

Twenty-Five Years of Latin American Judicial Reforms: Achievements, Disappointments, and Emerging Issues

by Linn Hammergren

In the democratic opening of the early 1980s, judicial reform appeared on the policy agenda throughout Latin America. Although such efforts were not new to the region, their virtually universal and nearly simultaneous adoption into policy was novel, extending even to the few countries (Colombia, Costa Rica, and Venezuela) without recent *de facto* regimes. The movement eventually incorporated the entire justice sector (“sector”) rather than the courts alone.

The reforms were locally inspired, though they received financial and political support from the donor community, and over time, other external inputs. Twenty-five years later, regional (and donor) interest has not waned despite a failure to deliver many promised improvements. Still, the sector’s organization, operations, and political influence were altered substantially, and most of these changes appear irreversible. Whether perceived as down payments on future progress or as a source of new challenges, the changes suggest the project will not be abandoned soon. The following explores these arguments in three parts: first a review of the movement’s early history and the way new actors and circumstances broadened its agenda; second, an examination of its accomplishments, failures, and the causes of each; and finally, an exploration of issues that have emerged in recent years.

A HISTORICAL OVERVIEW OF THE MOVEMENT’S DEVELOPMENT

Early Emergence, Actors, and Agendas

The early 1980s saw a region-wide concern for re-democratizing Latin America’s governance institutions. Somewhat surprisingly, given the many other candidates, judicial reform was among the few areas with sufficient consensus on a plan of action to allow immediate implementation.¹ The reasons are worth noting because of their lasting effects.

Linn Hammergren is a Senior Public Sector Management Specialist (Latin America and the Caribbean) at the World Bank. The opinions expressed here are those of the author and in no way meant to represent the official position of the World Bank

Although hardly unique to the judicial arena, there was widespread agreement on the need to remove the vestiges of dictatorial control. For decades, judiciaries and other sector institutions (police, prosecutors where they existed) had been either circumvented or subject to abusive external interference. The widespread perception that the organizations had colluded in perpetrating abuses might have inspired new regimes to take the usual steps—replacing the incumbents and returning to business as usual. Frequently, the traditional purges did occur, but two additional factors ensured that the changes would not stop there.

The first was the presence of a region-wide network of independent jurists who, since at least the 1960s, had been advocating legislative and structural changes to bring sector operations in line with “international principles,” human rights doctrine, and recent continental European trends. In short, a plan for further reform existed. It appeared relatively simple, fit well with the new democratic ethos, and faced no credible alternative proposals.

Still, the advocates were few and not politically well-positioned. Their proposals might have languished were it not for the second factor. The donor community, and especially the U.S. Government (via USAID, the U.S. Agency for International Development), had concluded that strengthening the justice sector, especially the courts, was critical to advancing democratic governance in the war-torn Central American nations.² They thus offered support to the initial proposals because those proposals addressed their own concerns.

From these foundations, the movement grew, emphasizing criminal justice (because the worst abuses had occurred here and later, because rising crime rates created more demand), law revision or “legal change” (because the local advocates were almost exclusively lawyers), and the adoption of innovations already introduced in continental Europe. These innovations included far more than criminal justice reform, but it received the most attention.³ The first programs emerged among the less advanced Central American countries (El Salvador, Guatemala, Honduras). The explanation is simple—donors were active in these countries and provided funding to move the reforms ahead. In countries with peace accords (El Salvador, Guatemala, Nicaragua) judicial reform figured among the commitments made by the signatories. In the region’s more advanced countries, the absence of the first two elements, more complex political situations, and an active legal community with its own internal divisions produced delays, although in the end most succeeded in introducing their own variations on the common themes.

Criminal Justice Reform and Democratic Governance

Although criminal justice reform was also pursued for its own sake and the sector's contributions to democracy building do not end here, the two goals were closely joined. Proponents claimed that in contrast with accusatory criminal proceedings, Latin America's traditional inquisitorial systems were inherently less transparent, more prone to corruption, less protective of the defendant and victim's rights, and less likely to arrive at "true" verdicts because of their reliance on investigations prepared by a single judge. Drawing on European and Anglo-American models, they thus called for new procedural codes and related laws that:

Eliminated the instructional judges and their written reports, substituting evidence collected and presented by the prosecution and defense in an oral trial and preliminary oral hearings.

Had special judges (*jueces de garantías*) oversee police and prosecutorial investigations to protect the defendants' rights. These judges could not participate in the trial.

Substituted the "principle of opportunity" (prosecutorial discretion) for the "principle of legality" which required prosecutors to pursue even the most hopeless or trivial complaints.

Included abbreviated proceedings for defendants willing to acknowledge responsibility for all or part of the offense.

In some cases, introduced juries, mediation with the victim for minor crimes, alternative sentencing, decriminalization of some offenses, and the victim's participation in the trial.

As crime rates increased, some codes were revised to soften the due-process emphasis.

Despite the frequent contention that the movement was entirely donor-driven, the donors' early contributions were less intellectual than financial and political. Donors generally let their local, and occasionally regional, allies define the reforms' parameters. The earliest donor innovations tended not to prosper in any case (examples include an early U.S. effort to reform El Salvador's criminal justice system via judicial protection units, a forensics laboratory and an investigative police, and USAID's attempt to improve judicial budgeting and administration in Honduras). Donors became more intellectually involved at later stages when the law-driven strategy encountered implementation problems. Two themes were important here: "capacity building" (reorganizations, training, automation and administrative improvements) to ensure organizations could carry out their new functions, and support for new selection and career systems to improve the quality of judges, prosecutors, defense, and police. Aside from this, early donors adopted local initiatives uncritically.

In the early years, donor presence was limited to USAID and the United Nations, either through observer missions or the UN Development Program. USAID's decision to fund ILANUD (the United Nations Latin American Institute

for Crime Prevention and Treatment of the Delinquent) was instrumental in moving the programs beyond Central America. ILANUD was a small organization, operating out of Costa Rica but with ties to the regional code reformers. When USAID increased its budget ten-fold, ILANUD took its program on the road, locating allies in countries further to the South.⁴

Later Developments and New Themes:

Throughout the 1980s, the movement was focused on criminal justice and supported by the US Government, the UN, and a few private foundations and small bilaterals.⁵ By the early 1990s, new actors and themes emerged. The multi-lateral development banks (MDBs World Bank and Inter-American Development Bank) were especially important, seeing justice reform as an opportunity for new loans. However, initially they were stymied by an apparent prohibition on justice work.⁶ The emergence of “neo-institutional economics” with its emphasis on the role of institutions in shaping economic growth offered a way around the prohibitions and a new rationale for justice reform. As depicted in the writings of Douglass North (1990) and others, law and legal institutions provided the juridical security necessary to market growth. Where the US government portrayed the courts as the missing pillar of democratic governance, the neo-institutionalists saw them as critical to economic development.

From the early 1990s on, the MDBs introduced projects aimed at reforming non-criminal legal frameworks and general court strengthening. They worked in areas introduced, but given less attention by the earlier arrivals—court administration, automation, infrastructure, judicial selection and governance systems, and alternative dispute resolution (ADR). The MDBs were less directive in their program design, and channeled most funding to equipment and buildings, what the judges perceived as their most vital needs.

The MDBs are the largest but not the only new actors. The past fifteen years have seen a remarkable expansion in external organizations involved in sector reforms. Newcomers have tended to abandon the criminal justice focus because it was so thoroughly monopolized by the early entrants or because they identified new problems. Although they commonly forge alliances with local groups, local growth hardly matches that of the external allies. This remains one of the movement’s weaknesses—the limited local support base and its members’ tendency to privilege external over broader local alliances.

More recently, a third macro-goal appeared—the use of the justice system to better the situation of the poor. Here again external actors have played a major role, most recently through the creation of a UN Commission on Legal Empowerment of the Poor (CLEP). Yet international support has also strengthened new local allies, most notably public interest lawyers, a larger variety of NGOs, and an emerging group of socially oriented judges.⁷ This third strand also builds on activities introduced earlier—opening the courts to the traditionally marginalized, creating various kinds of ADR, legally educating the population, and promoting indigenous dispute resolution systems.

A Single Vision or a Field of Multiple Aims?

Judicial reform can be pursued for its own sake, but even then consensus on its objectives is notably lacking. Like rule of law, with which it is sometimes equated, the term has multiple interpretations (Tamanaha, 2004). The three macro-objectives, fortifying democratic governance largely through criminal justice reforms; promoting economic development; and reducing poverty by augmenting the poor's access to the courts or to "justice" writ large, enjoy a problematic co-existence. Twenty-five years into the project, this is becoming painfully visible, as when socially-responsible judges overrule legal contracts because they are harmful to the poor, or when expedited debt collection favors banks and other large lenders. One person's juridical security is another's entrenched elite privilege.

These contradictions have gone unnoticed for so long because judicial reforms have developed along several parallel paths even when encompassed in a single "holistic" project.⁸ Of course, there is common ground. No one endorses corrupt or under-qualified judges and police, and for the most part delay is not seen as a virtue. But there are differences in priorities and preferred methods, and as reforms have begun to make their impacts felt, the disparities among the ends sought are having an impact as well. The large umbrella sheltering all reform programs may now be too small for the task.

A STOCKTAKING ON PROGRESS TO DATE*Accomplishments*

Whatever doubts there are about the improvements, it would be foolish to contend that the reforms have had no impact. The sector has expanded dramatically. The absolute number of judges and other legal actors has increased several-fold in most countries; the ratio of judges per 100,000 inhabitants has reached a regional average of 8.1, as compared to the Western European 10. This often goes unnoticed because, with the exception of the police, sector institutions are small. Thus, even a quadrupling of staff has had little impact on public employment.

The judiciary's share of the public budget is correspondingly minor—it currently reaches 6 percent, at most, and more often falls in the 2–3 percent range. This is, however, quite respectable by international standards. In addition, some judiciaries (especially those in Brazil and Mexico) have special investment funds for construction and automation. Others have relied on donor financing. Despite well-founded concerns about how funds are used, the former picture of pervasive institutional poverty has decisively changed.⁹

Growth was accompanied and partly explained by structural changes—the addition of new organizations (prosecution and defense), specialized offices and actors as required by the new criminal procedures (for example, judges overseeing police and prosecutorial investigations); the introduction of other jurisdictions (e.g. family and juvenile matters, economic crimes, and constitutional issues); and the addition of intermediate courts and offices to oversee the territorially enlarged

system and other internal reorganizations designed to redistribute tasks. New services like ADR require public or private organizations to support them, and as access programs increase, new work units (mobile or small claims courts, one-stop justice centers, offices for orienting clients) have proliferated. Judicial councils, introduced in about half of the countries, require their own administrative services. In short, the justice sector has increased not only in size but in organizational complexity as a result of the reforms.

The sector workload has grown substantially, which was not anticipated by the reformers. Statistical records remain inadequate, but what does exist suggests an increase in filings and average workloads. In some instances (e.g. Brazil)¹⁰ judges are receiving and processing near-world record numbers of cases. Statistics for police, prosecutors, and public defenders are more dispersed and harder to interpret, but given rising crime rates, we can infer that they are busier than ever. New constitutional jurisdictions have increased their workloads dramatically. Brazil's constitutional court (the Supremo Tribunal Federal) now processes over 100,000 cases annually. Other supreme or constitutional courts routinely receive thousands of annual filings. Growth here may be most dramatic because prior to the constitutional changes of the 1980s (addition of guaranteed rights and means for accessing them), most high courts had a low constitutional workload, instead focusing on *casación* or a final review of ordinary complaints. Many new filings might fall in that category, but parties often find it easier (and faster) to request reviews alleging violations of due process rights.

A final change is a higher incidence of overrulings of laws and government actions via enhanced judicial review powers. While partly attributable to constitutional and other legal changes, there are clearly other factors at play: changes in the composition of the constitutional bench, greater citizen demand, more conflicted executive-legislative and inter-party relations (which leave more space for the courts to operate independently), and the emergence of lawyers specializing in public interest law. These trends have provoked increasing confrontations between courts and the executive, and occasionally, renewed efforts to control the bench.

Shortcomings:

This increased complexity, while intended to improve services, has created confusion among clients and staff. There are problems of coordination within and across organizations, failures to adjust to new mandates, and a reemergence of old vices within the presumably improved structural framework. Some countries have made the new mechanisms work as intended. Chile's experience with the new criminal procedures code, although initiated only recently and not without problems, is among the more successful. The Chileans have also taken the novel approach of tracking performance, identifying issues, and resolving them along the way. Unfortunately, most countries have not followed this example.

Brazil's ability to respond to, if not keep up with, a phenomenal demand for court services is another success story. Whether or not the automated batch-

processing of cases is the ideal solution, it has facilitated the handling of a growing number of repetitive demands. Two or twenty thousand requests for a similar readjustment to individual pensions can be answered with a template judgment, signed digitally by the presiding judge. Costa Rica has also used automation and novel reorganizations to keep abreast of its workload. It recently took another unprecedented step by having the legislature “de-judicialize” the traffic cases accounting for 60 percent of incoming filings.

On the other side, there are countries with less positive results. Throughout most of Central America and the less developed South American countries, judges still struggle with relatively small caseloads—an annual average of under 300, largely simple filings. As these countries were among the first to introduce new criminal procedures, it is particularly distressing that signs of improved performance are so few and that in some instances, the new rules have facilitated the reintroduction of old vices—offering more opportunities for bribes, stopping cases in their tracks. Available statistics suggest that police and prosecutorial closures of criminal investigations remain low, especially for the most serious crimes. Moreover, completed investigations of less serious crimes are often attributed to police rounding up the usual suspects, guilty or not.

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Insufficient supervision of sector personnel perpetuates abuse of clients, corruption, and inefficiency. However, the fault is not always with the front-line workers, and there are still too many high-ranking leaders who perpetrate their own abuses or direct those of their subordinates. In nearly half of the region’s countries, observers have identified corruption networks centered in the supreme courts—not all have been disbanded. There are indications of similar networks among police and prosecutors. New hiring systems are criticized for focusing on the wrong criteria (e.g. an ability to recite laws from memory)¹¹ and for encouraging subjective assessments and patronage. Judges and prosecutors may take a written examination, but a personal interview often determines the final results. Although only a few countries (Haiti, Nicaragua, Paraguay) have not introduced a career system, others still rely on temporary appointments (Peru, which is slowly replacing Fujimori’s provisional judges, and Venezuela, where Chavez has imitated Fujimori’s practices). Some countries are criticized for making it nearly impossible to remove a judge or prosecutor “known” to be corrupt.¹² New disciplinary systems don’t work—they either provide excessive protection to poor performers or exert irregular pressures on staff. The same complaints apply whether discipline is handled by a high court or an external council.¹³

Except for countries like Brazil that have introduced pro se (self) representation for small claims courts or Colombia and Costa Rica where *tutelas* or *amparos* (individual constitutional writs) can be filed without a lawyer, and despite efforts to subsidize legal services, financial barriers continue to impede access for the poor. In some sense, the principal benefits of the reforms stop at the courthouse or lawyers' doors. Judges have better housing and salaries, and lawyers can now file by internet, but the ordinary client confronts a complex, unintelligible, and costly obstacle course. As for the promises of positive impacts on extra-system goals – democracy, growth, or poverty reduction—while perhaps a moot point because of the incomplete first-order improvements, there are doubts as to whether they would occur even in the best of circumstances.

The situation is dramatically illustrated by the ten years of opinion polls compiled by the *Centro de Estudios de Justicia de las Américas* (2003 and 2005). The polls show little change in public perceptions; some judiciaries demonstrate notable declines in already low public evaluations. As the polls only cover the last ten years, it is conceivable that ratings improved earlier. However, for a country like Peru where only 14 percent of the citizenry consider the courts trustworthy, any improvement would have been on a base of nearly zero.

Taken collectively, the polls indicate the same concerns the reforms promised to address—corruption, delays, and limited accessibility. More focused questionnaires might reveal some exceptions—citizens may approve such innovations as Brazil's mobile and small claims courts, certain constitutional bodies and mechanisms (most notably the handling of *amparos/tutelas* by Costa Rica's Constitutional Chamber and Colombia's Constitutional Court), or some more targeted innovations (but only by those to whom they were targeted). However, even in countries with positive examples, the sector's overall ranking contrasts starkly with the reformers' promises. What went wrong?

Some Explanations of the Expectations Gap:

The simplest explanation is that not enough has been done and not enough time has elapsed. While probably true, this contrasts with the reformers' predictions and the time frames they set. The maximum of five years allowed for major reforms (to criminal justice, to the quality of the bench, to expand access significantly) was at most sufficient to shake things up. After that came the hard work of making them work better. Hence, to the extent the gap originates in unrealistic expectations, the reformers deserve most of the blame. They oversold their product.

Yet, while reformers might endorse the first rationale (too little done in too little time), there are reasons for finding it insufficient. For one thing, some late-starters made real improvements. Chile did it not only with its criminal justice reforms, but also through increasing judicial independence, as demonstrated by judges' willingness to rule against the state. Some provinces/states in Argentina, Brazil, and Mexico also improved, although as late starters on the criminal justice side, more often in shortening delays or increasing access. However, even in unitary systems, there are

often specialized jurisdictions or districts that have shown progress. As this suggests, it may be less what the reformers aimed for than what they overlooked in achieving it that counts. If this is correct, more time to do more of the same is not the answer and will only lead to further frustrations.

Two problems affected the reforms from the start: poor information and over-reliance on legal change. The first is less often recognized, but it led the reforms down many wrong tracks. Twenty-five years ago, the justice sector was among the region's least studied and worst understood institutions. Organizational records were so bad that the numbers and location of employees, or workloads, were simply unknown. Lacking good data, the reformers instead relied on intuition, anecdotes, and conventional wisdom all notoriously inaccurate. For example, many problems were blamed on excessive workloads. With the benefit of better statistics, it now appears that most judges, prosecutors, and public defenders are not overburdened and that when push comes to shove, as it rarely does, they can dispatch their caseloads within reasonable time limits.

Poor information exacerbated a second problem - the excessive reliance on legal change. For some reason, lawyers, who should know better, typically offer a new law to resolve virtually any problem. The situation worsens when the problem is misdiagnosed. New laws are a useful means of announcing an intention to do things differently or removing legal obstacles, but they are notoriously insufficient on their own.

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There were frequent delays in drafting and enacting the new legislation, and in creating the structures it mandated. It took Bolivia, Argentina, Peru, and Paraguay several years to create their judicial councils, but that was not the end of their problems. The councils' performance (with the possible exception of Peru) is uniformly unsatisfactory to national and international observers.¹⁴ Most countries took less time to establish new criminal justice agencies (Colombia's 20,000-person prosecutorial agency is often described as emerging from one day to the next). However, when not wracked by corruption and general inefficiency,¹⁵ the agencies' members often continue to operate much as they did under the old rules. Prosecutors still compile written reports on evidence, and judges insist on seeing one, whatever the codes say about oral presentations. Constitutional courts have had a rocky trajectory, although some (Brazil, Colombia, Peru post-2001) have earned the respect of citizens (if not of the government) for the quality and quantity of their decisions. In explaining the few successes and the more numerous failures, several

additional factors merit mention.

First, the laws were sometimes poorly drafted, motivated more by a desire to incorporate important juridical principles than by an eye to what would work in practice. This derives from a tendency to leave the job to jurists who regarded laws as more symbolic (a statement of the ideal) than instrumental (a guide to action).¹⁶ However, when drafters did strive for results they often incorporated infelicitous details—things that could not be done, or that would create unnecessary hindrances or further complications. Many of them lacked practical experience. Their fertile imaginations and reliance on doctrine and models drawn from developed countries were not good substitutes; they were drafting in two dimensions for implementation in a four dimensional world.

Second, there was the question of how to get organizational actors to embrace the spirit of the new codes, especially if they had been working under the earlier systems. Observers often comment that the “new” Colombian prosecutors, many of whom had been instructional judges, continued to operate much as they had in their former roles. Moreover, many holdovers brought with them the vices the new systems sought to eliminate. A prosecutor or judge used to taking bribes was unlikely to desist just because the basic procedures were different. Even getting new recruits to act differently has been difficult because the only system they knew, however imperfectly, was the one being supplanted.

One evident answer is training, but much of what has been taught is more inspirational than practical. Absent the development of new *operational* procedures (what one does on arriving in the office on Monday morning), there is little other basis for the courses. Donors tried to fill the breach with programs on investigative or oral trial techniques, but that still left a large gap. Knowing how to conduct a single investigation is one thing; knowing what to do with 250 pending investigations and how to coordinate them with the police is quite another. In a situation where individuals traditionally learned by doing, picking up bad practices with the good, the need to design work processes systematically was simply unrecognized.

Much the same is true of structural re-engineering—setting up offices and work groups to address new tasks in the most efficient manner. Organizational “organic” laws (regulating internal structures and responsibilities) did exist, but had rarely been drawn up from a practical standpoint and were completely inadequate to current needs. At one point it probably made sense for each judge or prosecutor to have one secretary or clerk, two or three drafters, and a concierge, but that time had long passed. Unfortunately, the basic work unit design was as often as not carried over into the new era along with the original staff.

Finally, there were the issues of incentive structures (explaining why individuals behave one way and not another) and the oversight role played by organizational leadership. Incentive structures require carrots and sticks. Traditionally both revolved around the subjective evaluations by higher ups. Where higher ups had nothing to go on but their gut reactions, they were unlikely to distribute rewards any differently, in fact might punish those attempting to adopt new procedures. Despite the small

fortunes invested in computerization, automation plans rarely incorporated management information systems to allow more objective assessments. When performance statistics were provided, leaders often had no interest in using them and no basis for their interpretation.¹⁷

As this suggests, one overlooked element was the development of sector leadership and governance. Donor and national programs alike seem at most to require that leaders accept the new inputs, but virtually never mention concrete results. Computers were provided because those financing them believed they would accelerate case processing, but no one set targets. Training is financed to improve the quality of performance, but results are not tracked. Sector leaders have become more adept at requesting inputs, but they never make explicit promises on the outputs or attempt to monitor them. The problem—getting agency leaders to see themselves as managers—is both more critical and more resistant to resolution than getting lower-level actors to perform differently. In fact this second goal will never be achieved absent advances in the first one.

The challenge is most difficult for the judiciary, as collegial governance and judicial independence pose enormous obstacles to a more managerial outlook. However, the judiciary can and should be managed without interfering with judges' ability to make independent decisions. As one Argentine provincial court noted on firing a judge for inexcusable delays, "judicial independence refers only to the content of your decisions; it does not affect your responsibility for making them in a timely fashion." Unfortunately, a managerial perspective and skills are in short supply.

Then there is the problem of how to proceed when leaders are also incompetent and corrupt. Fortunately, the reforms have reduced the frequency of that situation. However, even in Brazil, where both problems are relatively rare, there have been a few recent scandals involving bribe taking as well as the discovery that many state appellate judges were receiving illegally high salaries or had violated the law against nepotism by placing their relatives in positions of confidence.¹⁸

As this suggests, the reforms, however nobly motivated, have fallen short of their aims because of enormous strategic oversights. Fortunately, many of these have been recognized, and if still lacking satisfactory solutions, are being addressed. However, what has been achieved has introduced several new concerns, most of them never contemplated previously. They are the topic of the final section.

EMERGING ISSUES AND CONTRADICTIONS

The challenges can be grouped into three related categories. Starting with the easiest, they are: how to get inefficient organizations to work more efficiently and effectively; how to deal with escalating workloads; and how to tackle the ideological and political contradictions among the various reform goals.

Dealing with Retrograde Institution and Politics:

This relatively basic problem largely affects countries at the lower end of the developmental spectrum. Typically, their justice sectors benefited from the reform

inputs (buildings, equipment, higher budgets and salaries) without making any effort to resolve performance problems—corruption, inefficiency, and a series of rather banal obstacles to marginalized clients (fees, attorney costs, and simple judicial prejudice). In the worst cases, the principal resistance originates not in the sector but in a broader power structure dependent on patronage and corruption and thus with little interest in improving sector capabilities or its professionally-based independence.

There are serious questions as to whether judicial reform can be advanced in a pervasively corrupt political environment. We have seen partial successes (the Dominican Republic during the late 1990s), but they thus far ended in substantial backsliding. Arguably, measures aimed at improving leadership's oversight and monitoring capabilities, increasing efficiency of case processing, and providing training to staff are worthwhile. Yet, there are risks that leaders' enhanced capacities will be used to undesirable ends. The same question applies to reforms directed at the police, prosecution, or defense. How much does one want to improve the internal efficiency of an organization if that efficiency might be misused?

In most of Latin America, the political situation is not so grim and the question is instead how one encourages unreformed, but relatively independent courts to adopt a program of self-improvement. What needs to be done is evident—the challenge is to encourage those in charge to do it. Governments and interested donors missed their chance by initially giving the organizations much of what they wanted (buildings, equipment, higher budgets and salaries) with no strings attached. Their only recourse is to condition further assistance on resolving concrete problems and to enlist the private bar, the press, and civil society organizations as monitors and supporters.

Demand Management in More Advanced Systems:

An emphasis on efficiency, managerial oversight, and control of corruption is a good start, but there are limits to its impact on growing demand. Eventually, organizations with large workloads must find other means to deal with them: expanding, diverting business to other venues, or simply rejecting it. Further expansion (“doing more with more”) seems unlikely, and thus they will have to adopt other measures or face mounting backlogs of unattended work. In truth, both options come down to rationing services, explicitly or implicitly.

For organizations adopting explicit rationing, cases can be prioritized in various ways—by monetary value, subject matter, or clients.¹⁹ Demand can also be controlled through entry barriers, ranging from the traditional tactic of rejecting filings for small errors in presentation to the relatively novel compulsory pre-entry mediation. Unfortunately, barriers usually have the largest impact on poorer clients. A third approach, now being explored by the most overburdened judiciaries, starts by recognizing that their workload includes many cases they should not be treating. Some are legal garbage—frivolous complaints; unnecessary, repetitive appeals, and other dilatory practices. Others involve important issues that might be handled more

expediently by alternative judicial or non-judicial means. These include examples like Brazil's pension cases where the judiciary steps in to do the administrator's job and others where the traditional absence of binding precedent means that thousands of identical complaints must be treated individually. The different categories have diverse solutions: targeted code reforms; judicially-enforced restrictions on appeals and redundant pleadings; steps to improve administrative services and sanction administrators for systematic abuses; dejudicialization, and adoption of collective actions and binding precedent. All will face enormous resistance. User complaints to the contrary, many powerful actors benefit from pervasive delays and congestion. Resistance is also bolstered by traditional values (i.e., the right to appeal any decision to a second-instance trial; the right to individualized treatment) and by certain unfortunate realities—an often well-founded suspicion that multiple reviews are necessary because individual officials (whether judges, prosecutors, police or bailiffs) cannot be trusted to act fairly and objectively.

For countries with individual caseloads upwards of 700 annual filings, efforts to control demand seem inevitable. The courts cannot instate them unilaterally—legislative, executive and citizen cooperation are needed to put them into effect and because of the political values at stake. Most solutions have a large technical component, but they will produce winners and losers, and thus merit a careful consideration of those impacts before being adopted.

Emerging Ideological and Political Issues:

The first challenges invite technical discussions and solutions however much politics impede their realization. In the third second set, the dilemmas and solutions are politically and ideologically defined. Most have already emerged in more developed democracies. It is surprising that Latin American reformers did not anticipate them, but they were too busy pursuing their individual projects. Nonetheless, the other shoe is dropping and can no longer be ignored. The issues are highly interrelated and can be expressed in several forms. The following is one of several possible iterations.

A first set of questions concerns the relationship between judicial independence and judicial accountability, the issue of “who guards the guardians?” Because external interference with the courts (and, to a lesser extent, other sector institutions) was a traditional complaint and a reputed cause of most other ills, reforms focused nearly exclusively on increasing independence, on the apparent assumption that more was always better. Two emerging scenarios challenge that assumption. In the first, repoliticization, courts, while nominally more independent, have been recaptured by political and other elites, resulting in a subservient bench with “stable tenure.” In the second, neo-corporativism, courts have translated greater real independence into an ability to forge partisan alliances, set their own rules, and exercise irregular controls over their own employees. While the temptation in both cases is to replace the incumbents, this risks a return to the status quo ante of complete formal and informal dependence—judges who owed their appointments and continuity on the bench to the administration *de turno*.

Other solutions being explored for these modern versions of traditional vices reintroduce the overlooked theme of accountability. Efforts to fine tune appointment systems continue, but quality at entry for officials who may remain in office for thirty years is insufficient, especially when they can further define the rules under which they will operate. Some kinds of accountability are easy to introduce — those regarding compliance with national rules on budgeting, contracting, transparency, and hiring. Judges and even police (claiming national security interests) have found creative ways to avoid them, but time is not on their side. Accountability is trickier for judgments—what to do about judges who habitually delay decisions, violate or misapply laws, or substitute biased interpretations. Improving complaints and disciplinary systems and increasing external oversight (if only to call attention to problems) are some solutions. Extending to other types of judges the limited appointments adopted for constitutional courts (following the European tradition) is another, but the general dilemma (which also affects other sector institutions) entails a continuing political debate over how much independence is desirable and how it is best achieved.

A second set of issues incorporates the themes of judicialization of politics, judicial activism, and the courts' appropriate role in controlling the other branches of government. If court actions were limited to resolving disputes between private parties, "excessive" independence would be less worrisome. However, their tendency to enter into grand politics has increased, if only because political actors invite it. If some judiciaries have voluntarily leapt into the breach, others are the victims of the vices of others—the executive and legislative creation of a legal framework, "never intended to be enforced" (Wilson et al, 2004) which the judges must now apply. The problem is less judicial activism or a government of judges (two terms now attaining currency in the region) than flawed legislation and parties' expectations that it be enforced. Its ultimate solution thus lies in countries' deciding which laws they want applied and rewriting their legal framework accordingly. Until that happens, the judiciary and others responsible for applying the laws face a lose-lose situation, either enforcing ill-conceived rules or violating them in the interests of higher values or simple common sense.

A third set of issues addresses the suitability of the thin rule-of-law model in a region where distributive justice has come to the fore. The same debate occurs in more developed countries, but the trade-offs are more stark in Latin America's highly unequal societies. Many Latin American jurists contest the model's emphasis on predictability and uniformity because of a traditional preference for the individualization of all claims. In its newer form, the opposition recognizes that laws are written by and for the benefit of elites, and thus argues that the classical rule of law only perpetuates an unfair status quo. It follows that judges must take the most pro-poor interpretations and where that fails, circumvent the law to favor the dispossessed. Social revolution by judicial fiat seems an unlikely outcome because it

will eventually provoke a negative reaction.²⁰ However, the argument does raise doubts about the entire rule of law project and its relevance to the region's most pressing socio-economic problems.

CONCLUSIONS

Latin America's quarter century of judicial reform began with the optimistic promise of improving sector performance and its contribution to broader development goals in a few years' time. Today, the optimism seems exaggerated. Changes have occurred, but neither the narrower nor broader goals are near achievement. The narrow goals are probably within reach although further progress will require substantial modifications to the strategies adopted and an ability to overcome the remaining political obstacles. The broader goals are more problematic. They may have been based on false premises, but even where not, still require some fundamental political choices, none of them envisioned by the reformers. If it is any consolation, these same choices face more developed countries and currently affect only the more advanced Latin American countries. For the rest, combating corruption, inefficiency, and limited access remain first priorities, necessarily preceding decisions on the type of rule of law they want and the sector's role in adopting it.

Notes

¹ See Linn Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (University Park: Penn State Press, 2007) for further discussion, especially pages 33-35 for the criminal justice doctrine.

² See *The Report on the President's Bipartisan National Commission on Central America* (New York: Macmillan, 1984) and its description of the judiciary as the "missing pillar" of democratic governance.

³ Other innovations included the creation of judicial councils (as judicial selection and sometimes governance bodies), the introduction of a judicial career (to increase judicial independence); the strengthening of the constitutional jurisdiction often via the creation of constitutional courts, and the incorporation of more constitutionally guaranteed rights. While the constitutions expanded the first generation (political and civil) rights, the real innovation was the long lists of second (socio-economic) and third (diffuse and group) generation rights.

⁴ ILANUD's contacts also permitted the involvement of several Argentine jurists. While less successful in implanting their reforms at home, they were instrumental in introducing them in Central America and elsewhere. For a lengthy discussion of the individuals involved, see Máximo Langer, "Why Do Codes Travel? Three Theses on Diffusion and the Wave of Criminal Procedures Reforms in Latin America," (Draft paper on file with author, 2007).

⁵ The Ford Foundation had been involved in justice programs since the earlier law and development movement (see James Gardner, *Legal Imperialism: American Lawyers and Foreign AID in Latin America* (Madison: University of Wisconsin, 1980 for a discussion). Its programs emphasized legal aid, public interest law, and "legal empowerment." See Stephen Golub and Mary McClymont eds., *Many Roads to Justice* (New York: The Ford Foundation), 2000. Available at: <http://www.fordfound.org/impact/searchresults?many+roads+to+justice> (accessed February 29, 2008).

⁶ Their articles of agreement prohibited political work and dictated a focus on economic development. The MDB's legal departments first interpreted this as placing judicial reform outside the acceptable areas of

action.

⁷ This group has raised questions about the earlier rule-of-law emphasis, suggesting that because the law is made by and to benefit elites, judges should circumvent it when it discriminates against the poor. See Armando Castelar Pinheiro, "Judiciário, Reforma e Economia: A Visão dos Magistrados," *Instituto de Pesquisa Econômica Aplicada*, July 2003. Available at: <http://www.ipea.gov.br/default.jsp> (accessed March 1, 2008) for a review of Brazilian judges' views. See also Ivan Ribeiro, "Robin Hood Vs. King John Redistribution: How Do Local Judges Decide Cases in Brazil?" *Latin American and Caribbean Law and Economics Association (ALACDE) Annual Papers*, May 1, 2007. Available at: <http://repositories.cdlib.org/bple/alcde/050207-03/> (accessed February 29, 2008) who casts doubts on their willingness to act on those views. Self-proclaimed "socially-oriented" judges are not a large minority in any country, but they can influence policy, especially when they sit on constitutional courts.

⁸ Hammergren, *Envisioning Reform*.

⁹ Higher sector budgets were not emphasized in most programs, but they were a natural consequence of the demands for more services and service providers. Donors occasionally included budgetary increases as conditions for their assistance.

¹⁰ See World Bank, *Making Justice Count: Measuring and Improving Judicial Performance in Brazil* (Washington, D.C.: The World Bank, 2005) for a review of these trends in Brazil. Brazil's average of 2,000 annual filings per judge is approximated by both Chile and Costa Rica.

¹¹ Luis Pásara, a Peruvian expert, now working in Spain, has made this criticism repeatedly.

¹² See Pablo Abiad and Mariano Thieberger, *Justicia Era Kirchner: la Construcción de un Poder a Medida* (Buenos Aires: Marea, 2005) for a discussion of this problem in Argentina's federal courts.

¹³ Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Washington DC: Carnegie Endowment for International Peace) June 28, 2002. Available at: <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1015> (accessed March 2, 2008)

¹⁴ Hammergren, *Do Judicial Councils Further Judicial Reform?* for a review of experiences throughout Latin America.

¹⁵ See Due Process of Law Foundation (2007) for a discussion of the situation in Central America.

¹⁶ On this tendency see Mauricio García-Villegas, "Law as Hope: Constitutions, Courts, and Social Change in Latin America," *Eurozine*, February 25, 2004. Available at: <http://www.eurozine.com/articles/2004-02-25-villegas-en.html#footNoteNUM20> (accessed February 29, 2008).

¹⁷ Recent attempts to use the statistics for planning purposes are illustrative: the head prosecutor who argued that since his country had four times the homicide rate of the United States it needed four times the police, judges, and prosecutors (meaning that Colombia would have a world record 1,200 police per 100,000 inhabitants), or the Chief Justice who suggested that because the judiciary's share of the budget was only a fraction of that for education, the government cared less about justice.

¹⁸ One of the first actions taken by Brazil's new National Judicial Council, in 2004, was to order an end to both practices. It was estimated this affected the jobs of 2,000 to 3,000 judicial employees. Judicial salaries (and pensions) are set by a national law that apparently had been routinely ignored.

¹⁹ In diffuse constitutional control systems, rights cases already get priority over ordinary complaints.

²⁰ See Julio Faundez, "Legality without Courts – The Rule of Law Before Allende," (paper prepared for the *International Conference of Law and Society*, Berlin, Germany, July 25-28, 2007)