

## THE CINDERELLA OF GOVERNMENT: JUDICIAL REFORM IN LATIN AMERICA

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### INTRODUCTION

In the 1990s, a great body of information was published about efforts to reform the judiciary in Latin America.<sup>1</sup> Billions of dollars in foreign aid from government and non-government organizations (NGO) have been directed into judicial reform projects in developing nations—at times, with less than stellar results.<sup>2</sup> Experts leading the aid projects insist their efforts have brought about a new dawn of legal justice, political stability, and reform in the region. However, books like *Mentiras de la Reforma Judicial*

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1. See e.g., Edgardo Buscaglia, *Corruption and Judicial Reform in Latin America*, 17 POL'Y STUD. 273 (1996); JUDICIAL REFORM IN LATIN AMERICA (Malcom Rowat et al. eds., 1995); Edgardo Buscaglia et al., *Judicial Reform in Latin America: A Framework for National Development*, in ESSAY IN PUBLIC POLICY 21 (1995); Edgardo Buscaglia, *An Analysis of Corrupt Practices Within the Judiciary in Latin America*, in IV ESSAYS IN LAW AND ECONOMICS 223 (Claus Ott & George Von Wangenheim eds., 1998); LINN HAMMERGREN, THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA (1998) [hereinafter POLITICS OF JUSTICE]; JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN: PROCEEDINGS OF A WORLD BANK CONFERENCE (Malcom Rowat et al. eds., 1995); Linn A. Hammergren, *Fifteen Years of Judicial Reform in Latin America: Where We Are and Why We Haven't Made More Progress* (visited Oct. 1998) <<http://darkwing.uoregon.edu/~caguirre/papers.htm>>; HUGO FRUHLING, JUDICIAL REFORM AND DEMOCRATIZATION IN LATIN AMERICA (Felipe Aguero & Jeffrey Starks eds., 1998).

2. See Charles Roberts, *Rule of Law and Development: USAID and the Public Order Courts of Colombia* (1995) (unpublished manuscript, on file with *Georgetown University*). For criticism on judicial reform in Latin America see GABRIEL PELÁEZ GANTIER, *MENTIRAS DE LA REFORMA JUDICIAL* (Tupak Katari ed., 1995); FRANCISCO ELISEO ORTIZ RUIZ, *Diez Años de Reforma Judicial en El Salvador, 1985-1995*, in APROXIMACIÓN DE UN DIAGNÓSTICO (1997); JAVIER HENAO HIDRÓN, *NUEVA REFORMA JUDICIAL* (1989); CARLOS TOVAR GUTZLAFF, *REFORMA ESTRUCTURAL DEL PODER JUDICIAL* (1989).

(*Judicial Reform Lies*), statistics,<sup>3</sup> and numerous writings by Latin American authors,<sup>4</sup> leave us wondering if the programs adopted to reform the judiciary have truly been successful. Furthermore, the picture of success depicted by judicial reform professionals completely contrasts the one painted by Human Rights watchdogs.<sup>5</sup>

The lack of political stability and failure to achieve real democracy was the justification for seeking judicial reform throughout Latin America. Now, one wonders if judiciary reform is to blame for the lack of socioeconomic development and persistent violence. One of the indicators of the inefficiency of judicial systems in Latin America is the number of sentenced prisoners. In 1998, in spite of judicial reform programs, "on average, 70 percent of all prisoners in Latin America and the Caribbean [were] awaiting sentencing."<sup>6</sup>

The character of Latin American judiciaries is questionable. To placate the first world countries sending aid their way, Latin American countries have played the judicial reform game to a dexterous effect, bringing in millions of dollars to the judiciary, that would otherwise be unavailable from internal sources. However, judges, prosecutors, and affected citizens wonder what became of the millions of dollars in foreign aid, and of the training intended to improve the quality of their work, as well as their working conditions.<sup>7</sup> Latin Americans' displeasure with their justice systems is evident, although there is palpable ambivalence among the 'establishment.'<sup>8</sup> Yet, it is not clear if "the widespread complaints constitute a mandate and basis for further reform, let alone, for the conventional current efforts."<sup>9</sup> A negative answer "does not invalidate the reformers' objectives. It will make their work more difficult and recommends a reexamination of their goals and the means they have selected to achieve them."<sup>10</sup>

Problems with Latin American judiciaries have fueled a lucrative consulting industry in the United States.<sup>11</sup> As a matter of fact, a judicial reform

3. "In Argentina, only 13% of the public has anything good to say about the judiciary; in Peru, 92% distrust the judges; in Brazil, 79% distrust the justice system." IDB América, *The History of an Orphaned Institution* (visited Nov. 30, 1999) <<http://www.iadb.org/lexr/IDB/stories/1999/eng/e1299s1.htm>>.

4. See generally PELÁEZ, *supra* note 2; RUIZ, *supra* note 2; HIDRÓN, *supra* note 2; GUTZLAFF, *supra* note 2.

5. For a discussion on the United States Agency for International Development Administration of Justice/Rule of Law program in Colombia in the early 1990s see Charles Roberts, and Development: USAID and the Public Order Courts of Colombia, *supra* note 2; Lawyers Committee for Human Rights Report, *Colombia: Public Order, Private Injustice* (Feb. 1994); GERARDO MOLINA, JUSTICIA SIN ROSTRO: ESTUDIO SOBRE LA JUSTICIA REGIONAL (1996).

6. IDB América, *supra* note 3.

7. This information was obtained by the author from many interviews conducted in Colombia during June and July of 1999.

8. See IDB América, *supra* note 3.

9. HAMMERGREN, POLITICS OF JUSTICE, *supra* note 1, at 5.

10. *Id.*

11. Consulting organizations active in Latin America include the National Center for

project is underway, has been recently completed, or is currently in the planning stages in nearly every Latin American country.<sup>12</sup> All of the reform projects are based on the premise that something is terribly wrong and needs to be fixed. The numerous reform efforts and their failures indicate “the seriousness of the situation and the difficulty of its resolution. They also suggest that, while bad reforms can be worse than no reform at all, society’s patience can run out.”<sup>13</sup>

In support of democracy in Latin America, court consultants and organizations who butter their bread with justice reform Requests for Proposals (RFP), jump at any opportunity to win contracts from government agencies tasked with carrying out the policies of the United States.<sup>14</sup> And in the off chance that there is not a particular problem to be fixed, one can easily be manufactured by either government officials of the United States seeking personal enrichment through foreign aid, or abroad by over-enthusiastic NGO in need of justifying the salaries of senior staffers. “In many instances in Latin America, judiciaries do not instigate reform, but they do have proposals, often calling for more money and independence.”<sup>15</sup> Money is the lynchpin that motivates many officials to find ways to enrich themselves and the elite social class which continues to control representative democracy in Latin America.<sup>16</sup>

The focus of this article is not to discuss the many judicial reform efforts undertaken in Latin America, because to do so would be to go over ground that has already been adequately covered by many capable analysts. Rather, the purpose of this article, which draws substantially on the author’s experience as a former Colombian judge,<sup>17</sup> is to examine not just the judiciary, but the historical, political, and cultural factors inherited from colonial Spanish domination which are still embedded in Latin American countries. All of these factors affect the judicial systems of Latin America, making them dysfunctional which requires more than just reforming the judiciary for meaningful change to occur.<sup>18</sup> As such, the reforms must be sweeping

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State Courts, DPK Consultants, World Bank, Inter-American Development Bank, USAID, WOLA, and others.

12. See generally Buscaglia et al., *Judicial Reform in Latin America: A Framework for National Development*, *supra* note 1.

13. HAMMERGREN, *POLITICS OF JUSTICE*, *supra* note 1, at 4.

14. Judicial reforms projects started in Latin America in the early 1990s when the United States invested in these programs. See *id.*

15. Carnegie Endowment for International Peace, “*Promoting Rule-of-Law Reform: Lessons from Latin America*”: A Conversation with Linn Hammergren, USAID (visited Nov. 30, 1999) <<http://www.ceip.org/programs/democr/jreform/htm>>.

16. The current exception is that of Venezuela’s President Hugo Chavez who is seen as a radical reformer and an outsider. President Chavez won a populist election in December of 1998. See *Venezuelan Democracy Quivers*, L.A. TIMES, Sept. 2, 1999, at B8.

17. The author was a district judge in Medellin, Columbia from 1983-1986.

18. One could argue that the judiciary in Latin America has been made a scapegoat for the corruption and excesses of the other two branches. Additionally, one can also argue that the other two branches consider the judiciary to be a potential “cash cow” able to attract

reforms of political, social, and cultural character.

## I. THE LEGACY OF THE PAST

It has been said that, “[a]n effective government requires functioning legal and judicial institutions to accomplish the interrelated goals of promoting private sector development, encouraging development of all other societal institutions, alleviating poverty and consolidating democracy.”<sup>19</sup> As a result of the legacy of its colonial past, Latin America has been burdened more than many developing regions of the globe by its past in which the autocratic caprices of Iberian monarchies pillaged a fertile and abundant land for the sake of religious zealotry and strategic hegemony over other Old World rivals.<sup>20</sup> Five hundred years after Europeans began the conquest of the New World, Latin America continues to struggle with its demons, namely, rule by white and criollo<sup>21</sup> oligarchies intent on preserving a status quo characterized by a rigid class consciousness.

Colonial and post-colonial Latin American governments and economies were founded on mercantile systems. The notion of representative democracy, featuring a judiciary capable of enforcing universal and constitutional rights for all citizens, was of little importance to the elite who grew rich and entrenched in positions of power and influence.<sup>22</sup> However, as mercantile economies yielded in this century to violent rebellion, social and labor unrest, economic depression, and dwindling natural resources, Latin America’s elite were forced to redefine their government structures in order to preserve the status quo and ensure continuation of their influence over their fellow countrymen.<sup>23</sup> Furthermore, the elite, faced with threats from leftist ideologies and recognizing the opportunities to be bestowed upon them by industrialization and strategic alliances with their powerful neighbor to the north, elected to wholeheartedly embrace market economies and representative democracy—at least at face value.<sup>24</sup> Latin America refused to be left out

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badly needed money into the government.

19. Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean- Elements of Reform* (World Bank, 1996).

20. “The judges from Spain and Portugal were, for the most part, an integral part of the conquering army. Almost three centuries later, Latin American judges have yet to overcome this image.” T. Leigh Anenson, *For Whom the Bell Tolls . . . Judicial Selection by Election in Latin America*, 4 Sw. J.L. & TRADE AM. 261, 291 (1997).

21. Criollos or creoles were originally distinguished as pure-blooded Spanish and Portuguese born in the New World of European-born parents. Over the centuries, the term came to represent members of an upper class whose bloodlines had little if any traceable Indian or African ancestry. The distinction is important in Latin American countries where one’s name and membership in the elite class determines one’s future success in the powerful oligarchies that exert dominant control in politics, business, and education. See generally BRIAN M. FAGAN, *THE AZTECS* (1984).

22. See *id.*

23. See *id.*

24. See *id.*

of the economic development and prosperity. However, if economic reforms toward wealth were to take place, it stood to reason that government institutions had to support economic changes. Such changes began in earnest in the 1980s when experiments in leftist<sup>25</sup> and rightist<sup>26</sup> totalitarian rule began to unravel. By the end of the decade, it became widely recognized that economic development and free market enterprise flourish in societies with stable, equitable, and respectable courts.<sup>27</sup> International and national investors as well as private individuals enter into contracts more willingly in countries where the judiciary addresses problems efficiently and justly.

Free and robust markets can thrive only in a political system where individual freedoms and property rights are accorded respect and where redress for violations of such rights can be found in fair and equitable courts.<sup>28</sup> In Latin American States, the judicial system does not occupy an equal footing among the three branches of representative democracy (judiciary, executive, and legislative). The brutal truth is that the judiciary has long been little more than a maidservant—a Cinderella to the other branches of government.<sup>29</sup>

#### A. *Evolution of the Modern Latin American Judiciary*

The Spanish granted little opportunity of self-rule to the New World.<sup>30</sup> Every government decision was made by the Monarchy through the auspices of the Council of Indies (Council).<sup>31</sup> The members of the Council served as an administrative board, legislative branch, and an appeals court all at the same time.<sup>32</sup> The will of the Council and that of the Crown was realized in the New World by viceroys, the provincial governors whose primary responsibility was to act as agents of the Crown and carry out royal

25. For example, the Sandinistas in Nicaragua and the Farabundo Marti de Liberacion National (FMLN) in El Salvador. See generally KATHERINE HOYT, *THE MANY FACES OF SANDINISTA DEMOCRACY* (1997).

26. For example, regimes such as Pinochet's in Chile, Noriega's in Panama, Stroessner's in Paraguay, and the military junta in Argentina. See generally Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829 (2000); A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT'L L. 45 (1999).

27. The judiciary of industrialized nations was also more stable, respectable, and efficient.

28. See Maria Dakolias, *A Strategy of Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 168 (1985).

29. For a thorough study of the history of the judiciary in Latin America see 10 MODERN LEGAL SYSTEMS CYCLOPEDIA (Kenneth Robert Redden & Linda L. Schlueter eds., 1991).

30. This discussion also generally applies to the Portuguese experience in the New World.

31. The Council of Indies was a body of noblemen advisors to the Spanish Crown. See generally Ali Friedberg, *Reconsidering the Doctrine of Discovery: Spanish Land Acquisition in Mexico (1521-1821)*, 17 WIS. INT'L L.J. 87 (1999).

32. See generally DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 10 (1993).

policy, regardless of the needs of the colonists and native people. In this capacity, the viceroys also performed the duties of the high court in the colonies,<sup>33</sup> and in times of fiscal or political crisis, “they assumed supreme executive authority as well as judicial authority.”<sup>34</sup> This demonstrates the intertwined relationship between executive and judicial power from the earliest days of colonial expansion. By reviewing the acts of the royal officers in the colonies, the *audiencias* assumed a type of appellate power to protect royal prerogatives.<sup>35</sup> The *audiencias* “improved access to [the] judicial service for the Indies population,”<sup>36</sup> but the colonies remained far from self-determination in matters of judicial affairs. Locally, the *alcaldes* were judicially elected or appointed authorities who “exercised regular civil and criminal jurisdictions within their municipal boundaries.”<sup>37</sup> The decisions of the *Alcaldes* were subject to review by the *audiencias*. In municipalities with a predominantly indigenous population, indigenous judges were elected in order to introduce the aborigines to the Spanish municipal institutions.<sup>38</sup>

The decades preceding rebellion against the Spanish Crown were characterized by the tightening of central control by the Crown over the colonies. This was in part due to the dwindling resources and fiscal crisis brought on by ongoing warfare between colonial powers. The fiscal imbalance was addressed mostly by reinforcing the monarchy’s absolute powers and by further centralizing decisionmaking in the central bureaucracy. There was also an accentuation of the exceedingly regulated management of the economy and polity. This institutional framework did not encourage fiscal soundness in the end, nor, did it create an environment conducive to increased productivity and wealth creation.

After the revolt of the Netherlands and the decline in the inflow of revenues from the Indies, this framework generated a vicious cycle of chronic fiscal imbalance, bankruptcy, and insecure property rights (resulting from the increasing need for confiscation and the arbitrary and ubiquitous role of the central bureaucracy). Another result was a fragile judiciary, which continued its ultimate dependence on the monarch’s authority and was perceived mostly as an enforcer of an ever-growing body of statutory and administrative directives.<sup>39</sup>

This distrust of the judiciary by citizens in the emerging nations in Latin America persisted through the succession of *juntas* and *caudillos* (rul-

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33. See Luz E. Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT’L & COMP. L. REV. 62, 63 (1995).

34. BUSHNELL, *supra* note 32, at 29.

35. See *id.* *Audiencias* were a tribunal that assisted the viceroy and acted as a check on the viceroy’s power. See generally Friedberg, *supra* note 31.

36. Felipe Saez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT’L. L. REV. 1267, 1276 (1998).

37. *Id.* at 1277.

38. See *id.*

39. *Id.* at 1280.

ing strongmen and coalitions)<sup>40</sup> that characterize the decades following independence. The courts were thought to enforce the authority of the ruling elite, rather than to equitably interpret the laws of the land, this regardless of the fact that "Latin American countries rigorously adopted the prescriptions of the separation of powers doctrine, aimed at protecting both the executive and legislative branches from immoderate judicial interference."<sup>41</sup> The result was that judges had little, if any, authority to issue legal edicts or interpretations without the fear of reprisal from the executive and legislative branches and from the omnipresent church authority.

The inquisitorial system of ecclesiastic justice upon which the state criminal justice system of the New World was founded, was secretive and malevolent. The intricacies of religious dogma, zealotry, and obedience to a higher authority resulted in persecutions and great depredations against citizens. The Milanese jurist Cesare Beccaria Bonesana railed against such depredations.<sup>42</sup> In his treatise, *Of Crimes and Punishment*,<sup>43</sup> Beccaria denounced the excess of the criminal system and the abuses of the judges to whom Beccaria referred as "despotic tyrants."<sup>44</sup>

40. See generally Friedberg, *supra* note 31.

41. Garcia, *supra* note 36, at 1283.

42. Cesare Beccaria Bonesana was born in Milán on March 15, 1738 and died on November 28, 1794. He was a marquis whose life was influenced by the incidents of his time, particularly privileges of power to the nobility (high bureaucracy). Nobles were the intermediaries between the monarch and the rest of the society. They controlled and governed the judiciary and public institutions (the councils or, as in Spain, *consejos*). These noble intermediaries were very corrupt. See FRANCISCO TOMAS, *Introduction to CÉSAR BECCARIA, DE LOS DELITOS Y DE LAS PENAS* (2d ed. 1976).

43. See *id.*

44. *Id.* at 78. Some of the principles advocated by Beccaria include:

Only the law can determine the punishment of crimes.

Judges in criminal cases have no right to interpret the law because they are not legislators. Only legislators have the authority, as representatives of all of society, to make laws. As such, the code is to be observed in its literal sense, and nothing more is left to the judge than to determine if an action conforms to the written law. Hence, the authority to make criminal law and decide the punishment of crimes resides with the legislator.

There is a principle of legality, *nullum crime sine lege* and *nulla poena sine lege*. A person could not be punished without prior definition of that conduct as being criminal. Laws must be clear and simple to avoid the need for interpretation. Consequently, the greater the number of people understanding the laws the less frequent the crimes.

Criminal justice must be public. Evidence must be clear and rational, and torture should be eliminated.

Witnesses should not be presented in secret. There should be corroborating witnesses to determine their credibility and prove the crime. It is necessary to have more than one witness because while one affirms and the other negates, there is nothing truthful. The right that each man must be believed innocent prevails.

Secret accusations must be banned. Such a custom makes men false and cowardly. Who is able to defend himself from slander when that person is armed with the strongest shield of tyranny—secrecy?

Everyone should be equal before the law (this was in reaction to the nobility being

In much of Latin America, the inquisitorial system of criminal justice would persist in its most repulsive forms well into the ninetieth century.<sup>45</sup> For instance, in the emerging nation of Colombia, the secretive criminal courts, known as the *Santo Oficio*, were not abolished until the adoption of the Constitution of 1821.<sup>46</sup> In fact, judgment by one's peers would not be implemented until the adoption of the Constitution of 1851.<sup>47</sup> During that the intervening thirty years the only system in place was purely inquisitorial and highly distrusted by the people.

Further complicating the emergence of a respected judicial authority, was the political patronage and turmoil plaguing Latin America after independence. This was characterized by constant military intervention, and a series of governments run by strongmen (these governments were called *juntas*),<sup>48</sup> which were struggling to establish a political authority favoring one or another ideology or oligarchic structure. During this period, instead of the judiciary being the objective branch and balancing and neutralizing the power of the political branches, it became their servant.

In Latin America, the forces for change did not generate the type of institutional transformation effectively brought about in post-Revolution North America. As a matter of fact, no revalorization of the individual vis-à-vis the State took place. There was no development of effective checks and balances among the branches of government, and popular participation in political decision making, and judicial processes was not encouraged. Instead, after achieving independence, Latin American countries maintained the authoritarian institutional structure of colonial times. Kinship networks, political influence, and family prestige prevailed over clear and stable rules.<sup>49</sup>

The struggle to establish executive authority is evidenced by the many constitutions that were written and re-written in the fledgling nations during the last two centuries. Colombia and Peru have each had no less than thir-

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accorded deferential treatment).  
Punishment should be proportional to the crime.  
The death penalty is unjust.

*Id.* at 78; JOHN HENRY MERRYMAN, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 67, 140 (1978).

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Judges did not 'make law' by issuing verdicts that were then used as precedents by other judges; rather, they were expected to merely apply statutes that had been defined by legal scholars and passed by national legislators . . . . In criminal cases, judges had what is called an 'inquisitorial' role, where they both conducted the criminal investigation and issued a verdict. Public defenders and prosecutors had limited or nonexistent roles.

Inter-American Development Bank (visited Nov. 30, 1999) <<http://www.iadb.org/exr>>.

46. *See id.*

47. *See id.*

48. *See generally* Friedberg, *supra* note 31.

49. Garcia, *supra* note 36, at 1267.



teen constitutions, and Brazil has had ten constitutions.<sup>50</sup> The Latin American courts are rendered largely incapable of exerting judicial independence because of the many constitutional changes.

Historically, Latin American judiciaries have been less than an institutional player. Their political role has been one of concern over “which parties or which individuals dominate institutions and so influence specific decisions and actions.”<sup>51</sup> The judiciary is used as a pawn in conflicts among political and economic elites,<sup>52</sup> with judges often the recipients of political favors.<sup>53</sup> The courts have long been filled with political appointments<sup>54</sup> owing their loyalty to individual presidents and political parties. Higher Court judges by and large come from the same oligarchic circles, and share the same economic and class interests.<sup>55</sup> Contrary to conventional wisdom, the political elites have not minimized the influence of politics in the judiciary. In reality, politics influence the judiciary and the judiciary influences politics.<sup>56</sup> This intricate political choreography was intended to maintain the equilibrium between the dominant political parties to the point that, if a judge belonged to one political party, the judge’s secretary must be a member of the opposition party.<sup>57</sup> A judge’s ability to stay on the bench or be promoted has been largely predicated on maintaining political alliances rather than on qualification and competence.<sup>58</sup> Even if the Higher Court

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50. See generally Alfredo Quispe Correa, *The Evolution of Religious Beliefs in a Constitutional Text*, B.Y.U. L. REV. 357 (1998); Jacob Dolinger, *Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 20 CAP. U. L. REV. 1041 (1993).

51. See HAMMERGREN, POLITICS OF JUSTICE, *supra* note 1, at 25. Hammergren calls this “micropolitics” in contrast to “macropolitics” which he defines as having to do with structural biases and the balance of institutional powers within a political system. See *id.*

52. See *id.* According to Hammergren, historically, the fluctuations in the Latin American judiciary’s political role often had been at the micro level. Traditional concerns with parties or which individuals dominated institutions and so influenced specific decisions and actions. See *id.*

53. See Inter-American Development Bank, *Would You Trust This Court?* (visited Nov. 30, 1999) <<http://www.iadb.org/exr.htm>>.

54. Election to the bench by popular vote is nearly non-existent.

55. There are few, if any, minority groups that are represented in the ranks of Latin America’s high courts.

56. For an excellent discussion on how politics influence the judiciary see HAMMERGREN, POLITICS OF JUSTICE, *supra* note 1; JOSE ANTONIO MARIN PALLIN, PERU: LA INDEPENDENCIA DEL PODER JUDICIAL (Centro para la Independencia de Jueces y Abogados ed., 1989); VICENTE ESTRELLA, CRISIS DEL PODER JUDICIAL EN LA REPUBLICA DOMINICANA (1997).

57. In Colombia, after the violence between the Liberal and Conservative Party in the 1940s, the oligarchy decided to form a national front by which the political parties would alternate in power every four years during a period of 16 years. Even after this National Front ended, there existed a de facto party power sharing. See generally Nagle, *supra* note 33.

58. Political appointments interfere with judicial independence. Judges and lawyers throughout Latin America and the Caribbean consider political appointments as a type of discrimination that interferes with judicial independence and believe that judges should be selected based on their talents and capacity, without regard for any type of discrimination. See PALLIN, *supra* note 56; ADOLFO PEREZ ESQUIVEL & DAKNI DE ABREY DALLARI, LA

judges appoint the Lower Court judges, Higher Court judges are usually replaced by the new governments. These new governments then impose their predilection for certain appointees.<sup>59</sup> Higher Court candidates are generally handpicked by the executive or by its allies.<sup>60</sup> As such, given the highly volatile political climate, there is little likelihood that the judiciary would stray far from executive authority. Presently, this symbiotic relationship persists even in the present climate of judicial reform.

### B. *Problems with the Status Quo*

The judiciary has been largely left to its own devices as long as the courts towed the party line. Given the assumption that the higher courts were expected to rubber stamp executive authority and find constitutional justification for executive actions, the courts commanded little respect from citizens or from the other branches. This lack of judicial will to interfere with executive actions left Latin American countries at the mercy of capricious law-making by executives working under their own executive declarations.<sup>61</sup> Instead of transforming and reforming the state's institutions to embrace disaffected groups, Latin America's elite have used the judicial branch to "reward followers, ensure the outcomes of certain distributive decisions, and otherwise enhance the political advantage of one partisan faction or another."<sup>62</sup>

What is worse, however, is that the judiciary has been a victim of its own tendencies for self-preservation. The judiciary has long been "perceived to be benefiting from the status quo and therefore unwilling to consider reform . . . those who control the judiciary enjoy a monopoly on the justice system, they have no incentive to promote reform or act efficiently."<sup>63</sup> One could argue that this statement is not wholly accurate. While the perception of a government institution trying to maintain the status quo may be acceptable, the notion that a corrupt body would resist the potential for personal enrichment via the funneling off of foreign aid for reform programs is absurd. Particularly if one is referring to the reform of the infrastructure versus reforming how the judiciary fulfills the goals of a democratic government. Judicial officials would be all too happy to receive, for instance, new computers and software applications, funds for contracts for judicial support organizations, funds to build new facilities, or funds to pay

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INDEPENDENCIA DE JUECES Y ABOGADOS EN ARGENTINA, BRAZIL, PARAGUAY Y URUGUAY (1998).

59. See *supra* note 53 and accompanying text.

60. See *id.* Confirmation is by simple majority in the Parliament with little or no debate or investigation. See *id.*

61. This information is derived from the author's personal experience as a district judge in Medellin, Columbia from 1983-1986.

62. HAMMERGREN, *POLITICS OF JUSTICE*, *supra* note 1, at 27.

63. Dakolias, *supra* note 28, at 170.

for the hiring of staff for political and personal reasons.<sup>64</sup>

The factors that have exerted the strongest influence on fomenting change in the judiciaries of Latin America are the increased economic pressure on the position of Latin American nations in world markets, and the need for first world nations to have stability in the region. The pressure directed at the judiciaries has come from both internal and external forces. On the internal side, reticent governments have been forced to respond to “[t]he growing skepticism [of private sector representatives] over the judiciary’s ability to respond to conflict resolution challenges arising from increasingly integrated and competitive markets, including sectors formerly dominated by public monopolies, that demand specialized enforcement based on an understanding of prevailing business practices.”<sup>65</sup>

External pressures, particularly foreign aid, exert pragmatic influence on governments reliant on such assistance in order to preserve the status quo, maintain hegemony, and stimulate development. Such pressures include: “initiatives of the United States government aimed at strengthening the capacity of the regional judiciary, which have played a pioneering role in the region,<sup>66</sup> [and] the increasing role played by multilateral financial institutions in promoting judicial reform in conjunction with economic stabilization, . . . and liberalization.”<sup>67</sup>

Such may have been the case when the Fujimori government in Peru instigated a major judicial sector reform program in the mid-1990s by inviting in a group of foreign consultants and negotiating a grant with Japan to finance a reform project.<sup>68</sup> President Fujimori recognized that foreign aid and foreign investment to the government sector was linked to a judicial infrastructure capable of attending to matters of commercial law and regulation. When foreign institutions such as the Inter-American Development Bank and the United Nations Development Program showed a willingness to fund a reform program, the Fujimori administration aggressively encouraged the judiciary to begin a reform program with the goal of “improv[ing] judicial performance and, especially, to reduce corruption and malfeasance as conditions for attracting private foreign investment.”<sup>69</sup> At this point, judicial reform became the target that both the executive branch and the judicial branch worked together to bring about in order to stimulate economic de-

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64. Many of these computers would end up in the personal libraries of the judges, the contracts for judicial support and construction of new facilities would be given to companies owned by the judges, or their family, or the elite. *See id.*

65. Garcia, *supra* note 36, at 1269 (citing Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT’L L. 167, 168 (1995)).

66. *See id.* at 1270 (citing Jorge Obando, *Reforma del Sector Justicia, Gobernabilidad y Desarrollo Democratico en America Latina y el Caribe* (World Bank 1997); Shavid Javed Burki & Guillermo Perry, *The Long March: A Reform Agenda for Latin America and the Caribbean in the Next Decade* (World Bank 1997)).

67. *Id.*

68. *See* HAMMERGREN, *POLITICS OF JUSTICE*, *supra* note 1, at 180.

69. *Id.* at 181.

velopment and investment.

Likewise, in Mexico, President Ernesto Zedillo's presidential campaign platform included judicial reform promises. In order to fulfill his campaign promises upon entering office, he forced judicial reform measures through the legislature in an extraordinarily short time. The judicial reform package "included as many as twenty-seven constitutional amendments . . . Congress passed the reform in just ten days."<sup>70</sup> The reforms were ratified and published seventeen days later and immediately put into force.<sup>71</sup>

In the latter half of the century, the judiciary faced a mounting challenge in terms of its credibility, functional effectiveness, and standing vis-à-vis the other powers of the State. Not to mention the judiciary's contributions as a bulwark for the protection of human rights in societies with vulnerable democratic institutions, its role in promoting a predictable institutional environment in the economic sphere, and its obligation to provide a forum for the fair and effective resolution of disputes.<sup>72</sup>

Latin American judiciaries have failed to fully perform their constitutional duties. The reasons they have failed vary from country to country, however, they can be summarized as threats and intimidation, corruption, and the political pressure influencing judicial decisions.<sup>73</sup> When Latin American courts have attempted to tackle serious issues of law which affect national policy in contradiction of the desire of the executive, or in many cases in contradiction of the military oligarchy, the results have been disastrous. Such was the case in Columbia in 1985 during the presidency of Belisario Betancur, when the military staged what essentially amounted to a coup d'état against that nation's Supreme Court. This notorious incident was sparked by the poorly orchestrated takeover of the Palace of Justice by the leftist guerrilla group, M-19.<sup>74</sup> The timing of this operation could not have been more fortunate for the ultra-conservative factions in government who despised both the Betancur administration and the Supreme Court for its attempts to make peace with leftist guerrillas, and turn matters of sovereignty regarding the extradition of Colombian drug lords over to the United States.<sup>75</sup> Judiciaries have also maintained the status quo by abdicating their authority to the executive branch or the military by failing to exercise con-

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70. Alberto Szekely, *Democracy, Judicial Reform, The Rule of Law, and Environmental Justice in Mexico*, 21 HOUS. J. INT'L L. 385, 404 (1999).

71. *See id.*

72. *See Garcia, supra* note 36, at 1268.

73. *See* EDGARDO BUSCAGLIA & WILLIAM RATLIFF, *JUDICIAL REFORM IN LATIN AMERICA* 2 (1995). In addition to the factors listed here, other factors to consider are judicial incompetence due to the lack of talent attracted to the bench. *See supra* note 61 and accompanying text.

74. M-19's ill-planned operation was intended to call national attention to the movement's social and political platform after negotiations with the Betancur administration had broken down. The palace was destroyed during the military's assault and nearly all the justices were killed. *See* ANA CARRIGAN, *PALACE OF JUSTICE: A COLOMBIAN TRAGEDY* (1993).

75. *See id.*

trol over issues of constitutionality, or by deferring to the legislative body to determine issues of state.<sup>76</sup>

## II. PERSISTENT PROBLEMS WITH JUDICIAL SYSTEMS

“Under normal conditions, stability is an indicator of the strength and well-being of democracy.”<sup>77</sup> Normal conditions have not prevailed in most Latin American nations, particularly with regards to the courts and its relationship to the people. The movement towards reform was initiated by reaction to the traumatic human rights abuses in the 1970s and 1980s. During this time, many Latin American countries became the battleground for Cold War ideologies and violent clashes between conservative and leftist activists.<sup>78</sup> The judiciaries were incapable of keeping pace with social and political events. In addition, they were constrained by inefficiency, ineffectiveness, and inconsequence, all influencing the groundswell of change occurring throughout the region. As democratic principles triumphed over totalitarian regimes, democratizing suddenly placed the judiciary at center stage in Latin America. “The basic idea of the reform was to democratize the judiciary by opening its structures to a new institutional framework.”<sup>79</sup>

As a matter of judicial survival, judicial reform must be placed on the horizon for representative government in Latin America. However, the challenge lies on where to start, what form judicial reform should take, and by whom the reforms should be identified and implemented. Although Latin American judiciaries all spring from the same genesis, the fundamental dilemma with discussing the vast problems with the judiciaries in Latin America is that they each operate under different political and constitutional constraints. However, regardless of the current structure and operation of each court from nation to nation, they each share one common and vital trait: a

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76. One example of this occurred in Peru, where the constitutional right to have a referendum was annulled by order of the court, as such leaving the issue to Parliament. Specifically, the National Electoral body allowed Parliament to have the final decision on the admissibility of a referendum to derogate Law 26657 (interprets article 122 of the Peruvian Constitution), which allows the election of President Fujimori to a third term. See ANDEAN COMMISSION OF JURISTS, AT A SLOW PACE: EXECUTIVE SUMMARY 22 (1999).

77. ANDEAN COMMISSION OF JURISTS, THE ANDES: EMERGENT OR IN EMERGENCY? EXECUTIVE SUMMARY 2 (1997).

78. See *id.*

79. Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 S.W. J. L. & TRADE AM. 323, 324 (1998). Barra, writing on events in Chile, notes,

[t]he transition in Chile also echoed the regional movement towards change in legal structures in all of Latin America. The movement “towards the rule of law,” received important support from international agencies, which already produced major statutory changes in a number of Latin-American countries, especially in the criminal procedure field.”

*Id.* at 325.

nearly 200 year-old inferiority complex with the other branches of government. This self-imposed subservience to the executive branch, and to the legislative branch to a lesser degree, is responsible for the support of judicial reform, mainly from international benefactors.

Many Latin American countries have jettisoned the traditional inquisitorial traditions of the continental system in favor of an Anglo-American oral adversarial system for which no regional precedent, historical context, or experience exists. From a legalistic point of view, this does not make sense. Strengthening traditional institutions would better serve the region than consigning judicial traditions to the trash heap. From an economic viewpoint, which is the view promoted by leading judicial reformers, judicial reform is the only way for Latin American countries to compete in the global market, and ensure that foreign investments and trade will be protected when legal disputes arise. It is alarming to think that judicial reform in Latin America is driven by money rather than by devotion to the rule of law.

### A. *The Cinderella of Government*

In a real democracy, the judiciary must be positioned with the executive and legislative branches as one of the three pillars of government guaranteeing liberty, justice, and respect of the rule of law. However, "in most Latin American and Caribbean countries, the judicial pillar is fractured, weak and incapable of supporting the weight of its constitutional responsibilities."<sup>80</sup>

The judiciary of modern democracy is plagued by a historical legacy of meekness and subservience. Sáez Garcia states:

The constitutions of all newly born Latin American republics established a rigorous Montesquiean principle of separation of powers. Thus, the judiciary was assigned a more restricted role than in colonial times. The distribution of power among branches of government was asymmetric, however, owing mainly to the personalized power relationships and a strong administrative bureaucracy. The executive branch assumed a prevalence vis-à-vis the legislative and judicial branches. During the following decades, . . . branches focused on the balance of power between the parliament and the executive, such as the debate over the prevalence of parliamentary or presidential democracies. The judiciary played a lesser role in defining the appropriate balance of power, reflecting the true power balance within the newly created states.<sup>81</sup>

The courts of modern Latin American countries hardly deserve respect. This in part because the courts have been the vehicle by which repressive colonial regimes enforced monarchical and executive authority over the populace.<sup>82</sup> In the process of the executive establishing authority over the

80. See IDB America, *supra* note 3 and accompanying text.

81. Garcia, *supra* note 36, at 1287 (citations omitted).

82. "Political instability and institutional crises over time have subjected regional judici-

State, the meekness of the judicial branch negatively impacted the protection of individual and social rights. This in the face of state power and deference to conservative constitutional authoritarianism. "Thus, the judiciary in the region assumed a defensive role compared to major political actors such as the military and political establishments."<sup>83</sup>

The infrastructure of the judiciary has languished to the degree that it has failed to assert itself as an equal branch of government. Therefore, judicial reform became an important component in aid packages from foreign lending institutions and first-world nations attempting to prop up democratic governments in developing nations. The judiciary is the least well regarded and consequently the least well funded of the branches of Latin America democratic government. The problems are endemic and universal throughout the region: attrition is high, resources are meager, and continuing training are all but non-existent.

The incorporation of advanced technology into the courts occurs only in the largest cities, leaving courts in small towns in the dark ages. Even today, it is not unusual for secretaries of lower court judges to buy supplies from their own salaries, to work on dilapidated manual typewriters, and to work under candlelight during the all too frequent power outages. Carbon paper is still in general use and there is little, if any, modern case management apparatus available outside the courts of major cities. Then again, even in the larger cities where technology has been made available to the courts, there is an acute lack of interest on the part of judges to utilize new technology, due in large measure to the lack of consistent, motivated, and progressive judicial education.<sup>84</sup> During an interview with a judge in Colombia last summer, he pointed to the computer behind his desk and said he had never used it because no one was available to train him on how to use it.<sup>85</sup> The computer had been on the judge's desk for months, but it had never been turned on.

Being a judge is not considered a prestigious milestone in Latin America, therefore, the position of judge in the lower courts is not desirable to the top legal talent. Consequently, lawyers get appointed to the bench who may not have the legal training or mental capacity to do their jobs. Admitting that the judiciary is incompetent, however, goes against the Latin mentality of machismo and infallibility.<sup>86</sup> "In many countries, judicial ineptness is a delicate topic."<sup>87</sup> In fact, one could argue that such attitudes are part of the

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aries to intense political influence, including their virtual subordination to the prevailing political forces." *Id.* at 1285 (citing T.D. FERGUS ET AL., *EUROPEAN LEGAL HISTORY* 278-80 (1995)).

83. *Id.* at 1287.

84. See ANDEAN COMMISSION OF JURISTS, *supra* note 76, at 47.

85. See *supra* note 61 and accompanying text.

86. See generally Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253 (1998).

87. Wendy Vicente, Comment, *Questionable Victory for Coerced Argentine Pharmaceutical Patent Legislation*, 19 U. PA. J. INT'L ECON. L. 1101, 1138 (1998).

root of the problems confronting judiciaries in the region.

Judgeships have often been the jobs no one seeks, unless the individual is either truly committed to social justice, or interested in a venue for acquiring wealth through bribery and corruption. Those who become lower courts judges for the sake of societal good, however, are soon stymied by their corrupt superiors who do not want reformers rocking the boat.

Low self esteem in the court system is part of a larger morale problem. In writing about the situation in Chile, de la Barra stresses the need to increase prestige in the institution in order "to attract skillful people with high ethical standards . . . [and] to hire and maintain skillful people, not merely depending on some idealistic lawyers."<sup>88</sup>

Associated to a high prestige profile goal is the institutional capacity to develop an integral program of initial and continuing education . . . specific training will help create institutional identity and set a minimum level of standard to exercise prosecutorial function . . . This exercise will also provide the elements to create the common language and practices that will shape the new legal culture in criminal law and procedure and the unwritten rule for acting inside the system.<sup>89</sup>

Reform of the judiciary must begin with committed leadership in the highest level of the judicial branch.

[T]he design of judicial policies must start with the clear leadership of judges as main characters of the reform strategy. It is equally incontrovertible that such a reform binds the other bodies of the state in the same imperative manner, and demands that leaderships coordinate actions, lay bridges toward dialogue, and solidify consensus.<sup>90</sup>

### B. Judicial Corruption

Judicial malfeasance represents just one element of the corruption that pervades most Latin American countries.<sup>91</sup> In recent decades, much of the corruption is attributable on a fundamental level, to the way things are done in Latin America. Specifically, the oligarchy retains control through whatever means necessary, as long as wealth and power remain in the hands of the elite. However, a large part of corruption in Latin American judiciaries stems from the overwhelming influence of illegal drug production and trafficking, particularly in nations whose territories are used as transshipment staging areas, such as Panama,<sup>92</sup> Chile,<sup>93</sup> Mexico,<sup>94</sup> Paraguay,<sup>95</sup> Brazil,<sup>96</sup> and a

88. Cousino, *supra* note 79, at 337.

89. *Id.* at 338.

90. Fernando Carrillo Flórez, *Supreme Courts of the Americas Organization: Judicial Independence and Its Relationship with the Legislative Bodies*, 42 ST. LOUIS U. L.J. 1033, 1041 (1998).

91. For a probing analysis of judicial corruption see BUSCAGLIA, *supra* note 1, at 95.

92. See Juanita Darling, *Traffickers Set Up Shop in Panama Narcotics: Colombian Drug*



number of islands in the Caribbean.<sup>97</sup>

Drug lords have long penetrated and corrupted the judicial authorities through coercion, threats, bribes, and blackmail. In the 1980s, Colombian judges were offered the choice of “plata o plomo” (silver or lead)<sup>98</sup> by drug lords whose operations crossed international borders and invaded all levels of society and government. It was not difficult to persuade judicial officers to accept bribes because judges and court officials were so poorly paid and were held in such low esteem in the legal profession. Not to mention that the judicial system was wide open to corrupting influences given that the institution did not compensate, train, or monitor judges and judicial officers.

While many Latin American countries resolve to live with judicial corruption, attempts have been undertaken to break the status quo. In Venezuela, current President Hugo Chavez has taken a highly aggressive stance on reforming a “notorious judiciary”<sup>99</sup> by removing hundreds of judges during the summer of 1999. This purge came at a time when the Venezuelan

*Dealers Looking for Sanctuary From Their Violence-Racked Nation Are Returning, Authorities Say*, L.A. TIMES, Jan. 18, 2000, at A1.

93. “The State Department, however, lists both Chile and neighboring Argentina as transit points for cocaine from Colombia, Peru and Bolivia.” Geoffrey Mohan, *Drug Smugglers’ New Route / Moving Cocaine via Chile, Pacific ports*, NEWSDAY, Jan. 21, 2000.

94. “Mexico continues to be the primary transit country for cocaine entering the United States from South America.” General Accounting Office, *Drug Control—U.S.-Mexican Counternarcotics Efforts Face Difficult Challenges*, GAO/NSIAD 98-154 (June 30, 1998).

95. According to Brazilian authorities, cocaine is shipped by small plane to Pedro Juan Caballero, Paraguay, where it is then shipped overland into the state of Sao Paulo, Brazil. See Edson Luis & Hugo Marques, *CPI on Drugs Suggests Stricter Airport Controls*, WORLD NEWS CONNECTION, Sept. 22, 1999.

96. “Brazil has become big on the drug trafficking map for a number of understandable reasons. The nation has lengthy borders with South American producers and smugglers of cocaine, heroin and marijuana: Colombia, Peru, Bolivia and Paraguay.” Sebastian Rotella, *Drug Panel in Rarefied Territory: Investigators in Brazilian Probe Have Won the Support of the Working Class, one Observer Points Out, Because ‘People See the Rich and Powerful . . . Going to Jail. Slowly, Things are Changing,’* L.A. TIMES, Jan. 4, 2000, at 1.

97.

According to interagency estimates, Mexico and Central America received 59 percent of the cocaine during this period. The Caribbean countries accounted for 30 percent of the flow, and 11 percent was shipped directly to the United States from source countries was shipped directly to the United States from source countries.

General Accounting Office, *Drug Control—update on U.S. Interdiction Efforts in the Caribbean and Eastern Pacific*, GAO/NSIAD 98-30 (Oct. 15, 1997).

98. The phrase “silver or lead,” represented the dilemma of Colombian judges to either accept bribes or risk assassination by drug traffickers. Many of my colleagues on the bench were assassinated for their refusal to give into the drug lords. I was finally forced to flee the country as similar threats against me made my remaining in Colombia impossible. See *supra* note 61 and accompanying text. During the so-called “War on Drugs” waged in Colombia against the notorious Medellín Cartel in the late 1980s, more than 275 judges were murdered. See *id.*

99. Bart Jones, *Venezuela’s Leader Launches Reform*, ASSOCIATED PRESS, Oct. 1999, available in 1999 WL 28124448.

Constitution was being rewritten, including a mandate on reforming the way judges would be appointed and trained.<sup>100</sup> This shake-up was in reaction to atrocious conditions in a court system in which “[t]hree-fourths of Venezuela’s inmates have never had their day in court,”<sup>101</sup> and “[h]igh-power law firms write verdicts themselves and bribe judges to sign them.”<sup>102</sup> Additionally a recent newspaper article stated:

The attempt to clean up the courts started . . . after the nationally elected assembly was installed to write a new constitution. Assembly members said they had unearthed 4,000 formal complaints of wrongdoing against many of the nation’s 1,200 judges.

The allegations had been collecting dust for as long as 15 years in the offices of the National Judges Council, which is supposed to investigate such complaints, said Manuel Quijada, head of the assembly’s judicial emergency commission . . . .

In one recent case that provoked a public outcry, judges dropped charges against two dozen bankers accused in a 1994 scandal that nearly bankrupted the financial system and required a \$10 billion government bailout. Justice has long been subject to the whims of the country’s increasingly unpopular political parties, since Congress appoints judges from the Supreme Court on down. Just one-fourth receive permanent appointments, meaning they can be dismissed for offending politicians, their allies or powerful business interests.

“Judges make decisions based more on their fears than on judicial criteria,” said Juan Navarette of the Venezuelan branch of the human rights group Amnesty International.<sup>103</sup>

While many observers consider President Chavez’s actions extreme,<sup>104</sup> par-

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100. Historically, judges were appointed by the Supreme Court, allowing for institutionalized cronyism. The commission tasked with writing the constitution stressed that “U.S.-style procedures for selecting, training and supervising judges” would be instituted and “Supreme Court candidates would be subjected to public hearings and intense background checks.” *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

In one notorious case, the Supreme Court bottled up corruption charges against former President Jamie Lusinchi for years, ignoring the recommendation of the investigating justice that Lusinchi be put on trial. The justice, Roman Duque Corredor, resigned in protest in 1992. A group of Venezuela’s most respected intellectuals urged the rest of the court’s members to do the same, but none did, and the Lusinchi case died.

*Id.*

104.

Critics of the commission’s actions said that the judges were being denied the right to due process of law because they were not allowed to defend themselves before they were suspended or dismissed. Adriana Lander of the Alliance for So-

ticularly the elites who have been inconvenienced, his election to power was by a popular mandate of people who were fed up by years of political corruption.

In of September 1999, the World Bank pledged to increase funding to forty-eight countries to fight institutional corruption, targeting judiciaries in need of judicial reform.<sup>105</sup> Latin American countries targeted for funding were Argentina, Bolivia, Colombia, Ecuador, Guatemala, Nicaragua, and Paraguay. However, it remains to be seen how much money funneled to these countries will be siphoned off by the very corruption the aid is supposed to fight. Corruption has and will remain a refined and discreet art form in Latin America.

Among the more troubling problems with judicial reform appear in the law enforcement agencies responsible for gathering evidence in the investigative stage of the inquisitorial process because they are plagued by institutional corruption. Judges and prosecutors often are unable to bring charges against the police who are bribed to lose evidence, shield witnesses from testifying, or target innocent and defenseless individuals in order to allow guilty parties to go free.

It is not difficult for criminals to escape prosecution through bribery and coercion because police are so poorly paid and educated, and come from the lower rungs of Latin American society. During the Christmas season, policemen line up outside the gates of the estate of Joaquin Builes, a drug lord in the Medellín Cartel, to receive Christmas cash "presents" for a year of "service to the community."<sup>106</sup> Colombian judges interviewed as recently as June 1999 reported that they had solid evidence of judicial police being involved in drug trafficking but they felt powerless to prosecute the police because the corruption was so institutionalized that no charges would ever stick.<sup>107</sup> Even the mention of conducting an investigation would elicit death threats against the judges.

Intimidation of judges by police and military investigators is frequent and usually sufficient to quell any attempts to clean up the judicial system. In one instance, a Colombian judge brought charges against two soldiers for their involvement in a massacre of civilians. After issuing arrest warrants, she was forced to leave the country due to death threats and in retaliation, her father was murdered.<sup>108</sup>

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cial Justice, a non-governmental organization that supported judicial reform, said that the commission's procedure 'may not be the most fair and orderly manner' for ridding the country of corrupt judges.

*Judges Purged in Courts Shake-up, Facts on File*, WORLD NEWS DIG., Dec. 23, 1999, at C1.

105. See *World Bank Joins 48 Countries in Corruption Fight*, AGENCE FRANCE PRESSE, Oct. 22, 1999.

106. *Supra* note 61 and accompanying text.

107. See *id.*

108. See Leslie Wirpsa, *Economics Fuels Return of La Violencia: Colombia's Religious, Human Rights Groups Seek End to Slaughter; Catholic Church Tries to Mediate Amid Tor-*

### C. *Lack of Capable and Honest Investigation*

Incompetence within the judicial system is a serious obstacle that must be overcome in order to raise the status of the judiciary as a respectable branch of government. Many times, court procedures are often not followed, and sometimes they are intentionally ignored. For example, procedures that are required such as verifying the identity of witnesses or securing physical evidence are often not followed. And when followed, they are done in such an incompetent manner as to render the witness unavailable, or the evidence contaminated, or damaged rendering it useless. Often times these problems are due to the lack of training and care on the part of the police, however, more often than not, the problems are intentional and the result of bribery. For example, judges are required to conduct initial investigations of crimes and turn evidence gathered at crime scenes to the police. However, many times the evidence that is turned over to the police, particularly drugs that the police are ordered to take to the forensics lab for testing, never reach the lab.<sup>109</sup> In addition, in many police coordinated raids on suspected

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*ture and Murder of Civilians by Paramilitary Forces and Others*, NAT'L CATH. REP., Oct. 24, 1997, at 34. Wirpsa writes:

To understand the relationship among Colombia's paramilitary networks and their development requires a return to the banana lands of Uraba. One of the first highly publicized death squad massacres in Colombia was the March 1988 slayings of 22 workers from the Honduras and La Negra banana plantations in Uraba. Paramilitaries yanked the men from their beds and shot them. This collective killing was the curtain raiser to a string of horrific massacres that year that claimed more than 600 lives. So frequent and brutal were the 1988 mass slayings that they prompted unprecedented action from Colombia's judges. By September 1988, Judge Marta Lucia Gonzalez announced preliminary results of her probe and brought charges against two well-known drug traffickers, three military officials, a police lieutenant, a local mayor and 11 other civilians. Gonzalez subsequently fled to the United States because of death threats. Seven months later, her father, Alvaro Gonzalez, was slain. In July 1989, the judge who assumed the investigation, Maria Elena Diaz, was assassinated. As a result of her investigation, Gonzalez outlined an alliance between the army, Medellin cartel drug traffickers, cattle ranchers and death squads who trained in Puerto Boyaca.

Gonzalez claimed that Maj. Luis Felipe Becerra Bohorquez, from the intelligence division of the Uraba army battalion, contracted with assassins to massacre the banana workers. A lieutenant and a captain were also linked to the massacre. Despite the ongoing investigation involving him, Becerra resumed normal military life. He got a job running the army's press office and continued officer training abroad. "When a government official tried to notify Becerra of a judicial decision in 1989, he was told that the officer was not available since he was in the United States taking a course necessary for his promotion to lieutenant colonel," Human Rights Watch reported.

*Id.* For additional history see JENNY PEARCE, COLOMBIA: INSIDE THE LABYRINTH 232, 254, 257-58 (1990).

109. This circumstance occurred routinely while the author was a judge in Medellin, Colombia. See *supra* note 61 and accompanying text.

drug-processing labs, suspects are hardly ever arrested because they are tipped off by police just prior to the raid taking place.<sup>110</sup>

The practice of cloning witnesses is one of the most repugnant practices in Latin American courts. Cloning was the result of a system gone awry, identities of witnesses had to be withheld by courts in order to protect them, and to compel their testimony in notorious cases. "Cloning occurs when the same person is presented on two or more separate occasions as different witnesses."<sup>111</sup> Cloning has occurred in Peru and Colombia where anonymous judges take testimony from anonymous witnesses.

Among the cases in which the United Nations Special Rapporteur noted instances of witness cloning is the case *Unión Sindical Obrera (USO)*. This case involved the petroleum workers' trade union in Colombia.<sup>112</sup> Twelve of its members were arrested and accused of committing terrorist acts, and brought before the regional courts.<sup>113</sup> "Their capture and detention were based on testimony of at least four 'faceless' or anonymous informants who collaborated with Army investigations. The Attorney-General (Procurador General), while carrying out his oversight function in this case, determined that some of these anonymous witnesses had been cloned."<sup>114</sup>

One can argue that no amount of judicial reform in Latin America could alter the insidious behavior that is itself an institution. Especially as long as the training and job requisites for police officers are a low priority, it will remain difficult to recruit and retain individuals whose personal codes of conduct are as strong as the letter of the laws they are supposed to honor and uphold.

There are only few controls in place to deal with institutional corruption, and the situation is only aggravated by the power and influence of the executive branch which exerts a shield of protection over investigative agencies. Add to this the omnipotent presence of the military, which lurks just beneath the surface of popular democracy. Both of these entities often work in concert to prevent the judiciary from holding investigative units accountable to high standards of conduct and efficiency.

Arbitrary decisions are also a constant problem at all levels of the judiciary, and the legal system seems incapable of attacking them. Part of this difficulty stems from the fact that laws are often confusing, hard to inter-

110. See *id.*

111. *Question on Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Kumaraswamy: Addendum: Report on the Mission of the Special Rapporteur to Colombai*, Commission on Human Rights, U.N. Doc. E/CN.4/1998/39/Add.2 (1998) [hereinafter *Question on Human Rights*]. "This abuse of regional justice has been confirmed in several cases where regular Army informants—some of whom are paid monthly wages to testify – are used to accuse persons of rebellion or terrorist acts." *Id.*

112. See *id.*

113. See Luz E. Nagle, *Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality or Modern Inquisition?*, U. PITT. L. REV. (forthcoming Summer 2000).

114. *Question on Human Rights*, *supra* note 111.

pret, and unpredictable.<sup>115</sup> Despite expensive and tedious efforts, courts suffer from great backlogs, delays, and needless errors in procedure.<sup>116</sup>

In addition to the inherent unfairness of a system in which those in control are also its prime beneficiaries, those willing to subject their claims to such a system must contend with an equally daunting reality: the length of time necessary to resolve a case once it reaches a Latin American courtroom. Cases commonly take up to twelve years to be resolved in court. Such delays lead to two additional problems: 1) backlogs that limit access to the judicial system, and 2) additional losses caused by the delay and prolongation of litigation for those fortunate enough to secure a place on the court docket.<sup>117</sup>

Distrust of the judiciary continues to deepen, particularly among the private sector, which worries over the "judiciary's ability to respond to conflict resolution challenges arising from increasingly integrated and competitive markets, including sectors formerly dominated by public monopolies, that demand specialized enforcement based on an understanding of prevailing business practices."<sup>118</sup>

The poor reputation of Latin American judges also stems from the public's perception that many judges use their positions for personal gain and consequently, apply the law arbitrarily. In Peru, for example, the population's dissatisfaction with the judiciary has increased dramatically, which is indicated by the number of disciplinary actions filed.<sup>119</sup>

Some Latin American countries are taking steps to identify and acknowledge problems in their judicial system. One such example is Paraguay's Supreme Court which seems to be moving in the right direction by having identified the following "obstacles for the objective regarding efficient and real justice":

- (1) Tardiness in trials;
- (2) Deficient quality in the procedure of trials and sentences;
- (3) Inadequate, insufficient, or untimely resources;
- (4) Expensive justice;
- (5) Inadequate internal information;
- (6) Efficient public relations;
- (7) Insufficient confirmation as a State power;
- (8) Inefficient justice related organs; and
- (9) Inadequate and insufficient decentralization.<sup>120</sup>

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115. See BUSCAGLIA & RATCLIFF, *supra* note 73, at 2.

116. For an extensive analysis of the problem see Edgardo Buscaglia, *A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America*, 17 INT'L REV. L. & ECON. 275 (1997).

117. See Dakolias, *supra* note 28, at 170.

118. Garcia, *supra* note 36, at 1269 (citing Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 168 (1995)).

119. See ANGEL PAEZ, *THE DREADFUL COURT*, LA REPUBLICA 8 (1994). In 1993, 9121 complaints were filed compared with 3319 in 1991. See *id.*

120. Enrique A. Sosa Elizeche, *Restructuring of Justice Administration in Paraguay*, 42 ST. LOUIS U. L.J. 1153, 1157 (1998).

#### D. Violence Against the Judiciary

The lack of faith and trust in the judiciary raises the prospect of violence occurring against the judiciary in part because of the perception that the courts are so inefficient, and so corrupt as to be incapable of dispensing fair and equitable justice.

Only the naive would seriously argue that the government renders equal attention to all citizens. The lower class does not impact the government in the same manner as the middle and upper class do. Therefore, it is unfair to expect disaffected citizens to be anything but alienated and distrustful.<sup>121</sup>

This distrust led to the rise of paramilitary and vigilante groups (*autodefensas*) that exact justice with their own swift and brutal methods.<sup>122</sup> Vigilante groups exist because citizens believe that their institutions of government are incapable of protecting them, their interests, or their property. Therefore, citizens were forced to seek justice through extra-judicial means, outside of government intervention. Vigilante justice is the only viable alternative for those who are already marginalized from the institutional justice system because they know that the alternative is to wait for many years for justice to be served.<sup>123</sup>

The same vigilante and paramilitary groups that take the law into their own hands have been responsible for acts of violence and intimidation against judges, prosecutors, and judicial police units. In countries with no formal government control, such as Peru, Colombia, and southern Mexico, paramilitaries have been responsible for human rights violations, and the carrying on of criminal enterprises. Attempts by the judiciary to bring paramilitary groups to justice have resulted in the assassination of judges and prosecutors. Such was the case on January 18, 1989 in Colombia when two judges of the public order courts<sup>124</sup> and ten assistants investigating accusations of paramilitary atrocities were brutally murdered.<sup>125</sup>

121. See generally Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating The OAS Role in Haiti, Peru, and Guatemala*, 25 U. MIAMI INTER-AM. L. REV. 393 (1994).

122. For a practical examination of the autodensas and paramilitary groups in Latin America see CARLOS MEDINA GALLEGU, *AUTODEFENSAS, PARAMILITARES Y NARCOTRAFICO EN COLOMBIA: EL CASO PUERTO BOYACA* (1990).

123. In Brazil, for example, of the more than 4 million cases filed in the courts of first instance in 1990, less than 58% were adjudicated by the end of that year. See Dakolias, *supra* note 28, at 171 (citing Maria Tereza Sadek & Rogerio Bastos Arantes, *The Crisis of the Brazilian Judiciary: The Judges Perspective*, Paper Presented at the 16th World Congress Conference of the International Political Science Association (Aug. 21-25, 1994)) (on file with the author)). In several courts of first instance in Bolivia, only 42% of the cases that enter the system are disposed of in the same year. Bolivia: Judicial Reform Project. It is not surprising that vigilantism is an attractive and popular alternative. See *id.*

124. See generally Nagle, *supra* note 113.

125. Three of the 15 men survived by faking death. According to Carlos Eduardo Lozano, the National Director for Criminal Instruction, "lower and middle-rank chiefs of the police and the Army are tolerating and sponsoring ultrarightist groups." AMERICAS WATCH, *THE KILLINGS IN COLOMBIA* 98 (1989).

The executive branch has a poor record of ensuring the safety and security of judicial officers. This was most apparent during the 1980s and 1990s in Columbia during the "War on Drugs" when hundreds of judges and court officials were murdered in narco-terrorist attacks.<sup>126</sup> This bleak situation gave little incentive for lawyers to become judges during a time when a judge's life expectancy was about two years.

### III. JUDICIAL ACTIVISM AND INDEPENDENCE

Many have addressed the need for promoting judicial independence as a component of judicial reform.<sup>127</sup> Dakolias stresses that "the quality and integrity of a judicial system can be measured best by the quality and integrity of its judges."<sup>128</sup> The notion of judicial independence is threefold: 1) detachment from political affiliations and special interests; 2) individual autonomy from the judicial bureaucracy; and 3) independence from the other branches of government.<sup>129</sup> In addition, add to this reverence for a code of judicial conduct enforced by a disciplinary body of judicial officers and non-judicial participants. The first element of judicial independence, detachment from party affiliations, is held hostage by the power exerted on the judiciary by the other branches of government, a situation that is as "disabling as any other judicial or psychological attack on the judiciary."<sup>130</sup>

Judges in the lower courts have struggled for years with internal commotion within the judiciary that impedes their ability to render independent decisions, and take proactive actions in navigating the justice landscape. Fiss notes that "[i]n common law systems, judges feel the

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126. See Jeffrey Stalk, *Faceless Judges Dodge Assassins*, TIMES, Dec. 17, 1991, at A1. Stalk reported:

Nowhere in the world do judges and lawyers work at such risk as in Colombia, a recent report by the Geneva-based International Commission of Jurists says. Between July 1989 and June 1990, 37 judges and lawyers were killed there. Another 36 court officials were murdered the following year while others were forced by persistent death threats to quit their jobs and flee the country. In all, 350 judicial officials have been killed in Colombia since 1980 and one-fifth of the country's more than 4,300 judges have been threatened with death.

*Id.* In late 1985 following the Palace of Justice tragedy and the assassination of some of my close colleagues, I called the Ministry of Justice to request protection. The Ministry's response was that I should wear running shoes to the office because the Ministry had no way to protect me. I was fortunate that a friend, an army general, who took it upon himself to provide me with an around-the-clock military escort. See *supra* note 61 and accompanying text.

127. For a detailed analysis of judicial independence see Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996).

128. Dakolias, *supra* note 28, at 172.

129. See *id.*; OWEN M. FISS, *The Right Degree of Independence*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 55, 55-56 (Irwin P. Stotsky ed., 1993).

130. Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 FORDHAM INT'L L.J. 577, 603 (1993).



Fiss notes that “[i]n common law systems, judges feel the pressure of other judges through the doctrine of stare decisis,”<sup>131</sup> which is foreign to Latin American judiciaries. Stare decisis cannot easily be adapted by the continental law terrain. This is mainly because there is no historical precedent upon which such doctrine could be founded. Judicial independence assumes that judges are free from the influence of the other branches in judicial proceedings. However, in most Latin American countries, executive power and party affiliations exert enormous bureaucratic and back-room pressure on the courts. While a judge may believe she can render fair and impartial decisions in the face of such pressure, there is no control over the actions of subordinates or other judicial officers who may, and do, sabotage judicial proceedings. The patron-client legacy inherited from Ancient Rome makes achieving “political insularity,”<sup>132</sup> eliminating the influence of other branches of government and other political entities, nearly impossible in Latin America.<sup>133</sup> This still persists in Latin America<sup>134</sup> and influences how alliances are made, appointments are assigned, and careers sustained.<sup>135</sup> As long as emphasis in the legal profession and in politics is based on who one knows rather than what one knows, it will be nearly impossible to establish a judiciary with enough autonomy to make independent decisions.

Dakolias argues that “[p]ersonal independence for judges can be achieved through appropriate methods of appointment, removal, and supervision.”<sup>136</sup> However, even in the United States where appropriate methods for appointment, retention, removal, and supervision are entrenched, there is no guarantee that judges will exercise independent authority and decision-making. This was the case in the recent fiasco in Miami where a Cuban-American state court judge prevented a child from being repatriated to his father in Cuba, this in direct contradiction to the Immigration and Naturalization Service, and accepted norms of international law.<sup>137</sup>

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131. Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 58 (1993).

132. *Id.* at 59.

133. The patron-client legacy is an ancient social-economic system in which individuals attached themselves to influential and political elites in order to improve their position in the society in exchange for unquestioned support for the patron’s affairs. See generally ERNEST GELLNER & JOHN WATERBURY, *PATRONS AND CLIENTS IN MEDITERRANEAN SOCIETIES* (1977).

134. Throughout Latin America since the earliest days of colonization, local strongmen (known as *caudillos* or *patrones*) have held control over regional commerce, politics, and societal affairs. The fate of those living within the sphere of influence of strongmen was dependent upon absolute allegiance to the strongman. Likewise, the *caudillos* depended upon their clients in order to maintain power and influence. See generally Friedberg, *supra* note 31.

135. “The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal.” Larkins, *supra* note 127, at 608.

136. Dakolias, *supra* note 28, at 175.

137. See Mary Hladky, *Ruling on Elian Adds Fuel to Debate on Whether State Should Stop Electing Trial Judges*, BROWARD DAILY BUS. REV., Jan. 21, 2000, at B1; Manny Garcia, *Possible Conflict of Interest Questions for Judge in Case of Cuban Boy*, MIAMI HERALD, Jan.

In Latin America, corruption is so intensely woven in the fabric of government that accountability to the people is of almost no consequence. Removal of judges occurs as a result of backlash from the executive branch, at times when the court moves to curb the activities of the executive branch. As well as, when a new regime comes into power and decides to clean house and replace judges with those who subscribe to the new order. Furthermore, there is little historical precedent for judicial activism and independence. These are concepts foreign to the legal traditions of the civil law system, and particularly to the civil law systems of Latin America. Rather, the symbiotic relationship between the courts and the executive branch remains complex and entrenched by constitutional precedent and tradition.<sup>138</sup>

The judiciary has traditionally conducted its work largely free from public scrutiny because the laws enforced are not based on *stare decisis*. There is a disconnection between the judicial decision-making process and how the decisions are deemed acceptable to the society. This is the case because in the eyes of the people, the courts have been so closely associated with the executive branch, that there is simply no trust in the judicial branch.

The purpose of the judiciary in any society is to order social relationships among private and public entities and individuals, as well as to resolve conflicts among these societal actors. Unfortunately, the Latin America judicial system is widely perceived to be in a state of crisis because it cannot fulfill these basic expectations. A climate of distrust and frustration permeates the judicial system and has been acknowledged by virtually every sector of society including private individuals, the business community, and judicial system insiders like judges and lawyers. This perception of ineffectiveness by the institution's potential users discourages intended beneficiaries from seeking services, and leaves them with low expectations of justice when forced to participate in judicial proceedings.<sup>139</sup> This lack of trust in the autonomy of the courts is in part responsible for the rise the *autodefensas* and paramilitary groups who feel compelled to take matters of justice into their own hands.

A problem also exists in determining how the judiciary attempts to enforce the law which the public perceives as interference with the natural order of society. For instance, should the judiciary punish a peasant father living in a remote region of a country who commits incest with his daughters

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12, 2000.

138. For an excellent discussion on Latin American judiciaries see Fiss, *supra* note 131, at 67-76.

139. See Dakolias, *supra* note 28, at 173. Dakolias notes that in Argentina only 13% of the public has confidence in the administration of justice and only 16% of the public polled has confidence in that country's judges. In Brazil, 63% of the public views the administration of justice as "average" or "poor or substandard." *Id.* "The worst case perhaps exists in Peru, where 96% of the population lacks confidence in judges, and 86% has either little or no confidence in the overall administration of justice" according to a World Bank assessment on the judicial sector in Peru. *Id.*

when he probably has had little exposure to the law of the nation, and has lived his life according to local, age-old customs which permits this practice. Should the judiciary enforce laws for which rural groups such as indigenous cultures have no association or understanding. The basic tenets of a modern democracy assume that the population understands democratic principles and live under one rule of law. Therefore, it is possible for the judiciary to function in a country where more than one rule of law exists. The government has not given the judiciary the tools to educate the public about the laws and how they must be applied in order to ensure a civil society. Given such a situation, the judiciary is particularly distrusted by isolated rural and indigenous societies.

There is significant resistance by the other branches of government toward modernizing the courts, or granting stronger authority to the judicial branch. Judicial activism is viewed with considerable distrust and skepticism. If the traditional role of the judiciary was to condone the exercise of executive power, then there is little interest in new authority or autonomy to the judiciary that might liberate the courts from executive tutelage, and in the process, expose the executive to scrutiny or loss of power. Simply put, the other two branches do not want Cinderella to come to the ball. Changes in the laws affecting the judiciary worsen the stability and credibility of this branch. In Peru, for instance, Congress passed a law<sup>140</sup> which “has all but nullified the constitutional attributions of the national council of the judiciary.”<sup>141</sup> Furthermore, in 1997 the Peruvian Congress dismissed three magistrates of the constitutional court. This action prevented the court from hearing and deciding on the constitutionality of recently passed laws.<sup>142</sup> In Ecuador, the legislature has repeatedly rejected proposals to have the constitutional court as the ultimate interpreter of the laws.<sup>143</sup> In Bolivia, in late July of 1998, the President called an extraordinary session of Congress to elect the titular and alternate members of the constitutional court. This process was highly questionable, but proceeded nevertheless.<sup>144</sup>

Attempts by the judiciary to take an activist or independent role have been ugly and embarrassing. In Colombia in 1991, a new constitution created a constitutional court to interpret the constitutionality of a wide range of political and social issues. In 1994, the court legalized personal possession and use of illegal drugs. This decision was based on dubious legal reasoning,<sup>145</sup> and elicited domestic and international outcry. In response, the executive branch labeled the court a loose cannon of State, and the ill-conceived decision appeared to confirm to the world the widely held belief that Colombia was nothing more than a narco-democracy.

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140. See PERU Law No. 26933 (amended by Law No. 26973).  
 141. ANDEAN COMMISSION OF JURISTS, *supra* note 76, at 24.  
 142. See *id.* at 42.  
 143. See *id.*  
 144. See *id.* at 41.  
 145. See Nagle, *supra* note 33, at 85-88.

When the judiciary has been bold enough to go after government corruption, the other two branches have been quick to condemn the court, and challenge its sanity. For example, a case in point are the judicial proceedings in Colombia in 1997, referred by the press as "Case 8000." These proceedings consisted of faceless courts<sup>146</sup> that launched an in-depth investigation into political corruption caused by the infiltration of narco-trafficking.<sup>147</sup> Many politicians and officials connected to the Presidential administration of Ernesto Samper, including the President himself, were accused of illicit enrichment from the Cali Cartel.<sup>148</sup> Many of the accused were tried, convicted, and sentenced, including a former Attorney General who was fined and sentenced to eight years in prison for illicit enrichment in connection with bribes received from drug lords.<sup>149</sup>

Prior to this investigation, the faceless courts were praised by the other two branches of government as the last hope for Colombia to fight drug trafficking, guerrilla insurgency, sedition, and human rights abuses. As part of that support, four consecutive presidential administrations solicited millions of dollars in foreign aid from the United States to develop, train, and fund the court. However, when the faceless courts turned its prosecutorial attention on government corruption, the politicians cried foul and accused the courts of incompetence and vigilantism. In fact, President Samper's associates in Congress introduced a bill that would have abolished the crime of illegal enrichment.<sup>150</sup> Then, in late 1998, a bill was introduced, but did not pass, that would have eliminated the faceless courts altogether. The Justice Minister's efforts to prevent the bill from passing resulted in his resignation, and his successor vowed to "work to end the faceless judges for crimes that were not typified as 'atrocities.'"<sup>151</sup> The irony of this incidence is that the executive branch lobbied the United States intensely for judicial reform aid to establish the faceless courts, and then turned on the courts when the courts showed signs of judicial independence.

When a preceding presidential administration leaves office and leaves behind a judiciary packed with allies, the judiciary may be impeded from exercising judicial independence. The judiciary that remains, is largely under the influence of prior authoritarians making it difficult for succeeding executives to institute new political mandates. Such was the case in Chile

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146. Since July of 1999, the "Regional Courts" are now called the "Courts of Specialized Criminal Circuits."

147. See *Prosecutors Under Political Pressure*, LATIN AM. WKLY. REP., Feb. 10, 1998, at 64.

148. See *Former Attorney General Received Prison Term For Illicit Enrichment*, BBC SUMMARY WORLD BROADCASTS, Nov. 29, 1997.

149. See *id.*

150. See Douglas Farah, *U.S.-Colombia Ties Strained Over Drugs: Americans See Pervasive Cartel Influence*, WASH. POST, Jan. 7, 1996, at A21.

151. *Id.* This attempt to change the jurisdiction of the court was a veiled attempt to shield leaders of the Cali Cartel from prosecution by the faceless courts since they were never charged with committing violence. See *id.*

where President Patricio Aylwin replaced General Pinochet, but was forced to deal with a Supreme Court of Pinochet appointees.<sup>152</sup>

As long as the judiciary selection process remains the same, one in which higher court judges are appointed by the President from a list compiled by the Supreme Court (under the auspices of the legislature), and lower court judges are appointed by the Supreme Court, the judiciary will remain a branch of government manipulated by external factors and not in full control.<sup>153</sup>

#### IV. THE CONSULTING GAME

Judicial reform projects are generally oriented in two areas of the reform for the justice system: procedural and administrative. Projects targeting procedural reforms range from the training and education of judicial officials, to completely altering the Latin American judicial system from an inquisitorial tradition to an oral adversarial model.<sup>154</sup> On the other hand, administrative reforms target issues such as case management, personnel training and staffing, records storage and retention, judicial education programs, and the application of technology in the courts. Specialists in judicial reform have identified specific areas where reform is necessary. These include "judicial independence, judicial administration, procedural codes, access to justice, legal education and training, and bar associations . . . and personnel administration."<sup>155</sup> Given the broad range of issues imbued in each of these areas of concern, court consultants have had no difficulty putting together proposals to feed the consulting machine.

Regardless of the emphasis of reform projects, international sponsors and consultants on judicial reform emphasize economic and global trade considerations as ample reason to push for judicial reform in the region. An autonomous and dependable judicial system is not only needed for development on a microeconomic level, it is also a requirement for participation in an increasingly complex and competitive marketplace.<sup>156</sup>

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152. See Fiss, *supra* note 131, at 71-74.

153. One clear exception is in Uruguay where Supreme Court justices are elected by a two thirds majority of the total members of the National Congress in a meeting of both Chambers, the Congress, and Senate. See Milton Cairoli Martinez, *Relationship Between the Judicial Power and the Bar Associations*, 42 ST. LOUIS U. L. J. 1127, 1128 (1998).

154. See the extensive discussion on changing from an inquisitorial system in Cousino, *supra* note 79, at 328-36.

155. Dakolias, *supra* note 28, at 168.

156. See *id.* at 169. Dakolias writes:

Latin American countries currently participate as members of the World Trade Organization and regional trade associations like MERCOSUR, "the Common Market of the South." Many also aspire to accede to the North [American] Free Trade Agreement. Membership, however, brings with it a responsibility to pursue harmonization of laws. This requires revisions of existing laws and speedy and just resolution of disputes. To preserve confidence in trading relationships, mem-

Large-scale improvement projects could not be accomplished without foreign aid. This opened the door of opportunity to organizations such as the American Bar Association, the United States Agency for International Development (USAID), the World Bank, the United Nations Development Fund, the Inter-American Development Bank, and the National Center for State Courts. The interest of these organizations in providing reform assistance has not been based solely on altruism. These organizations, as players in the consulting game, saw a potential windfall for generating lucrative contracts for their army of consultants and staffers in the area of judicial administration, education, and planning.

There is a very unsavory element connected to judicial reform and justice reform programs, at least those sponsored by the executive branch of the United States. A link has been established between the aid agencies, and intelligence gathering agencies, such as the Central Intelligence Agency (CIA). As a matter of fact, the former director of the International Criminal Investigative Training Assistance Program (ICITAP) of the United States Department of Justice, has accused the CIA of infiltrating the reform programs and recruiting staffers to spy on government.<sup>157</sup> According to four former ICITAP staffers, and one State Department official, the CIA has from time to time sought to recruit staffers, contractors, and trainees affiliated with the reform program in countries such as Haiti and El Salvador, where ICITAP has trained thousands of police officers.

One former ICITAP contractor in Haiti indicated that he and other instructors were informed by students "that they were solicited by U.S. intelligence services." Charles Allen, a legal adviser to the Richardson, Texas police department who worked for ICITAP in 1995, believes the practice of intelligence agents approaching "was wrong."<sup>158</sup> Allen stated that when he went "to Haiti, [he] went with the understanding that the country had never had a democratic government or civilian police force."<sup>159</sup> Allen also believes that intelligence recruiting was "not good for those cadets, not good for Haiti, and not good for the program. [Their only purpose was to] make civilian police out of them, not spies."<sup>160</sup>

The fact that the CIA has infiltrated judicial reform programs in order to "spy" on the governments in which reform programs take place is not troubling per se. After all, given the level of institutionalized corruption in many Latin American governments, all bets are off when dealing with untrustworthy governments. The problem that exists is that such infiltration by

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ber countries must have assurance that laws will be applied and interpreted in accordance with international or regional standards.

*Id.*

157. See Sam Skolnik, *Ex-DOJ Official Claims Bid to Keep CIA Out of Police Training Program Cost Her a Job*, LEGAL TIMES, Mar. 1, 1999, at 1.

158. *Id.*

159. *Id.*

160. See *id.*

one government agency into the affairs of another government is indicative of inherent flaws and lack of control within the organizations conducting the reform projects. As such, this does not cast judicial reform in a favorable light, leaving one to wonder whether taxpayer money is being well spent.

The foreign judicial reform aid package sponsored by the United States Agency for International Development (USAID) to retool and reform the Colombian judiciary, is another example of a judicial reform project that is being used as a tool to advance the foreign policy of the United States.<sup>161</sup> In 1986, Colombia joined a reform project under the auspices of the Administration of Justice (AOJ) program of USAID.<sup>162</sup> Initially, the aid was intended to improve case management and disposition in the Colombian courts, which had reported unprecedented case backlogs. However, a number of external factors were at work behind USAID's interest in assisting Colombia. The Bush Administration's Andean Initiative to fight the drug war, was not succeeding as planned, and the violence between the drug lords, leftist guerrillas, and right wing extremists was pushing the Colombian judiciary to the edge of collapse. After Colombia cancelled its extradition treaty with the United States during the Gaviria Administration, the USAID AOJ program presented an opportunity for the Bush Administration to obtain results in prosecuting the drug war through direct involvement in the Colombian judicial system. The AOJ effort in Colombia was planned to include training and support for prosecuting serious crimes, including all crimes related to narcotrafficking and narcoterrorism. This effort came to be known as the Rule of Law program.<sup>163</sup> In the program, funds sent to the public order courts (the faceless courts), were then supposed to spearhead efforts to bring the drug lords to justice. By the mid 1990s, Colombia received more than \$36,000,000 in foreign aid under the Rule of Law program.<sup>164</sup>

The timing of the Rule of Law program could not have been better for the United States. In 1991, the U.S. needed Columbia's support in the UN for the use of force in the Persian Gulf War. The Bush Administration also needed to show a victory of some sort in the war of drugs, therefore, some critics of the aid package<sup>165</sup> suggest that ulterior motives were behind the large amount of money pledged to Colombia. Therefore, it is not beyond the realm of possibilities that a quid pro quo deal was struck between Washington, D.C. and Bogotá.

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161. *Id.*

162. See 22 U.S.C. 2346(c). The enabling legislation was 22 U.S.C. § 534 of the Foreign Assistance Act of 1961. See Pub. L. No. 87-195; International Security and Development Cooperation Act of 1985 (Pub. L. No. 99-83).

163. See *Colombia Justice Sector Reform Project, Detailed Project Paper*, USAID, AID/LAC/P-669.

164. See *supra* note 61 and accompanying text.

165. See Attorney Mark Sherman, Address at Symposium of the Lawyers Committee in Madison, Wis. (1995). Mr. Sherman is a Washington attorney and expert on United States/Columbia drug policy. See *id.*

Strengthening the capabilities of the public order courts took on a new significance by allowing the United States to remain engaged in bringing the Columbian drug cartels to justice, while President Gaviria's hands were tied over the extradition debacle. In addition, Noam Chomsky states that pressure from American corporations to secure investments threatened by guerrilla insurgency, and leftist labor leaders, played a role in expanding the jurisdiction of the public order courts to include the prosecution of individuals involved in almost any type of anti-government activity.<sup>166</sup>

The judicial reform program went forward and the public order courts drew sharp international criticism for fomenting human rights violations. Likewise, USAID was criticized by NGO for having broken its own requirements "that basic standards of human rights be in place."<sup>167</sup> After having reviewed a number of USAID reports, it remains unclear to what extent USAID was monitoring the activities of the public order courts. To this day, USAID insists that the judicial reform project was a tremendous success, and that the money was well spent, this despite the fact that highly credible NGO, such as Amnesty International and the Andean Commission of Jurists, compiled considerable evidence on human rights abuses and political violence tied to the public order courts.<sup>168</sup>

The experience of judicial reform in El Salvador raises a troubling issue regarding foreign consultants placing the cart before the horse. In the years following the drafting of a new constitution in 1983, "a small group of concerned jurists, only a few of whom were actively engaged in politics,"<sup>169</sup> came together to institute changes to the judicial sector. The key emphasis was on "eliminating human rights abuses and impunity, especially as it related to abuses of power by the military and paramilitary groups."<sup>170</sup> During the ensuing decade, outside actors such as the United States and the United Nations, became involved in judicial reform efforts, but "[n]one of these external institutions had any experience in promoting this kind of reform."<sup>171</sup> Hammergren states:

They were, thus, amenable to adopting proposals of the local reform ad-

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166. See Nagle, *supra* note 113. These claims were asserted during the meeting of the Lawyers Committee in Madison, Wisconsin in 1995. See *supra* 165 and accompanying text.

167. Harry Blair & Gary Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs (USAID Program and Operations, 1994)*.

168. See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, *COLOMBIA: PUBLIC ORDER, PRIVATE INJUSTICE* (1994); ANDEAN COMMISSION OF JURISTS, *COLOMBIA PUEDE SALIR DE SU CRISIS CON LA AYUDA DE LA COMUNIDAD INTERNACIONAL* (1995); ANDEAN COMMISSION OF JURISTS, *COLOMBIA: EL DERECHO A JUSTICIA* (1988); AMNESTY INTERNATIONAL, *POLITICAL VIOLENCE IN COLOMBIA: MYTH AND REALITY* (1994); HUMAN RIGHTS WATCH, *COLOMBIA'S KILLER NETWORKS: THE MILITARY-PARAMILITARY PARTNERSHIP AND THE UNITED STATES* (1996).

169. HAMMERGREN, *POLITICS OF JUSTICE*, *supra* note 1, at 215.

170. *Id.* at 16.

171. *Id.*



vocates. However, their involvement, increasing reliance on foreign experts, and focus on government institutions represented a pyrrhic victory for local reformers. This group was gradually sidelined from the more detailed development of programs, where the expertise was provided by outsiders and the negotiation of terms occupied the foreign donors and government actors. This development did not dilute the reform goals, which retained much of their initial focus on human rights, due process and depoliticization. It did, however, eliminate the only individuals with sufficient knowledge of the target institutions to detect emerging problems as reform proposals, including many of their own, clashed with local reality. Those who did not withdraw entirely retained less than effective participation. They became junior partners in the reform design teams, or external critics, concerned less with the mundane details of implementation than with the programs' doctrinal purity.<sup>172</sup>

Judicial reform programs are of a finite character because they are dependent on funding allocations. The window of opportunity is created during which funds will be available to accomplish the proposed goals of the program. Once the program funding is exhausted, the program ends, regardless of whether the goals of the program have been met. The nature of judicial reform, however, cannot be limited to beginning and ending dates. Reform projects require a significant commitment of time and resources over a period of years. If there is no opportunity for fine tuning newly installed programs or for follow-up monitoring, there is a risk that the programs will be abandoned or cause additional problems down the road. This leads to the concern that reform programs require careful due diligence and risk analysis prior to the programs being undertaken, and before significant funds are committed. Otherwise, rather than performing good deeds to bolster Latin America's justice systems, judicial reform programs may only serve to threaten the relationship between the United States and its southern neighbors.

### CONCLUSION

"An ideal judiciary applies and interprets the laws equitably and efficiently. Such a judiciary requires predictability in the outcomes of cases, accessibility to the courts by the population regardless of income level, reasonable times to disposition and adequate court-provided remedies."<sup>173</sup> There is a need for reforming the judiciaries of many Latin American nations. But, real reform must take place within the other two branches of government which today continue to use the judiciary as a tool for advancing the interests of the ruling elite. The other branches must relinquish the historical chains placed on the judiciary as a subservient branch of government. But, as Sherwood notes, "judicial reform is essentially a matter of po-

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172. *Id.*

173. Dakolias, *supra* note 28, at 169-70.

litical will.”<sup>174</sup>

The massive amounts of aid forwarded to the judiciaries of Latin America should be looked at unfavorably because the motivation behind the aid is not always valid. Judicial reform projects benefit the armies of highly compensated consultants and NGOs whose existence depends to large measure on judicial reform projects more than the programs benefit the targeted institutions. There is also something very disingenuous about judicial reform projects run by United States citizens who have little if any legal training, familiarity with the continental law system, language facility, and cultural orientation to the countries in which they go to work. This, in addition to little, if any, accountability for the quality of work being done, and no way of knowing if project staffers are being hood-winked by unscrupulous or corrupt Latin American judicial officers. In the scramble to win grants for conducting such projects, there is the possibility that due diligence and risk analysis for the organizations just does not get done. The danger then arises that the organization may find itself mired in a project it will come to regret, particularly if it turns out that the judiciary it is working for has been cheating under the table, or is so vilified by the world community (not to mention the target country) that the judicial reform organization loses credibility.

Judicial reform projects are suspect when they are accompanied by an attitude that only models from the United States can fix what is wrong in Latin America. Instead of reforming, many Latin American countries they are transforming legal systems into a common law-United States style judicial system. This is a faulty strategy and takes the judiciaries down a slippery slope.<sup>175</sup> Such transformations are too often based upon the unrealistic vision of how justice works in the United States. Some have argued that in order to improve the judiciary in Latin America, judges should be elected, and that the reforms should be more consumer oriented.<sup>176</sup> But how can we talk about reforms through elections when the elections are nearly always corrupt, and so few citizens vote. Many Latin American citizens do not know they have a right to vote, do not know what voting means, and do not understand the implications of their votes. Practically speaking, a vote goes to whoever sponsors the truck loads of food and alcohol at election time.

It is true that judicial reform efforts in Latin America are not without success stories. Costa Rica has undergone successful changes, at least as the reforms pertain to the appointment and training of judges. However, one must consider the fact that Costa Rica is unique in Latin America in that there is no standing army lurking in the shadows in support of a powerful autocratic executive branch. The dynamics of power are considerably dif-

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174. Robert Sherwood, *The TRIPS Agreement: Implications for Developing Countries*, 37 IDEA 491, 501 (1997).

175. This strategy was disastrous in Argentina. See Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and Its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77 (1997).

176. See Sherwood, *supra* note 174, at 501.

ferent than in other nations in the region, and attempts to apply what worked in Costa Rica to other Latin American countries may not work.

Latin American judiciaries must be reformed in some manner, but the process should be one of strengthening and reinforcing, rather than one of total transformation undertaken in a social, historical, and cultural vacuum. At the same time, the political branches must stop intervening in the affairs of the judiciary, particularly where changes to the judiciary are brought about by executive and legislative branches without the advice and consent of the judiciary branch.

For reforms to be successful and meaningful, they must be inclusive, comprising institutional, social, economic, and political factors—without forgetting the traditions upon which the systems were founded. Reform must not be solely focused on the judiciary, but on the individual institutions and a country's citizens. There is hope for a cure only if the ill patient is treated as a whole. If only one small part of the body is treated, the disease will continue to spread.

Education that informs the whole citizenry of their rights is one requirement to successful reform. Latin American countries, however, are years, if not decades, away from achieving such a condition. The judiciaries would have a pertinent meaning in the lives of educated and informed citizens. Through education, the judiciaries could, in time, become more respectable, self-sufficient, dynamic, and participatory in representative democracy.

The judiciary in Latin America has long served the ambitions of politicians seeking to promote political ideologies and personal fortunes.<sup>177</sup> In order for the judiciary to be stronger, constraints or safeguards must be adopted to stop the intrusion of the other political branches into the judiciary. Currently, the process of stacking the judiciary with judges of the same social class and political affiliation creates an oligarchy and assures continued consolidation of political and economic power from generation to generation. Judicial reform will not change a centuries-old practice, but rather gild the practices of corruption and favoritism in a new sheath.

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177. Likewise, judicial reform programs may serve the ambitions of judicial reform consultants to promote themselves, to see the world, and earn a very good living in the process. See *supra* note 61 and accompanying text.

