lessons of experience. Still, it is not uncommon to find that even programs sponsored by the same donor appear completely uninformed by that donor's work elsewhere, adopting measures that have already demonstrated unsatisfactory results or investing in the redevelopment of already successful mechanisms.

There are a multitude of explanations for these phenomena. Simple human nature dictates that everyone wants to be special and that quick fixes are more appealing than complex solutions. Studying an issue is hard and often unrewarding work; original solutions usually win more credit for their authors, and those who hedge their recommendations with caveats and conditions are less likely to be heard than those who promise rapid, unqualified success. Justice reform aims at improving judicial performance, but it is also a business and a political cause and thus offers opportunities to participants which transcend or circumvent its apparent objectives. All of these considerations will continue to influence reform programming and will always encourage it to be less logically and technically driven than the planners might desire. However, if we can't change human nature or eliminate the wider set of agendas behind specific reforms, we can introduce measures to promote better practices and to take better advantage of what we have learned.

The underlying changes are attitudinal -- those involved in specific reform programs must come to recognize they are part of an evolving discipline and that the experience of others does count. The change cannot be imposed. It can be facilitated by making that experience more easily available, and by the adoption of policies which reward its use. Donors are critical here -- first in making an effort to consolidate and disseminate the lessons of experience, within their own agencies and more broadly, and by encouraging national partners to visit other countries and observe program alternatives in action before adopting their own. Donors can also make the appropriate changes in their own operating procedures, insisting for example that designers review and utilize these lessons, placing a premium on proposals that build on others work, and specifically addressing these issues in their evaluations. Finally, they can provide financing for conferences, workshops, exchanges, and studies specifically devoted to reviewing and evaluating competing approaches to common problems. These are not the activities currently undertaken, which usually feature collections of uncoordinated presentations on too many themes and with too many agendas to facilitate critical analysis. Themes should be more narrowly defined, participants chosen for their ability and willingness to address the issues objectively (as opposed to merely selling their own program or view), and the agenda should set forth the terms of debate

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have criticized the adversarial excesses of criminal and civil justice in that country even to the point of recommending some "inquisitorial elements. See Strier.

and the anticipated product. For example, a conference on training would not be limited to a dozen descriptive explanations of national programs, but rather might focus on how to do effective needs assessments, evaluate impact, or link training to career advancement. Presenters might be provided lists of questions or topics to be covered before hand or with a theme paper to which they would respond. The same types of conferences and workshops could also be organized by judiciaries or judicial schools, drawing on national and international participants.

One product of these information exchanges will be the creation of improved approaches and solutions out of the combined experience of various countries. Another may be the exploration and selective elimination of some of the persisting myths of judicial reform -- the attractive oversimplifications or out-and-out errors that emerge every time someone decides to try their hand at the topic. These range from the ephemeral goals like judicial independence or apoliticism which, it turns out, are not only impossible but also undesirable in the extremes often sought, to some traditional benchmarks and solutions -- the constitutional earmarked percentage of the national budget, government by external council, or the test to detect judicial vocation -- which prove far more difficult to realize and far less beneficial in their results than their promoters had imagined. Most of these objectives and solutions address important issues, and some contain elements meriting further investigation, but much time and many resources could be saved if their flaws and shortcomings could once and for all be recognized. The most dangerous of all of them may be the notion that reform itself can be reduced to a technical formula or model which once defined can be automatically and almost mindlessly followed. That belief may account for some of the greatest disappointments and worst mistakes; those lulled into its acceptance are usually unprepared to recognize their own errors until they have taken on fairly substantial dimensions.

### **More Precise Strategic Approaches and Reform Objectives**

Much of what we know about judicial reform is at the level of reform activities -- how to set up a judicial school or curriculum, how to develop an improved system of court administration, or how to restructure a Fiscalía or public defense office. There are still enormous gaps in this knowledge, and as noted, much of it is inadequately used. However, its fullest utilization would still not resolve a higher order problem, that of how to combine activities into a single reform program and of how to structure the latter so as to produce real improvements in judicial performance. The challenge is not to find a fail-safe formula for reform; as noted above that is an unlikely goal. It is instead to continue to test relationships to arrive at more effective and efficient means for making discrete improvements.

This is essentially a means ends problem and one which requires attention to both areas. It often begins with an inadequate statement of the ends or desired improvements. Where the goal is reform, without further qualifications, the target too easily becomes the realization of the individual activities included: a higher budget, a less politicized appointment system, or better trained judges. These it should be noted are not themselves objectives -- they are means. If we did have an ideal model -- the perfectly functioning judiciary -- and a precise definition of its component parts, then a statement of means might be sufficient -- x units of training combined

with y units of information system following the adoption of certain legal changes. Even here, resource constraints would force its incremental realization. Absent both a model and limitless resources, a better, more precise definition of ends is necessary to help select means and to determine whether they are having an effect.

A second reason for focusing on ends is our inadequate, and often incomplete understanding of the problems to be resolved.<sup>20</sup> Many of the myths referred to above are one aspect of this phenomenon. Often representing solutions disguised as problems (e.g. the solution is higher budgets for the problem that is judicial poverty), they reflect a truncated analysis of the larger ill and one which ignores critical contributing factors. In other cases, the flaw stems from our misperceptions of judicial operations. One possible example is the frequent contention that excess demand and impossible workloads force courts and other actors to perform poorly. The few existing empirical studies<sup>21</sup> often indicate that the real workload, what actually occupies the time of judges, prosecutors and police, is hardly excessive and that they could do far more with improved procedures, work habits, and perhaps some monitoring of output. Specifying the problem more accurately cannot eliminate these misperceptions, but it will allow further analysis to test for errors and encourage the development of more effective solutions to address what is found.

Once the problems are adequately stated, the second part of the equation -- the development of reform strategies -- is easier to address. Obviously, a part of this is the better use of our accumulated knowledge to match means and ends, and to ensure that the means are adequately designed and implemented. Even if training is required, there is still the choice of what kind and how much as well as how to organize it in the most cost-effective manner. However, training is rarely the only solution, and where a variety of means is indicated, often to address a variety of objectives, the remaining dilemma is how to mix, coordinate, and sequence them. Sequences and mixes dictated by logic, convenience, or just how things work out (e.g. doing what is easiest or more attractive first) may not be the best answers. They can lead to dead ends (when the easy things are done, reform stops), counterproductive results (the information system is designed before new procedures are introduced) or suboptimize complementarities and synergies (early training helps reduce resistance to proposed laws and provides information to improve their content). There are some broader strategic dilemmas -- whether it is best to change laws gradually or redraft codes en toto; whether top down or bottom up strategies are best in restructuring organizations; when to use and how and when to replicate pilot projects; whether to replace or retrain ill prepared staff and how to combine and structure positive incentives and

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<sup>20</sup>Poor problem analysis is a common phenomenon in all policy reforms (Weimer, Chapter 8). Problems are always socially constructed, but there is a difference between a construction based on accurately perceived events and one stemming from a misreading or construction of the “objective” facts. See Daniels and Martin for a discussion of this phenomenon in the context of US civil justice.

<sup>21</sup>See for example, Proyecto Reforma Judicial, FIEL.

sanctions to encourage better performance; how and when to draw external constituencies or potential users into the reform design and implementation process.

The list is much longer, and it is doubtful that many of the questions will have clear cut answers. The broader point is that our persisting ignorance requires intelligent experimentation -- when we recognize what we don't know, we can attempt to expand the frontiers of our own knowledge, testing alternatives and recording the results so as to allow mid course corrections in on-going projects and incorporate better methods in the next ones. If there is to be a new generation of justice reforms, it will have to build not only on the lessons of past efforts, but also on a more systematic exploration of how to incorporate them most productively.

### **The Costs of Justice and of Reform<sup>22</sup>**

In the earliest reforms, costs were not an issue. Donors had to account for what they put into reform projects, but no one asked what national participants would or could contribute to maintaining reformed systems. In an era where budgetary and workforce reductions were the general rule in the public sector, justice seemed to be the one area of governmental operations exempted. In some sense, this was justified. Latin American nations had been spending too little on their courts and other sectoral institutions for decades and if they wanted better service they would have to pay for it. However, in the last few years there have been signs that this blank check will be withdrawn. On the one hand, it is not evident that increased investment and operating budgets have bought the best services. The concern here is not how much is spent, but rather maximizing the returns. On the other, however, as countries reach and surpass the traditional targets -- 6 percent of the national budget as in Costa Rica, or in some cases even more -- and still more needs are identified, the very legitimate question of how much a country can spend on justice begins to be broached. Alongside this issue, the first question of cost-efficacy, is far easier to address.

Judicial planners and leaders will have to address both issues, although they may postpone the second one if they can make progress on the first. Access to higher budgets and generous external funding has allowed considerable waste, and the reform process itself has further encouraged it. When new services or procedures are introduced, it is usually easier to add offices and staff, rather than forcing changes in what already exists. This avoids additional resistance and produces results more quickly. Production increases but productivity remains unchanged. For the users, things look better for awhile, but increased demand or an end to budgetary expansion eventually calls attention to the sector's continuing low efficiency. Adding more judges, defenders, or police without increasing their individual output is a short term, and in the end, very unsatisfactory solution. It has introduced other problems -- the proliferation of offices, organizations, and officials has encouraged a duplication of functions, overlapping powers and missions, and less rather than more coordination among them. A sector which

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<sup>22</sup>See Dakolias' argument on the lack of correlation between the amount spent on justice and its "quality." See Pastor for a more general discussion of costs.

always posed a certain amount of confusion and puzzlement to potential users has become more perplexing. Whole organizations may serve purposes few citizens understand, and anyone with a complaint may be still less clear as to where to present it, or once it is presented, who will handle it. Many of these new or reformed entities have already begun to create internal divisions devoted to more specialized concerns, without, many users protest, ever fully addressing their primary functions.<sup>23</sup>

The ambitious restructuring of the sector, its entrance into nontraditional activities, and the promises of more, often subsidized services for all have run smack into budgetary constraints. A concerted effort to rationalize operations and increase productivity may buy more time, but the still larger issue is what society will finance. Justice like any other public service has a price tag, and if the users don't always pay it directly they in the end will finance it -- and in the course of events receive less of some other good. Judicial training, public defenders, and courtroom social workers and psychologists must be paid for, just as must the more usual services of police, judges, and prosecutors. The implicit question has two parts: what will be a public service, and what public service will be provided gratis?<sup>24</sup> Costa Rica for example has an exemplary public defense office, which until recently provided services to all comers, under the assumption that a free defense was a constitutionally guaranteed right. The service is still provided and has expanded into new areas (civil and family law), but those who can afford to pay are now charged. The discovery that in most Latin American countries a majority of civil cases involve the collection of bad debts has raised a similar issue -- the first question is whether such cases should be addressed publicly (or whether a private service might be more appropriate.) The second is whether such services should be provided free, or whether special courts with user fees might not be more desirable.<sup>25</sup>

The two aspects of the dilemma are complicated by another feature -- the tendency of subsidized (or for that matter, better) services to alter demand patterns and to attract more users. This is implicitly their intent, but the increase can over tax the system, reducing quality or forcing rationing, and it may not represent the most efficient use of overall resources. Where litigation costs little, more people will litigate, rather than seeking to resolve their conflicts in other fashions or simply deciding to live with them. This is not always beneficial from the individual

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<sup>23</sup>In El Salvador, the Human Rights Ombudsman, Procuraduría, and Fiscalía, three organizations noted for their poverty, inefficiency, and rudimentary services, all added offices to deal with women's rights, and the latter two joined the courts in creating departments to provide mediation and social services. Since no one is doing any of this very well, a more rational coordination and division of labor might provide better attention to all users.

<sup>24</sup>This point was raised by Enrique Vargas in a presentation at an IDB seminar, March, 1998.

<sup>25</sup>See Kagan for a discussion of the nonjudicial factors accounting for the decline in contested debt cases in US courts.

or societal standpoint. The theme has been explored by any number of specialists.<sup>26</sup> Here, I would only note that few Latin American reformers have addressed it, and the oversight could be costly in a literal and figurative sense.

The choice between public or private, free or for-fee services includes a lot of middle ground. Special courts, public or private mediation services, progressive fee schedules, filtering mechanisms or other devices to discourage some users, and partially rationed or subsidized programs are all possibilities. They structure the choice, but they do not eliminate it. The era of infinite expansion is ending, and governmental leaders, judicial planners, and citizens will have to decide not only how to provide services more efficiently, but also what will be provided. Arguably, the choice should not be left to the sector alone; it is patently political and thus merits discussion by a far broader community.

### **Some Unanswered Questions on the Role of Judicial Institutions and Societal Expectations**

The questions of costs and efficiency already address part of this issue. They are inherently political although technical expertise can help guide and invent solutions. There is, however, a still more political set of questions which the reforms have treated only superficially, having to do with the more strictly political role of the judiciary -- its functions as a branch of government.

This issue had traditionally been addressed as one of judicial independence, with the underlying assumption that it was an undebatable, universal goal. Equally traditionally, its realization had been sought through efforts to increase the judicial budget, to give the judiciary control over its use, to create a judicial career with merit based, tenured appointments, and to expand the judiciary's power to review the actions of other branches of government. Progress in reaching these goals has brought a variety of unanticipated consequences and a resulting reconsideration of their desirability. First, in a number of cases, judicial independence has out paced reform, giving certain judiciaries more freedom to exercise their traditional vices -- misuse of resources, politically motivated decisions, and in some instances partisan conflicts or alliances with other branches of government. Second, a few governments have manipulated the reform measures to overtly political ends -- using permanent appointments to lock in their candidates, transferring their partisan interference to new bodies (councils), or dividing judicial powers among a variety of entities to diffuse their impact and lessen the chances of their effective use. Finally, even when the reforms have occurred as intended, elites and ordinary citizens have begun to question the extent of judicial independence, and raise a second, neglected issue, that of accountability.

The three scenarios are all relevant, demonstrating that independence is, like most values, relative not absolute. An absolutely independent judiciary, which answers only to itself (no accountability) is as much of a problem as one that is absolutely dependent. It may pursue

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<sup>26</sup>The law and economics literature and institutional economics (see North) offer two approaches. An interesting discussion in Spanish is found in Pastor.

objectives that no one else values, or which clash with those of the society it serves; it may become a class unto itself, impervious to new needs and divorced from the surrounding society. The dilemma is how to decide which values it should embrace, how to structure this into its organization, and how to check it when it violates them. Simply saying that the judiciary is responsible to the law is not enough; judges interpret the law and their interpretation in the end decides what the law is, to whom, and how it will be applied. When laws conflict, as they often do, even at the level of constitutionally guaranteed rights, judges will decide which rule prevails. When their decisions are based on appreciations which do not match those of their societies, or which coincide only with those of certain social groups, they will generate rather than resolve conflicts and eventually undermine their legitimacy and legitimizing role.

Over time, judiciaries develop ways of dealing with these dilemmas, their own informal rules for determining how and when to handle hard decisions. Reform, however, works almost exclusively on the formal rules. Although changes at this level will eventually produce a new set of informal behaviors and understandings, they develop more slowly and in less predictable fashions. The best social engineering cannot prevent unpleasant surprises, but reforms which explicitly address the judiciary's dual role -- as public service and political power -- which confront the contradictions of independence and accountability, and which by looking at past problems and others experience, anticipate where conflicts will emerge may be able to deal more creatively with the inherent tensions and so to guide informal solutions.

### **Dealing with Political Will**

All reforms have losers and winners. Although some self-perceived losers will accept their sacrifices in the interest of a common or long term good, most will either resist proposed changes or attempt to divert those they believe to be most harmful. Resistance or diversion may be overt or concealed, partial or global, internal or external to the organization, and at all levels within and outside it. It is most obviously a problem when it occurs at the highest political and organizational levels, but lower level opposition, aside from subverting reform, may also undermine higher level commitment. Leadership's interest in reform may lag as the costs of overcoming opposition increase and the prospects of visible improvements begin to look more distant. It is probably fortunate that so few of the technical and political difficulties are evident when a reform is initiated, but their unanticipated emergence can also produce partial or total paralysis of efforts.

It is commonly insisted that reforms only be undertaken with sufficient political will<sup>27</sup> -- that is the commitment of highly placed political and organizational elites. It is equally common to find that what will existed at the onset was less than had been imagined, or was insufficient to meet the increasing demands placed on it. It takes one kind and level of will to accept a loan or grant for a judicial school or to propose a new law; it takes quite another to push the law through Congress and guarantee its enforcement, to introduce standards for judicial performance, or to

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<sup>27</sup>Blair and Hansen.

change the rules for appointing judges and their staff, especially when those doing the willing stand to lose traditional powers and privileges in the process. This does not imply that lagging commitment is always self-interested. It can also be a function of insufficient power -- those leading the reform may find they lack the resources and skills to push it ahead. Whatever the specific reasons, and they clearly deserve more exploration, inadequate political impetus is probably as great if not a greater obstacle to reform progress as sheer technical and design constraints. This in some sense turns the usual principal/agent<sup>28</sup> dilemma on its head -- the problem here is not how to control the agent, but rather how to identify an adequate principal to lead reform.

The realization has reactivated a debate over who should direct a reform, with the logical candidates usually being the judiciary itself or the executive. Each has obvious advantages and drawbacks, as does the compromise solution of dividing the responsibility between the two. Where any of these alternatives has been successful, it is usually not because of inherent institutional characteristics but rather because of the emergence of a uniquely dedicated, visionary leader or group of leaders and thus is limited to that individual(s) stay in office. Such messianic leaders are rare, and not themselves immune to biases, self-interest, and lagging commitment. From the standpoint of encouraging an ample definition of objectives and ensuring that more particularistic agendas do not drive or inhibit reform, it may be well to look beyond the traditional solutions. One possibility is the creation of an artificial principal -- a directive alliance or consortium rather than a single organization, group, or individual. While primary responsibility for directing the reform may be lodged with one entity -- the Court, an implementing unit, a ministry -- other members would share in setting the agenda, monitoring implementation, and eventually deciding whether to continue or not. Ideally such other members might include a variety of reform stakeholders -- representatives of other branches of government, the broader legal community, and citizen groups. The hope is that collectively they may override more particularistic agendas and thus push for a reform which realizes a common good.

A variation on this theme might encourage the formation of an external consortium of public and private interest groups to monitor public sector performance and develop practical proposals to advance reform. To have an impact, this alliance would have to alter a number of traditional orientations and practices of Latin America's civil society organizations, seeking a less confrontational stance toward the public sector (and toward each other), inviting the participation of economic stakeholders, and shifting from open-ended criticism to the development of technically viable proposals for change. They will also have to accept incremental improvements as a goal, rather than the pursuit of utopias, and to recognize that justice reform is reform, not revolution. However, unless civil society can find a voice and articulate a program, they will by default leave reform in the hands of public sector actors whose interests and purposes will reflect narrower concerns and perspectives, and whose ability and willingness to

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<sup>28</sup>For a discussion of the principal/agent problem, see North. The traditional argument is that principals depend on agents whose own agendas will undermine the goals of the former.

further any agenda may be similarly limited.

### **The Role for Donors and How to Maximize Their Contributions**

Expanding the stakes in reform enactment is not an automatic solution. It may result in slower implementation and less ambitious objectives, and may generate additional conflicts. It does not resolve the problems of inadequate subjective models and other cultural constraints, inexperience, or more broadly inclusive, but still self-serving agendas. Such collective agencies have already been attempted, and observers have noted their tendency to adopt the fireman's syndrome,<sup>29</sup> an implicit agreement that members will not criticize each others proposal for fear of cutting off funding. This is one area where the participation of external donors may be helpful. First, they can help create and support the directive alliance or external consortium of stakeholders. Second, they can raise the level of technical input, and as mentioned earlier, ensure that actions are fully informed by their own and others experience in comparable reforms. Donors may not fully appreciate local needs and circumstances, but they do have experience and potentially useful technical expertise which can help avoid repeating common mistakes. Third, they can help set and enforce the agreements on specific objectives, procedural rules, and substantive benchmarks and continued monitoring to ensure compliance. These agreements should extend not only to local parties, but also to the donors themselves to ensure a common coordinated effort. Unfortunately, donors' record here has not been very positive.

For the earliest reform programs, donor coordination was not a problem because there was usually only one donor on the scene. However, in recent years, a veritable flood of donor funded projects has considerably altered these circumstances, offering the potential both for greater change and for counterproductive conflicts. It is not uncommon, both in Latin America and elsewhere, for national actors to use this situation to their own advantage, playing off donors against each other, avoiding conditionality, and producing programs still more disjointed than the worst that had gone before. True, it is largely the donor's funds that are at stake, but for the country, there are lost opportunities, wasted efforts, increased debt, and the dangers of initiating practices or systems which will be unproductive and costly to maintain. The solution to the problem will take efforts on both sides. Donors must find ways to coordinate their own activities and countries should insist on this coordination and also decide on their own priorities. National beneficiaries must also learn to say no -- where proposed activities make no sense, are redundant, or are beyond their capabilities to absorb or maintain.

Ideally, the format for all of this is a single sectoral reform plan, allowing the negotiated integration of national and donor efforts. While donors would not set the plan, they could provide technical assistance for its formulation, would be invited to comment on it, and would

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<sup>29</sup>The observation was made apropos of USAID's effort to direct its Colombian project through a commission composed of high ranking sector officials. It arguably could be applied to efforts by USAID and other donors to establish reform commissions or councils in several other countries.

suggest modifications, both as regards its general content and their anticipated contributions. Any such plan could be expected to undergo continual revisions, but they too would be openly discussed and negotiated, with input from private as well as public sector actors. A few countries have already attempted such plans, although none has been able to use one as an effective guide for international assistance or even for purely national efforts. .

### **Conclusions**

Whether as a result of specific reform programs or merely of broader patterns of socio economic and political change, Latin American judiciaries are undergoing substantial transformations affecting both their internal structures and operations and the external impacts of their actions. Efforts to produce reform have contributed to these regionwide trends and have also increased our knowledge as to the nature and origins of judicial shortcomings and the effects of specific activities designed to overcome them. As much of this knowledge has resulted from failed and misguided efforts as from reform successes, but an improved understanding is important no matter what its origins. However, its value will ultimately depend on how well it is used; mistakes are worthwhile only if we learn not to repeat them. A part of that knowledge also extends to defining our ignorance -- the questions we can't answer either about how to produce desired improvements or what those improvements really should be.

Judicial reform has reached a critical juncture in Latin America. If we can take advantage of our past mistakes and what they have taught us, assimilate the positive lessons, and focus on the new questions that have emerged, the next generation of reforms may be able to advance more rapidly, even if they of necessity are more selective and less ambitious in their goals. The role of Latin America's judiciaries has undergone a substantial, undeniable, and probably irreversible change. The challenge is to ensure that the change represents a real improvement, and one which will contribute to the region's future political and economic advancement.

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