

EXPANDING THE RULE OF LAW: JUDICIAL REFORM IN LATIN AMERICA

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Well, because I've been painted as the "glass-half-empty person," I'm not going to disappoint you. There are two things I want to say before I get started. First, although I am now with the World Bank and doing a lot of research, I have been working on judicial reform for eighteen years, the first twelve of which were spent in the field doing projects with the U.S. Agency for International Development (USAID). Second, when I talk about the reformers or about "us" in this presentation, I am not talking about the Bank, or even necessarily about the donors. Rather, I am talking about a group of people who have been actively involved in promoting and studying the reforms over the past twenty years. I am going to focus on the past twenty years because I think there is a particular judicial reform movement in Latin America that started in the early 1980s as a result of the redemocratization of most of the region. Actually, some countries (Costa Rica) did not have a dictatorship during that period, but just two or three countries were included in that category. It was a time when donors, and particularly the U.S. government, came in and gave this redemocratization a jump-start, although local demand was very important in shaping what was done. In some countries, like Brazil, Mexico, Argentina, and Chile, local demand really was responsible for most of what happened; external donors were much less important there.

There are three main messages I want to convey here. First, over the past twenty years, reform formulas (or reform recommendations) have been implemented, to a large extent, in countries throughout the region. There are variations—one can argue about detail, one can even argue about whether the people who were implementing them really understood the purpose underneath the formula, but a lot has changed.

Second, although this is where the glass-half-empty, glass-half-full notion comes in, the change—which has been structural and procedural to a large extent—has not necessarily brought the improvements in performance or output that were promised. Although I agree that it takes time to change things, I think there also is an additional problem: perhaps the kinds of recommendations we have made have not allowed us to focus

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on some of the more fundamental things that require change, and they are, in turn, creating some of their own problems. At this point, those of us who have been promoting these reforms must ask whether the result toward which these countries are headed is really where they want to be. There may be some tendencies we are promoting that are not well-considered.

The third message is that it is time for a change in direction. I think at this point, letting a hundred flowers bloom was great, but now we must do a little pruning and be more strategic. I think what was done in the past was good, but it is time for a change in direction.

As far as what has been done, we can probably trace this reform movement back to the early 1980s, first as a reaction to democratization. We often talk about a “judicial reform program,” but actually several different objectives and several different kinds of programs are being pursued. One of the objectives was reform to criminal justice, which was a very popular demand. Second, were reforms to make courts more efficient. Third, were reforms directed at creating greater judicial independence and a higher quality judiciary. A series of reforms looked at expanding access, particularly to traditionally marginalized populations. And finally, a series of reforms looked at strengthening the court’s political role as part of a system of checks and balances. This latter set of reforms is probably the only one where the donors have not been particularly active, because it has been seen from the start as terribly political, and therefore not something we wanted to get involved in. However, the countries themselves have taken on the task of strengthening the court’s political role. The combined efforts in these areas over the past twenty years have produced substantial changes.

I will go through a list of areas, rather than examples. First, definitively, there are higher budget levels and salaries, especially for the judiciary, but also for other organizations in the justice sector. There has been a consequent expansion in the organizations’ national coverage and changes in their internal structure. I like to talk about the sector and not just the courts, but anyone who compares the courts today with twenty years ago would find a completely different universe in terms of substance and organization, and this has been a tremendous change. Changes in the legal framework have brought procedural and substantive law in line with contemporary needs and values. Organizational management systems have been strengthened, especially as a means for tracking work flow, budgets, and employees. In the past, one could walk into a Supreme Court and ask its president, who usually was the head of the judicial government, how many judges the system has and how many cases it sees, and he would

have no idea. Now, they at least know how many judges they have. Cases are another issue, and that is where the statistical systems could be improved. There has been an expansion in the information made available to the public, both about their own cases and about general operations. People now have a somewhat better idea of what their courts are doing, particularly with their own case.

Entire new organizations have been created: public defense, prosecution, human rights ombudsmen, anti-corruption offices, constitutional courts, and chambers, also judicial councils, as a new form of judicial government. Alternative services aimed at expanding access for the poor in particular have also been created, such as ADR, legal assistance, legal information, small claims courts, multiple services, and justice vendors. There has been more attention in general to court performance by the media, the public, and politicians. The content of the docket has changed, so what the courts decide is now considered more important and holds more interest.

There has been a growth in cases, both in expansion of the types of cases and number of clients using the courts, and there has been increased involvement by courts in protecting constitutional rights and deciding on the constitutionality or legality of executive policies.

In short, after twenty years of reform, the region's justice sectors—not just the courts, but the other institutions as well—are larger, more complex, better funded, have more competent staff, and are increasingly equipped with modern information equipment. They also handle more work, distributed differently among and within sector organizations, and are more visible to citizens in general. Their member organizations tend to enjoy greater independence and higher levels of institutional autonomy. All of these changes were goals of the reform movement, and although they have not been met as much as some would have liked, even the strongest critic has to recognize that all of this has happened.

However, the reforms were not done just to accomplish these things. Judges and lawyers, and also the public—particularly ministries of finance and NGOs—got behind the reform movement because they wanted to see an impact on the quality of services the court provided to them. There was also a series of arguments that came out of the donor organizations in particular, about how this would create economic growth, reduce poverty, and improve governance. I am not sure where I want to fall on those as the ultimate justifications, but at least there were improvements in service.

Here we find the disturbing trends summed up in an article published a year ago that compiled all of the public opinion surveys done in Latin America over the last six years, asking how the courts compare with other

institutions in terms of trust in officers and perceived corruption. With the exception of Uruguay and Costa Rica, no country got as high as forty percent, and some countries were down in the single digits. And what was of even more concern was, over that six year period several of them had dropped. We admittedly do not have figures for the entire twenty years, and I hope that, if we had been able to compare the answers to those questions from twenty years ago with today, we would have seen an improvement before this recent backslide. This is a problem nonetheless.

As the president of the Supreme Federal Tribunal in Brazil said two months ago, our answer to this, as judges, has usually been that judges do not get high scores in public opinion polls because the public just does not understand. This is the usual answer throughout the region. But, he said, “no, we have to take this seriously, something is wrong, and we need to do something about it.” So there is recognition, even among the judiciary, that some of this is not working. Either we have plateaued or we are going downward, but it is not a good situation.

There are new problems that seem to be emerging, perhaps as a result of this very reform recipe. One problem is the cost for maintaining sector operations. Latin American judiciaries, across the board, tend to get a bigger percentage of the public budget than judiciaries anywhere else in the world. Costa Rica’s court was an early trend setter; it gets six percent (but has to share). El Salvador’s court gets six percent of the budget for itself and the judicial council. In Brazil, there is an ongoing debate as to how much the courts get, but some courts get up to seven percent of the state’s budget, which is an incredible amount. It would be wonderful if they were delivering that much more in services, but they are not. The problem is that demand is still growing; judiciaries are constantly saying that they need more. There is a problem in terms of costs and benefits.

There is also the issue of accountability for judicial resources and actions. As courts become more independent, they should also become more transparent and accountable, yet there is a lot of resistance to this. For example, Mexican courts will not publish judgments because they believe it is an issue between the judge and the party. How can the court’s role in upholding the law and the legal framework work if no one except the party knows what they are deciding?

There have been clashes within the sector and between its member organizations and other branches of government, including charges of judicial interference with policy-making. I know that is universal, but what courts get to decide in Latin America is amazing. At one point in Costa Rica, the judges thought they would have to overrule the Central Bank’s setting of the exchange rate, as an unconstitutional intrusion into the

Assembly's monopoly on law making. The Court changed its mind, but only after much reflection on the consequences. There have been problems of what has been called "institutional corporativism," self-interested rulings, and lobbying. The Argentine Supreme Court decided the constitutional prohibition on reducing judicial salaries meant they should not pay the income tax. So, to this day, Argentine judges do not pay income taxes, and this has not made them very popular. Ironically, one of the members who was just appointed to the court and who opposes the exemption, also admitted he did not pay social security taxes (he said that was because he did not want a pension).

There is also the question of "guild reforms," a term introduced by a Latin American colleague of mine, which is very appropriate. This refers to the complaint that these reforms have largely benefited the judges and the attorneys, but have not necessarily benefited the public. As a result, there has been a continuing failure to match the supply of services with the demand. That is to say, the courts in Latin America have been falling further and further behind in terms of ability to keep up with the cases they are getting.

Additionally, there are some contradictions among objectives. Some courts have decided that they need to start charging user fees in order to finance their budgets, but obviously that limits access. On the other hand, increases in access augment delays.

I will run through a list of contestable assumptions I presented to the Bank, as a means of re-examining our longer term strategy, an exercise we are still debating. The suggestion here is that the capacity-building we did in the past was necessary. Unfortunately, building capacity to produce better services does not guarantee provision of better services. Continued improvement requires that we, the reformers, focus more on ensuring that funding—whether from the national government, a donor agency, or a loan—is linked to concrete, visible improvements in performance. This means, among other things, we need to know what the problems are first.

One of the real problems with the judicial statistics systems in Latin America is that one cannot tell from looking at them whether there is a problem or not. They inconveniently do not measure delays or indicate their impact, as it is unclear what is being decided. This makes it very hard to set benchmarks. At the very least, judiciaries must begin to measure performance in a way meaningful to users, and then to set benchmarks to justify receipt of more money. Then, having decided what the problems are, the most credible and direct means must be used to resolve them. We should stop worrying about building a beautiful system and then hoping justice will come, and start looking at where the system is ugliest and fix it

there. That may mean cutting down on some experiments, but it will mean that justice will be achieved more quickly. But, on the other hand, maybe letting the hundreds of flowers bloom is the best way. Maybe we ought to keep planting for awhile.

Let me just talk about a couple of original and revised assumptions based on what we have learned over the past twenty years about judicial performance. First, there is the assumption that Latin American courts are overloaded with work. You will find no end of proposals for reform, but when we actually look at case loads, we find out that most trial courts do not receive unmanageable numbers of filings. Some of the case loads are surprisingly low; in some countries at least half the judges get only two or three hundred filings a year, and these are not complex cases. Because the average case in Latin America, as it is elsewhere, is usually debt collection or some simple family dispute, not extensive litigation.

Another assumption is that delays are excessive. In many courts, delays before judgment are often not excessive. Where they occur they are caused by two things that no one has really been looking at. First, there are procedural problems: excess opportunities to file interlocutory pleadings and an excess of opportunities to appeal. In Brazil, there are twenty-five different ways to appeal, and a good lawyer with a well-heeled client will use every one of them. Second, judges are reluctant to use even the powers that they have to prevent some of the most outrageous dilatory practices.

There has been a notion, particularly among the donors but also among the judges, that the best indicators of court efficiency are the speed and number of judgments. A number of issues have been raised here. One is that Latin American courts may render too many judgments, and that they make too little effort to encourage settlements. Also, more attention should be paid to enforcement: it does not do much good to get a rapid judgment if you cannot enforce it. In Latin America, no one has paid any attention to this, although it is the usual source of complaints about delay. It is not that enforcement is not a problem everywhere, but it is an unrecognized problem in Latin America. Additionally, there has been a reluctance in Latin America to use any kind of binding precedent, and so common violations of rights, for example by the government, have to be taken to court on an individual basis. Often the court responds very rapidly to the individual, but there are thousands, or hundreds of thousands, of cases where perhaps one lead case might be able to resolve the problem, particularly if that case also insisted the person perpetuating the abuse desist. Individual appeals that simply make the plaintiff whole but do not also award damages impose no sanctions on the violator.

There are also assumptions that augmenting courts' processing capabilities makes room for new users. But that is often not the case. One of the biggest impediments to the poor's access to the courts, which is often not mentioned, is the fact that in most countries individuals need a lawyer to get to court, even as a defendant. There is simply no way that these countries, where seventy percent of the population may be poor, can provide a lawyer to every person needing representation. Brazil's small claims courts ought to be looked at more widely for this reason. Unfortunately, the Brazilian Bar Association is currently working to eliminate the possibility for an individual to go to small claims court without a lawyer. I am told they are likely to be successful in this lobbying effort, at least at the federal small claims court.

Another common claim among the donors is that commercial justice is the key to market-enabling environments. We are very interested, at the Bank, in the impact of justice on economic growth. But we have failed to consider that the biggest impediments to investment are problems with criminal and administrative law, rather than the quality of the bankruptcy law.

Another assumption was that judicial poverty impedes improved performance. I think there are few courts in Latin America where you can talk about real poverty anymore. Judicial salaries are often very good in these countries, particularly compared to that of your average lawyer or to the average per capita income in the country, or even the income of the president of the country.

Additionally, there was the assumption that access to justice is best achieved through programs of legal assistance, popular legal education, and information services. As I said, one of the barriers to access is the requirement that a lawyer represent the case, and this just has not been recognized.

We had also assumed that law and justice problems are best resolved by improving court performance. One of the big problems with our "judicial reform" effort is that this really is not about reforming the judiciary; it's about reforming the system for resolving disputes. To reform the system, better processes are needed for investigating and prosecuting criminal cases, protecting rights, and guarding against government abuses. Focusing on individual organizations alone is insufficient. There is an enormous need to consider each of these pieces as parts of a whole. The emphasis on the court has often meant that the courts get all the money, even if they are not the ones who need it. I remember arguing and pleading with the head of the public defenders in El Salvador to request more money, but he said, "the Vice President of the court is

sitting on the committee, and I can't ask for more money unless he agrees and he may not because he also wants funding." The one with the squeakiest wheel gets the oil.

In addition, it is conceivable that even improving court performance in many of these countries might involve working with other agencies. Two of the biggest impediments to enforcing judgments are (1) very poor property registries—in order to enforce judgments you need to locate assets, and in many of these countries they are not sufficiently documented and (2) the procedural rule that to enforce a judgment the creditor needs to find assets. There are several European countries where the debtor is required to present assets or face sanctions, and Latin America needs to consider this system.

Finally, we assumed that capacity-building will lead to performance improvement, but this is not necessarily so. I think that this is where the reforms of the next decade are going to have to focus—on defining what society wants improved and helping the courts and other institutions to carry out these reforms. I do not foresee an executive agency implementing the reform, but there may be executive pressure.

I will end by saying I know at least three ministers of finance in Latin American countries have begun to question the money spent on the courts and have requested an audit of judicial finances. This would consequently allow us to know whether we can justify giving them any more budget. So, the day for the courts is coming; it is actually in their own best interests in these countries to start asking how they can improve performance, and not, as a group of judges once said to me, how to use the reforms to shorten their work day. Thank you.