ESSAY: ACCESS TO JUSTICE 1.1

JAMES M. COOPER*

After the Cold War, as Eastern European countries broke from the yoke of Communism, successor governments involved in the transition toward democracy undertook radical economic and legal reform. Capitalism has its rules. In order to join the global economy, laws concerning competition, intellectual property, investor protection, and business organization must be written and promulgated. In this process, there is much talk of the rule of law. Economic development and growth needs an efficient and just adjudication system that could expeditiously resolve business conflicts. The rule of law is good for business and provides for an ordered state of affairs for society. In addition to constructing a stable and integrated financial architecture, the rule of law is an essential ingredient in the recipe of democratic governance. In this process of change, a little less attention has been paid to the development of programs that provide access to justice to many of the constituencies of civil society.

To assist in some of this transition, international aid efforts focused on improving access to justice and promoting the rule of law have taken two distinct forms. The first is judicial reform, centering around mechanisms by which the judiciary can exact justice in an independent, fair, and efficient manner, separate from political pressures. Programs in this arena have focused on increasing judicial budgets, training judges and other court employees in new procedures,[1] and streamlining case management and other

* B.A., LL.B. (University of Toronto), LL.M. (Cantab.), Barrister and Solicitor (Ontario, Canada), Fellow, Cambridge Commonwealth Society. Mr. Cooper is the Executive Director of the McGill Center for Creative Problem Solving at California Western School of Law, San Diego, California and a co-founder of Proyecto Acceso, a pan-American training program for judges and lawyers. The author would like to thank Ivan "C.C." Diaz, Juan-Pablo Beca Frei, Ana Maria Silva, and Claudio Pavlic of the Catholic University of Temuco School of Law, Angel Valencia and Mirtha Ulloa of the Chilean Ministry of Justice, and Sara Castillo of CONOMAJ, Costa Rica, for sharing their views about law reform with him. Janeen Kerper, Lilia "La Flama" Velasquez, Rafael Raffaelli III, William Aceves, Tom Barton, Janet Bowermaster, and Judge Laura Safer Espinoza and Kevin Turner have all provided tremendous support to the author. Richard Page, Michael Mandig and Philip Robins have educated the author on the dynamics of Pan-American arbitration and mediation training. Thanks also goes to David Lorey, Steve Toben and Paul Brest of the William and Flora Hewlett Foundation for their continued support. Yvette Lopez and Michael Knox provided valuable research assistance.

1. As various Latin American countries move their criminal procedure from an inquisitorial to adversarial system, there is much need for oral advocacy skills training.

administration of justice tasks. The second form of programs to promote the rule of law centers around legal reform—the drafting of new model criminal, civil and administrative codes for promulgation and implementation in a developing free market economy.

Neither legal reform, nor judicial reform was ever a major focus for international agency funding. Programs that were more responsive to Cold War needs (infrastructure-building) and reactions to media frenzies (poverty reduction and disease control) were earmarked funds. In a contest for resources, the thinking at the time preferred larger programs.[2] While the promotion of democracy—a manifest destiny of American values abroad—has long been part of United States foreign policy, the Cold War era with its proxy wars and bent on anti-communism was not conducive to large-scale judicial training and law reform programs.

The government of the United States has funded programs for legal reform and judicial development assistance since the 1960s. The more substantive work commenced in the mid-1980s in Central America and after 1990 in Eastern and Central Europe. After the Berlin Wall fell and the Soviet Union dissolved, former Communist Europe was a major target for much of the legal reform work and judicial training that came from the government of the United States.

Another target was Latin America. As their respective political landscapes shifted towards democracy in the late 1980s and 1990s, there was a need to rebuild democratic institutions like the media, civil society, and political parties. State institutions, like the judiciary, were also viewed in need of reform if democracy was to take permanent root. It is no longer enough for a nascent democracy (or for a state that has recently returned to democratic rule after a period of dictatorship) to have successfully undertaken free and fair elections; the rule of law had to become institutionalized. Agents of the state like the police and the judiciary have been targeted for training. Some agencies focused on the reconstruction of civil society, believing that non-governmental organizations, the media, organized labor, and other actors would provide valuable solidarity and watchdog services.

Democratic governance has become a major priority for international aid and lending agencies. Programs for judicial reform and legal reform are now deemed part of the recipe to assist states in building democratic institutions and an essential part of sustainable development. There are now many international aid efforts focusing on building a strong, independent (politi-

2. It is ironic that the policies of the International Monetary Fund (IMF) and the World Bank have brought little progress and sustainable development to the people they were designed to serve—the poor and underdeveloped. People are living in situations of extreme poverty and much of the world's population faces endemic malnutrition. There is little or no access to basic healthcare and education and there is little chance for improvements in the quality of life for the next generation. Yet, the IMF and the World Bank have lent billions of dollars to the needy governments of the developing world over the last five decades. Maybe it is time to design a better system. *See* James M. Cooper, *More Democracy for Globalization*, SAN DIEGO UNION TRIB., Apr. 21, 2000, at B5.

cally and fiscally) judiciary viewed as a fundamental institution for the building of a successful democracy (and hence, worthy of monetary aid).[3] Some private foundations, philanthropic groups, think-tanks and educational institutions have also assisted in the transformation process.

Likewise, there are a number of legal reform projects being funded around the world, and in Latin America in particular. Money from the government of the United States has been spent in assisting legislative bodies draft new rules for adoption. The professional Bar from industrialized countries–primarily the United States–have also participated in legislation drafting for law reform programs and in training the professional bar associations in Latin America in new skills and basic rule of law-building exercises.

Unfortunately, the efforts have met with limited success.[4] For Thomas Carothers "what stands out about U.S. rule-of-law assistance since the mid-1980s is how difficult and often disappointing such work is."[5] The same can also be said of the work that has been undertaken by the other institutions. The results are not overwhelming. Despite millions of dollars being pumped into fixing the judicial systems in Guatemala, El Salvador, and other Latin American countries

> [m]ounting delays, case backlogs, and uncertainty of results have diminished the quality of justice throughout the region. Among the obstacles facing the judiciary are dysfunctional administration of justice, lack of transparency, and a perception of corruption. Delays and corruption in the judicial systems in Latin America have reached unprecedented proportions.[6]

Most importantly, programs that provide for greater access to justice for all of society[7] and promote the rule of law have not been successful. International lending agencies have not made much progress in reforming the judicial systems of the countries to whom they have lent money or provided grants. At the same time however, legal reform programs focused on provid-

3. The following agencies and other bodies with international scope are, in varying ways, promoting the rule of law in Latin America: The State Department, The United States Agency for International Development (USAID), The World Bank, The International Monetary Fund (IMF), The United Nations Development Programme (UNDP), The Inter-American Development Bank (IADB), The Organization of American States (OAS). "Latin America is immersed in an era of euphoria over the construction of democratic and social sates under the rule of law." Jorge Eduardo Tenorio, *Administration of Justice and Citizen Security, in* JUDICIAL CHALLENGES IN THE NEW MILLLENNIUM (PROCEEDINGS OF THE SECOND IBERO-AMERICAN SUMMIT OF SUPREME COURTS AND TRIBUNALS OF JUSTICE) 75 (Andrés Rigo Sureda & Waleed Haider Malik eds., 1999).

4. *See* Edgardo Buscaglia, *Obstacles to Judicial Reform in Latin America, in* JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 20 (Edmundo Jarquín & Fernando Carillo-Florez eds. 1998).

5. THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 170 (1999).

6. Buscaglia, *supra* note 4, at 20.

7. These members include aboriginal people, women, trade unions, student groups, and community-based organizations.

ing multinational corporations and their subsidiaries with a variety of shareholder rights, protecting intellectual property rights and enshrining remedies against unfair property restrictions and capital flows have yielded better results. "International business lawyers, who follow international business as it sweeps about the world, have seen their practice grown considerably."[8] New laws that are designed to assist economic growth are more likely to have impetus for promulgation and implementation than those involving civil society.[9]

It is no secret that business people dislike litigation—no matter the country. It is a slow, inefficient mechanism to resolve disputes. During a period of legal reform new laws are designed to facilitate open markets, provide against discrimination of goods and services from trade partners, and enshrine investor protection. There is also an opportunity to inject more efficient forms of conflict resolution that benefit capital flows and reduce transaction costs. The smooth functioning of international investment is of primary interest to business partners and financial institutions from the developed world.

Alternative Dispute Resolution (ADR)—a generic name which usually refers to arbitration and mediation—has long been a more efficient mechanism for disputes. It is an alternative to litigating in foreign courts. Indeed, most transnational corporations do not trust the judicial systems in foreign lands.[10] Court systems are seen as corrupt, slow, and costly. Additionally, the local party, rather than the foreign litigant, appears to have the home field advantage.

Over the last decade there has been much progress in the field of ADR. Arbitration mechanisms have been the first prong of the ADR imperialism that has invaded Latin America. Efforts to export North American-style mediation practices have followed suit. Part of the efforts of transnational ADR experts is to ensure that the target states have enabling legislation that provides for the enforcement of arbitration awards. Throughout Latin America (and Central and Eastern Europe) arbitration *conquistadores* wash ashore selling the benefits of ADR to corporate counsel, leading law firm partners, and Ministry of Trade and Commerce officials. Here, arbitration "confer-

---

8. Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 72 (1996) ("Harmonization and model law-making have the major drawback that they work only through persuasion: there is no political force capable of imposing the models of the states.").

9. *See id.* at 71. "[I]t is no accident that commercial laws have had the best luck in the pursuit of uniformity." *Id.*

10. "Aid officials assert that the rule of law is necessary for a full transition to a market economy—foreign investors must believe that they can get justice in local courts, contracts must be taken seriously, property laws must be enforceable, and so on." CAROTHERS, *supra* note 5, at 164. For the role that corporations play in international discourse see Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 754 (1983). Some transnational corporations do even more business than sovereign states. *See* John Stopford, *Multinational Corporations*, 113 FOREIGN POL'Y 12, 16 (1998).

ences" are often geared for lawyers who want to learn the value of arbitration proceedings, the manner in which one becomes an arbitrator (or, not often enough, a mediator), and the methods by which corporate lawyers can prevent litigation from clogging already inefficient court systems.

There is even international aid money available to assist countries in developing alternatives to litigation. For example, the Inter-American Development Bank (IABD) has funded programs that promote and train alternative dispute resolution programs. The IABD has funded the Santiago Chamber of Commerce to develop chambers for arbitration in Valparaiso, Chile.

It is important to note that ADR is not a new phenomenon in Latin America. Long a leader in the development of ADR in Latin America, the Argentinean government and its judiciary have been exporters of mediation and conciliation to the region. The Argentinean government passed the National Mediation and Conciliation Statute on October 4, 1995.[11] By Presidential Decree 91/98, new regulations on mediation were established. Seeing the situation in Argentina as a judicial emergency, for a five-year period compulsory mediation must occur prior to any lawsuit, except for family law cases.

The judicial extension and state endorsement of the ADR system was based on the past successes of Argentinean pilot projects. For a one-year period starting April 23, 1996, of the 75,010 cases drawn for mediation, only 17,526 (23.15%) were returned to trial. During that same period, in the Commercial Court of Appeals, of the 29,986 cases drawn for mediation, some 9167 (30.57%) were returned to trial. Such statistics speak to the growing use of mediation in Argentina. Since October of 1996, the Constitution of the City of Buenos Aires has accepted voluntary mediation.[12] Community Justice Centers have been successfully established in a number of neighborhoods. The Ministry of Justice is also quite involved with the Ministry of Labor and Social Security in the provision of pretrial labor conciliation. At the same time, private arbitration of commercial disputes has become more widespread. An important step in the drive towards making ADR a legitimate, recognizable and viable part of the justice system is the establishment of a national ombudsman.

The rest of the continent has seen other homegrown forms of ADR. Brazil has begun some limited work in the area. Arbitration Statute No. 9307 was passed on September 23, 1996. In the area of commercial disputes, 1997

11. For much of the information contained in this section of the essay see Gladys Stella Alvarez, *The Americas, in* RESOLVING DISPUTES IN THE GLOBAL MARKETPLACE 297 (1998). The author would like to thank Judge Gladys Stella Alvarez and Judge Elena Highton of *Fundación Libra* (and the Court of Appeals) in Buenos Aires for their comments on developments in Alternative Dispute Resolution (ADR) in Latin America at the SPIDR (Society of Professionals in Dispute Resolution Conference) in September of 1997 and for ideas presented in this essay.

12. *See Argentina Spearheads Latin American Movement Towards ADR*, 52 ALT. DISP. RESOL. J. 6 (1997).

saw the *Corte Brasileira de Arbitragem Comercial* established in Brazil. A plethora of commercial centers such as the Argentina-Brazil Chamber of Commerce and *Associacao Comercial de Minas* have been established and vested with varying ADR functions. In Colombia, Act 383 passed on July 7, 1998, ruled a tax exemption for the Justice Mission for the new century that includes ADR development. As part of Act 23 passed in 1991, there are now 140 Conciliation and Arbitration Centers established all over that country.[13] Costa Rica, too, has begun to accept arbitration as a mechanism for resolving commercial disputes. In particular, all insurance disputes involving the Costa Rican National Insurance Institute are subject to compulsory arbitration.[14]

Even with these successful initiatives, there remains an urgent need for uniform and efficient mechanisms that can efficiently and effectively resolve commercial disputes by means of binding and final arbitral judgments that can be enforced domestically and in other jurisdictions. Procedures must be developed to permanently remove from the purview of local courts commercial controversies which, because of their nature, or due to the conflicting nationality of the disputants, involve two or more countries. Often, Latin American states have some form of legislation providing for arbitration and conciliation (rather than mediation) but there is no implementing law or budget allocation. Moreover, commercial arbitration is not stipulated in such antiquated regulations.

If Latin America wants to be a significant force in the globalized economy, more attention needs to be paid to international agreements that enforce international arbitration.[15] For years, Latin American states refused to be part of the World Bank International Center for the Settlement of Investment Disputes (ICSID). Moreover, Decision 24 of the *Cartagena* Agreement prohibited arbitration of investment and technology transfer matters. Most Latin American states failed to sign let alone ratify the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Only twelve states have ratified its substitute, the Inter-American Convention of International Commercial Arbitration (Panama Convention).[16]

Even if the international conventions have been signed and ratified, juridical mechanisms were created to undo the effectiveness of arbitration pro-

13. Sixty are annexed to different Law Schools, 50 are within the Chambers of Commerce, and 30 are associated with a non-governmental organization.

14. *See* Jurgen Nanne Koberg, *Costa Rican Commercial Arbitration Rules and the U.S. Federal Arbitration Act*, 3 ILSA J. INT'L & COMP. L. 31, 33 (1996).

15. *See* Alejandro Garro, *Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. INT'L ARB. 293 (1984) ("Arbitration is little practiced, statistical information on the use of arbitration cannot be found, legal commentaries and treaties on the law of arbitration are rarely published, and reported decisions on the enforcement of foreign arbitral awards are almost nonexistent.").

16. Inter-American Convention on International Commercial Arbitration, Pub. L. No. 101-369, 104 Stat.. 448 (1990). It should be noted that even the United States was tardy in ratifying the Panama Convention, waiting until September of 1990. *See* Charles Norberg, *United States Implements Inter-American Convention on Commercial Arbitration*, 45 ARB. J. 23 (1990).

visions. The reason for such hostility stems from the fear of Latin American states of foreign economic and political domination.[17] It was customary practice for private parties—and even in concession arrangements between Latin American states and foreign companies—to insert *Calvo* clauses into their contractual agreements. Such clauses require that, regardless of stipulations calling for an arbitration process, disputants be allowed to have their cases heard in domestic tribunals.[18] Investing companies, therefore, had to waive any opportunity to resolve any commercial dispute arising from the agreement through diplomatic means.

Under a typical *Calvo* clause, any disputes are to be submitted to an appropriate domestic court; the parties attorn to the jurisdiction of the host country and its domestic laws; diplomatic protection of the foreign participant is waived; and, any rights that might be provided under international law are surrendered.[19] It is not surprising then that this practice of inserting such clauses sent a chilling effect through the international investment community, thwarting many kinds of foreign investment.

Despite this self-defensive and protectionist move by most Latin American states, multinational corporations and foreign investors have managed to creatively develop ways to integrate some forms of ADR into their business arrangements.[20] These business entities want access to justice and ADR provisions have proven to be somewhat successful as these developing economies move towards modernization. The ability to enforce arbitration awards, domestically and internationally, is one way the rule of law affects business interests.

According to Thomas Carothers, however, that is only part of the story:

> Effective, efficient administration of justice is a part of the rule of law, but not the entirety. Rule of law rests on other important features: laws that are publicly known, clear, and applied equally to everyone; respect for political and civil liberties, especially due process in criminal matters; and the subordination of government power to legal authority.[21]

---

17. The Dependency Theory of Development had many proponents and many variants. *See* CELSO FURTADO, DEVELOPMENT AND UNDERDEVELOPMENT (Ricardo W. de Aguiar & Eric Charles Drysdale trans., 1964); GUNNAR MYRDAL, ECONOMIC THEORY AND UNDEVELOPED REGIONS (1957); Theotonio Dos Santos, *The Crisis of Development Theory and the Problem of Dependence in Latin America*, *in* UNDERDEVELOPMENT AND DEVELOPMENT 57, 76 (Henry Bernstein ed., 1973).

18. *See* Erik Langeland, *The Viability of Conciliation in International Dispute Resolution*, 50 DISP. RESOL. J. 34, 36 (1995); Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 580; Betty S. Murphy, *ADR's Impact on International Commerce*, DISP. RESOL. J. 68 (1993).

19. *See* Roger C. Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Factfinding*, 7 LAW & POL'Y IN INT'L BUS. 813, 818 (1975).

20. *See* Alden F. Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. J. INT'L L. 31-32 (1976).

21. CAROTHERS, *supra* note 5, at 164.

In the past, programs investing in legal reform and judicial reform have focused on building the state-sanctioned institutions which provide for the administration of justice and the rule of law. Existing hierarchical—or vertical—systems of justice were re-entrenched. Police units have trained in human rights sensitivity, court systems have had their informational technology architecture improved, and public prosecutors were taught new investigative skills. The status quo was, in essence, maintained and even strengthened.

Unfortunately, very little attention has been placed on the masses who do not have any access to justice, do not trust police authorities, and have little faith in the judicial system. The audience that is too often left behind in reform projects—and one that must be shown why legal reform and judicial reform will benefit them—is civil society. After decades of institutional mismanagement, chronic crises of state, and failed social equity programs, there is a need for some civil society development. There is much momentum for the redevelopment of civil society in the Americas. At the Summit of the Americas in Miami, the leaders of the thiry-four States of the Americas (excluding Cuba) stated in their Declaration of Principles and Plan of Action that:

> A strong and diverse civil society, organized in various ways and sectors, including individuals, the private sector, labor, political parties, academics, and other non-governmental actors and organizations, gives depth and durability to democracy. Similarly, a vigorous democracy requires broad participation in public issues.[22]

To address this need, international agencies and donor governments alike should look to other forms of ADR that go beyond dispute resolution mechanisms for business. Problem-solving courts, community courts, teen/peer courts, and drug courts, amongst others, must be developed, engineered, and studie, but above all—replicated where appropriate. Thankfully, some of these horizontal systems are currently being recognized and enhanced.[23] In fact, conciliation is often incorporated into the codes of procedures of a number of Latin American countries. For example, in Argentina, a judge may, at any point in the proceedings or even before they commence, bring the parties together in order to get them to agree to a settlement. Based

---

22. Declaration of Principles and Plan of Action, 34 I.L.M. 808, 817 (1995).

23. An example of horizontal justice is Navajo peacemaking. *See* Robert Yazzie, *"Hozho Nahasdlii"-We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996). In peacemaking, a thoughtful an attentive examination of each aspect of a given problem to reach conclusions about how to best resolve the problem. The Navajo justice system is a horizontal justice system in which no person is above another person, as in a vertical model of justice, such as the American justice system. A horizontal justice system is often portrayed as a circle, because there is no left and no right, nor a beginning or an end, and each point (or person) on the line of a circle looks to the same center as the focus. The circle is symbolic in this culture because of its nature; it is perfect, unbroken, and a celebration of unity, harmony and interconnectedness. *See generally* Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

on the experiences obtained in Villa El Salvador during a pilot Community Conciliation, neighborhood conciliation centers are used to solve disputes in municipal areas. In Bolivia too, there are a number of legal actors assisting with judicial reform.[24]

In Peru, the Fujimori government passed the Conciliation Act in 1997, which within the next two years provides for mandatory pretrial conciliation. Through the Ministry of Justice, conciliation centers will be established in Peru. In addition, new juridical actors are emerging on the scene. Article 64 of the Judicial Organic Law of Peru provides that justice of the peace of is in essence a conciliator. Despite some of the constraints of the judiciary under the Fujimori regime, Peru has had some success in conciliation. Because the more formal mechanisms of justice do not satisfy the general public, there is an increasing role of the justice of the peace. These justices—seventy percent of which are not lawyers—pay homage to indigenous and rural practices, but also have some jurisdiction to propose alternative methods of conflict resolution.[25] It is not surprising that outside large cities and among indigenous peoples, conciliation is a popular method of dispute resolution.

All over Latin America, there is a strong need to embrace elements of conflict resolution techniques that are more truly indigenous in nature. It is also important to recognize that the civil law system, a cultural fragment left over from Spanish colonialism, is itself a foreign dispute resolution system. The *ley*[26] that the *conquistadores* brought to the Americas was just that—brought to the Americas. The civil code only has a couple centuries headstart in Latin America.

That is not to say that wholesale adoption of models is an answer to this globalization process. Nor is the adversarial system, as practiced in the United States through oral trials, the right of cross examination and the utilization of expert testimony, an adequate substitute for the inquisitorial system that is being adapted in Latin America. The American-style adversarial system is by no means a perfect system and the litigation explosion that has attended much of the civil actions in the United States today is testament to its imperfections. What is called for then, is the development of a leapfrog technology—a form of justice that recognizes that criminal procedures must be more transparent, open to checks and balances that come with oral testimony and other rules of evidence, but recognizes that the Americas is a multicultural place and that the specific cultural institutions—including aboriginal peacemaking and conciliation–must be brought within the system, not shunted aside as archaic mechanisms.

---

24. *See* Sebastian Rotella, *A New Breed of Justice Reshaping Latin America Reform*, L.A. TIMES, Oct. 11, 1999, at A1.

25. *See generally* Hans-Jurgen Brandt, *The Justice of the Peace as an Alternative: Experiences with Conciliation in Peru*, *in* JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 93 (1998).

26. Ley refers to a law or statute. *See* THE AMERICAN HERITAGE: LAROUSE SPANISH DICTIONARY 170 (1987).

In short, an encyclopedia of best practices in problem-solving techniques must be created and models of conflict resolution forums generated, archived, and disseminated. In this, skills like oral advocacy are important, but so are the new skills like media advocacy,[27] institutional advocacy, and cross-cultural communication. The kind of disputes that the Americas will face in the new millennium forces us to be creative and embrace both globalization and local remedies. The justice systems of the Americas need some cross-pollination and serious tinkering.

It is important to note that this is not just juridical imperialism. Many reformer politicians fighting elections against perceived entrenched elites speak to the need for judicial reform. Alejandro Toledo, the Peruvian opposition candidate who pulled out of the Peruvian Presidential elections due to allegations of unfair electioneering practices by two-time President Alberto Fujimori, stated that his first priority, if elected to succeed Mr. Fujimori, would be to create an independent uncorrupt judiciary.[28] Even Hugo Chavez, President of Venezuela has noted that his country "must restore the institutions of a pulverized democracy, lay the foundations of a new republic because the one we have is on its death bed, and rebuild the rule of law, which has been hit one and a thousand times."[29] Interestingly, for President Hugo Chavez of Venezuela, it is the judicial system which has been at the heart of the underdevelopment and corruption that has beset his country. "It is impossible to restitute the rule of law unless the undermined institutional framework is reformed. An assembly must be directly and universally elected by the people to restructure the government and especially the judiciary."[30]

---

27. According to former United Nations Secretary-General Boutros Boutros Ghali, "[f]or the past two centuries, it was law that provided the source of authority for democracy. Today, law seems to be replaced by opinion as the source of authority, and the media serve as the arbiter of public opinion." Boutros Boutros-Ghali, *Remarks at the Freedom Forum Media Studies Center (March 19, 1995), in* SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 357 (Chester A. Crocker et. al. eds., 1996).

28. *See* Clifford Krauss, *Peru's Message: Not Class War, but Stability vs. Democracy,* N.Y. TIMES, May 30, 2000, A10. In 1992 Mr. Fujimori temporarily disbanded the Peruvian Congress and Supreme Court, stating that he needed more extra-judicial powers to defeat terrorists and drug traffickers wreaking havoc on the Peruvian people. Since then, Mr. Fujimori has fired judges who disagreed with him, including the judges that ruled that the Peruvian Constitution prevented the two-term leader from running for a third term. *See id.*

29. Hugo Chavez Frías, *Judicial Reform, Social Peace, and Democracy, in* JUDICIAL CHALLENGES IN THE NEW MILLLENNIUM (PROCEEDINGS OF THE SECOND IBERO-AMERICAN SUMMIT OF SUPREME COURTS AND TRIBUNALS OF JUSTICE 13-14 (Andrés Rigo Sureda & Waleed Haider Malik eds., 1999).

30. *Id.* at 14. Justice Jorge Eduardo Tenorio, President of the Supreme Court of Justice of El Salvador sees it differently: "Unfortunately the judiciary is often made a scapegoat for society's ills." Tenorio, *supra* note 3, at 75. As President Chavez headed into an election for a second term, however, the Supreme Court of Venezuela ordered its postponement, stating that the "reliability and transparency" of the electoral process could not be guaranteed. *See* Larry Rohter, *Court Orders Venezuela to Postpone Election on Sunday,* N.Y. TIMES, May 26, 2000, at A8.

As the chicken and egg game between politicians and the judiciary continues, it is important to note that transition periods are more than opportunities for the reform of civil and criminal procedures and international commercial dispute resolution. Periods of legal reform and judicial reform are also good opportunities to examine the role of the lawyer. The lawyer is the front end of the justice system and legal process. She is the access point and must balance the rights of the client and the needs of society. She must also advance the cause of justice and promote the rule of law and fundamental human rights. She must do all that and still make a living. The lawyer must design a route for her client to go forward and choose the appropriate forum for conflict resolution for a particular client's problem—conciliation, litigation, mediation, arbitration, and so forth.

The role of the Bar is also important—both local and international. We are practitioners of law and, as such, have a responsibility to ensure our colleagues in other states—and those in the developed world—are equipped with the best pedagogical models for teaching clients and society, skills in problem-solving and techniques for conflict resolution. After all, with all the immigration and multicultural that has attended globalization, the Bar has to face issues such as cultural relativism, transnational legal practice and cultural competencies. It is also in the Bar's best interest to ensure a certain degree of harmonization of legal precepts.

Long invested in the law reform process, the American Bar Association (ABA) has a special Committee on International Legal Technical Assistance Programs. The focus has been on drafting new legislation, model codes for commercial transactions, bankruptcy and insolvency, taxation, and shareholder protection. The ABA has enjoyed some success in the field with its Central and Eastern European Law Initiative, wherein some five thousand judges and lawyers have been involved in pro bono assistance in drafting not just new civil codes, but also criminal codes and constitutions.[31] More work in the Americas is called for as well.

The Bar has a responsibility to promote the rule of law as do individual legal practitioners, governments, and international lending agencies. We must also all work together to design new ways for all actors in society—aboriginal peoples, women, trade organizations, human rights groups, transnational corporations, regional associations, governments, and state institutions–to have access to justice. We are reminded daily that this is an era of globalization. Who better than the architects of legal relationships to have some input into the design of new forms of conflict resolution? Judicial reform and legal reform is a great mechanism to promote sustainable development for us all.

31. *See* Robert A. Stein, *A Century of Rule of Law*, A.B.A.J. 94 (2000).