

## COMMENT

### CONTINUING EVOLUTION OF THE COSTA RICAN JUDICIARY

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Latin America is commonly perceived as lagging behind the United States and other First World entities, in terms of making the successful transition to a fully functioning democracy. That is not to say that by and large the countries of Latin America have not struggled to embody democratic ideals since their inception.<sup>1</sup> After nearly two hundred years of independence, all the countries of Latin America, except Cuba, have some form of democratically elected government.<sup>2</sup> Despite sustained efforts towards democracy, however, there is a continuing disparity between democratic ideals and the reality of day-to-day governance.<sup>3</sup>

The judiciary plays a unique and important role in democratization attempts. An independent judiciary is able to protect against the "arbitrary exercise of government power."<sup>4</sup> Typically, the judiciary is responsible for protecting the constitution and the rights of individuals under the constitution, as well as guarding against human rights violations.<sup>5</sup>

Additionally, a functioning judiciary that applies the law in a fair, quick, and efficient manner is necessary for economic development. This presents a unique difficulty for developing nations, in that these nations stand to benefit the most from foreign investment, but may have the most difficulty providing an appropriate judicial forum to promote such investment.

This Comment will examine the most recent judicial reforms affected in Costa Rica. A summary of the legal and judicial development of Latin America generally, and of Costa Rica specifically will be presented in Part I. A rudimentary understanding of the history of judicial development is necessary in order to place the current problems and proposed solutions into con-

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1. See John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 *FORDHAM INT'L L.J.* 50, 51-52 (1996) (indicating that the constitutions of many Latin American Countries, including Costa Rica, contain lofty guarantees intended to protect individual freedoms and ensure a vibrant democracy).

2. *Id.*

3. *Id.* at 51.

4. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 *AM. J. COMP. L.* 605, 606 (1996).

5. *Id.*

text. The attitude of Latin America, and of Costa Rica, towards the judiciary derives from its evolution from colonial subjects to independent democracies. Costa Rica's success with reform efforts can be attributed to several factors, including Costa Rica's unique historical development and the strong impetus for reform within the judiciary itself. Part II will describe some of the problems confronting Latin American judiciaries generally, and discuss how Costa Rica has dealt with these challenges. Costa Rica has had a measure of success in establishing a functioning judiciary while other Latin American countries have failed in similar attempts.

### I. DEVELOPMENT OF SPANISH LAW

Much of Latin America's legal history derives either directly or indirectly from the conquest and subsequent colonial administration of the region by the Spanish. The colonies were completely subjugated to the will of the Sovereign. Latin America was

[T]reated as the direct and exclusive possession of the crown. . . . The king possessed not only the sovereign rights but the property rights; he was the absolute proprietor, the sole political head, of his American dominions. Every privilege and position, economic, political, or religious, came from him.<sup>6</sup>

The Colonies were ruled by the will of the King, and the law of the colonies derived from attempts to unify the law of Spain.

Spanish law can be traced back to Roman law, which was introduced into Spain as early as 250 B.C., when Rome conquered the Iberian Peninsula.<sup>7</sup> Although Roman Law became the official law of the peninsula, local Celto-Iberian customary law continued to play an important part in private transactions.

[T]here is evidence of the continued vigour of native legal concepts at variance with those of Roman. . . . The impression remains that, during Spain's Roman period, Roman private law was the "official law," but that *de jure* by the measure of its recognition of native law, and *de facto*, by the tenacity with which the population clung to its traditional usages, the importance of the old customary law remained.<sup>8</sup>

The first Roman Code dates back to approximately 450 B.C., when a crude compilation of customary law and legislation was collected in the

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6. KENNETH L. KARST & KEITH S. ROENN, LAW AND DEVELOPMENT IN LATIN AMERICA 34 (1975) (quoting CLARENCE H. HARING, THE SPANISH EMPIRE IN AMERICA 5 (Harbinger ed., 1963)).

7. *Id.* at 20.

8. *Id.* (quoting EELCO N. VAN KLEFFEENS, HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES 39-40 (1968)).

Twelve Tables.<sup>9</sup> Subsequently, efforts to organize the law resulted in several different legal collections,<sup>10</sup> the most notable of which was the *Corpus Juris Civilis* of Justinian.<sup>11</sup>

After 650 years of Roman rule, Roman law was not displaced when Germanic tribes and the Visigoths conquered Spain.<sup>12</sup> Instead, conquest by the Visigoths actually served to reinforce some aspects of Roman law, since the Visigoths had incorporated parts of Roman law into their own Gothic Law.<sup>13</sup> The codification of this combination of Gothic law and Roman law appeared in the *Fuero Juzgo*.<sup>14</sup>

Even after the Moors conquered Spain in 710 A.D., the *Fuero Juzgo* and Roman law continued to govern its population.<sup>15</sup> The Reconquest of the peninsula from the Moorish invaders, however, resulted in a splintering of the law. This occurred because over the 800-year span of the Reconquest, individual kingdoms freed from Moorish rule were granted a unique system of rights and legal obligations, known as *fueros*.<sup>16</sup> Each city was governed by its own set of legal norms as set forth in its particular *fuero*.

[The *fueros*] generally set forth detailed rules and privileges for self-governance of the locale, often codifying local customs. [*Fueros*] tended to restrict the king's arbitrary exercise of power by such measures as tax exemptions or basic guarantees of due process in criminal cases.<sup>17</sup>

The grant of *fueros* to each municipality as it was freed from Muslim rule resulted in a multiplicity of legal norms.

This diversification of legal norms continued until Alfonso the Wise took steps to unify the kingdom's legal system.<sup>18</sup> In 1255 A.D., Alfonso promulgated the *Feuro Real* to replace the individual *fueros* that had been granted to cities until that time.<sup>19</sup> Instead of creating a unique *fuero* for each city as it made the transition from Moorish rule to Spanish Rule, Alfonso used the *Feuro Real* as a uniform set of legal norms applicable to all locales.

Another important work undertaken by Alfonso the Wise was the *Siete Partidas*.<sup>20</sup> The *Siete Partidas* derived both from the custom of the Gothic/Roman inhabitants of the Iberian Peninsula and from Roman

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9. *Id.* at 13.

10. *See id.* at 14-15 (e.g., *Institutes of Gaius*).

11. *Id.* at 15.

12. *Id.*

13. *Id.* at 20.

14. *Id.*

15. *Id.* at 22.

16. *Id.* at 23.

17. *Id.* at 24.

18. *Id.* at 25.

19. ALBERT S. GOLBERT & YENNY NUN, *LATIN AMERICAN LAWS AND INSTITUTIONS* 2 (1982).

20. *Id.*

Sources.<sup>21</sup> The *Siete Partidas* demonstrate the return to original Roman codifications of law. Much of the third and fifth sections of the *Siete Partidas* were nearly exact copies of Justinian's *Corpus Juris*.<sup>22</sup>

Alfonso's attempts to unify the legal system of the peninsula met stout resistance. There was a strong preference for the local custom and individualized municipal rights granted under the *fueros*.<sup>23</sup> Municipalities were reluctant to sacrifice the peculiar rights guaranteed in the individual *fueros* for the unity that the *Fuero Real* offered. Although the difficulty of unifying the diverse legal interests of the *fueros* persisted in Spain, no such difficulty arose when imposing a unified system of legal norms in the colonies.<sup>24</sup>

### A. Spanish Law in the Americas

The Crown had absolute power over the colonies in the Americas, and insisted on controlling every aspect of administration. The Council of the Indies was created in order to facilitate the regulation of the colonies.<sup>25</sup> The council regulated all aspects of colonial life by serving as "an administrative board, legislative branch, and an appeals court all at the same time."<sup>26</sup> The council served as the "ultimate judicial authority" for the colonies.<sup>27</sup>

The decisions of the crown and the council were implemented in the new world by *audiencias*.<sup>28</sup> These regional institutions protected the crown's interests by "reviewing the acts of the royal officers. . ."<sup>29</sup> The *audiencias* provided greater access to judicial services for the colonists, and served to check the powers of the colonial governors.<sup>30</sup>

Local municipalities were administered by *alcaldes* who were chosen through a combined system of elections and appointment.<sup>31</sup> In some instances indigenous judges were chosen as a means to introduce Spanish law to the indigenous populations.<sup>32</sup> The *alcaldes'* decisions were subject to review by the *audiencias*.<sup>33</sup> This colonial governance structure left little to no room for the development of means for local control. Each level of governance was subject to levels of review because self-governance was not con-

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 33.

25. Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L.J. 345, 349 (2000).

26. *Id.* at 349.

27. 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).

28. Nagle, *supra* note 25, at 350.

29. *Id.* at 350.

30. Garcia, *supra* note 27, at 1276.

31. *Id.* See also Nagle, *supra* note 25, at 350.

32. Garcia, *supra* note 27, at 1277.

33. Nagle, *supra* note 25, at 350.

sidered to further the interests of the king.

The bureaucracy created for the administration of the colonies made it difficult for those living in the colonies to comply with the letter of the law and accomplish anything. The system “derived from a deep distrust by the Crown of colonial officials.”<sup>34</sup> It was designed to promote the interests of the Crown, and was structured to prevent the accumulation of prestige or power in the colonies rather than for their efficient administration.<sup>35</sup> An interesting dichotomy developed which allowed the colonists to deal with their day-to-day business despite the oppressive bureaucracy and regulation.

Colonists recognized the value and importance of the law in theory, but they took a very practical approach to its application. They would pay lip service to the law, but felt no compunction about violating its terms when necessary. When regulations were “impossible or inconvenient to execute” they were “shelved with the famous Spanish formula, I obey but do not execute, and were referred back to Spain again for further consideration.”<sup>36</sup> It was a very pragmatic response, which allowed colonists to honor the law in theory, but avoid its restrictions in application. To some extent that same dichotomy exists in Latin America still; Latin Americans can ignore the law on one hand, while on the other they “possess a basic faith, an idealistic belief in the legislative paradigm, that legislation can solve all problems.”<sup>37</sup>

### B. Colonial Costa Rica

Costa Rica’s colonial experience was, in many ways, unique from that of its neighbors in Central America. These distinctive historical developments provide a framework that has facilitated contemporary rule of law reforms. Although Columbus landed on the coast of Costa Rica on his fourth voyage in 1502,<sup>38</sup> colonization of Costa Rica’s interior was delayed sixty years due to difficulties caused by the weather, landscape and dense forests.<sup>39</sup>

When settlement did proceed to Costa Rica’s interior, it presented a unique set of circumstances. While most Spanish colonies forced the indigenous populations to work as serfs,<sup>40</sup> the native population in Costa Rica found refuge in the forests.<sup>41</sup> Without feudal labor, the Spanish colonists were forced to work the land on their own.<sup>42</sup> This emphasis on individual farming activities, coupled with the absence of mineral resources, caused the

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34. Garcia, *supra* note 27, at 1277.

35. *Id.* at 1277-78.

36. *Id.* at 1278-79.

37. Linarelli, *supra* note 1, at 59.

38. RICHARD BIESANZ ET AL., *THE COSTA RICANS* 15 (1982).

39. *Id.*

40. Indians were required to provide labor or pay taxes, in exchange for which the colonists agreed to “protect and Christianize them.” *Id.* at 17.

41. *Id.*

42. *Id.*

focus of development in the region to be on individual landowners.<sup>43</sup> Consequently a strong sense of individualism became part of Costa Rica's national identity. The development of individual farms in the region has been described as:

[A] small world in which the family was born and raised, far from other farms. Their simple life, without ambitions or desires, gave the inhabitants a rude, mistrustful, very individualistic character. They were without exception peasants who had to till the soil for their food; as a result Costa Rica became a rural democracy. Unlike other Spanish colonies, Costa Rica had no social classes or castes, no despotic functionaries who looked down on others, no powerful creoles owning land and slaves and hating the Spaniards, no oppressed *mestizo* class resentful of the maltreatment and scorn of the creoles.<sup>44</sup>

While this characterization of Costa Rica as an egalitarian, classless society has been seen by some as more an ideal than a reality due to the wealth and power that resulted from the development of the coffee and banana industries in Costa Rica,<sup>45</sup> its important effect is in how Costa Ricans perceive themselves.

The Colonial mode of governance continued in Latin America, including Costa Rica, until Napoleon seized Spain in 1808. Many of the Creole elite in Latin America began contemplating independence at about that time. By 1822, most of the Latin American countries had attained independence.<sup>46</sup> Even so, many Costa Ricans were surprised when Guatemala declared the independence of all Latin America.<sup>47</sup>

The American and French Constitutions both influenced the new nations in Latin America as they drafted their own constitutions.<sup>48</sup> Further, the new nations drew inspiration for their own legal codes from the French Civil Code enacted in 1804.<sup>49</sup>

### C. Costa Rica After Independence

As other nations in Latin America declared independence, Costa Rica followed suit.<sup>50</sup> Independence from Spain was not declared at a national level; rather each town met and declared its own independence from Spain in 1821.<sup>51</sup> Over the next thirty years a gradual shift from localized independ-

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43. *Id.*

44. *Id.*

45. *Id.* at 20.

46. KARST, *supra* note 6, at 42.

47. BIESANZ, *supra* note 38, at 18.

48. KARST, *supra* note 6, at 45.

49. *Id.* at 44.

50. BIESANZ, *supra* note 38, at 18.

51. *Id.*

ence towards a sense of nationalism developed.<sup>52</sup> This development culminated in 1856, when people from all parts of Costa Rican society responded to repel an army that had crossed the border from Nicaragua.<sup>53</sup> This collective effort helped Costa Ricans feel “a sense of nationalism transcending old localist interests and grudges.”<sup>54</sup>

During the latter half of the 1800s, those who had become wealthy by growing and exporting coffee dominated the political scene and struggled among themselves for political power.<sup>55</sup> In 1871, Colonel Tomás Guardia took control of the government in a coup.<sup>56</sup> Until his death in 1882, Guardia limited the power of the coffee growing elite.<sup>57</sup>

During Guardia’s dictatorship, a group of men known as the “generation of 1889” met to discuss liberal ideas, and upon Guardia’s death, began implementing some of these ideas.<sup>58</sup> For example, in order to separate church and state, schools and cemeteries were secularized, and the Jesuits were expelled from the country.<sup>59</sup> The expulsion of the Jesuits is still seen by some as the reason that Costa Rica has escaped the difficulties experienced by other nations in the region in separating church and state.<sup>60</sup> The legitimacy of the government is reinforced by its independence from religion, and that legitimacy in turn allows the government to make meaningful judicial reform with greater ease.

Another important development in Costa Rica during that period was the emergence of a free press.<sup>61</sup> Increasingly, the public had access to information and ideas that permitted them to participate in the democratic process.<sup>62</sup> This tradition of free press is important because in contemporary society, “free and effective media are needed for constituencies to build their base of support and to generate public pressure for legal reform.”<sup>63</sup> The press not only promotes transparency in the judiciary by making it accountable to the public, it also provides the public with information about efforts at judicial reform.

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52. *Id.* at 20.

53. *Id.* at 19-20.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 21.

59. *Id.*

60. Juan Diego Castro, President of the Costa Rican Bar Association, Videotape: Interviews with Proyecto Acceso (McGill Center for Creative Problem Solving 2000) (on file with the McGill Center for Creative Problem Solving at California Western School of Law).

61. BIESANZ, *supra* note 38, at 21.

62. *Id.*

63. Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT’L L. 167, 227 (1995) (quoting Harry Blair & Gary Hansen, United States Agency for International Development (USAID) Program and Operations Assessment Report No. 7, Weighing in on the Scales of Justice: Strategic Approaches for Donor Supported Rule of Law Programs 24 (1994)).

During this period elections were held without being influenced by the government for the first time.<sup>64</sup> Costa Ricans had long participated in the electoral process, but the government had always influenced the elections prior to 1889. During the elections that year, the president tried to impose his own candidate, but his candidate was forced to withdraw by an organized march against the action.<sup>65</sup> Since that time elections have been fairly impartial, with one exception.

During the first half of the twentieth century, Costa Rica's government continued to develop in the face of two world wars and another brief period of dictatorial rule.<sup>66</sup> In 1940, President Rafael Calderón enacted a "radical social welfare system"<sup>67</sup> that set the stage for the civil war of 1948. The conflict itself was set in motion when the Electoral Tribunal indicated that one candidate had the lead in the presidential election, but the Costa Rican Congress announced its intention to annul the election and place another candidate in the presidency despite the election results.<sup>68</sup> Supporters of the candidate who appeared to have won the vote rightfully attacked several strategic outlying positions in the country, and began a march on the capital city.<sup>69</sup> After a month, the two sides ended the conflict by signing a treaty agreement that placed José Figueres, the leader of the rebellion, in power for eighteen months, after which Otilio Ulate, the candidate who had won the election, would become president.<sup>70</sup> During Figueres' eighteen-month tenure, the military was disbanded, the banks and insurance companies were nationalized, the utilities were taken over, and a new constitution was ratified.<sup>71</sup> Pursuant to the terms of the agreement that had ended the civil war, Ulate peacefully took control of the government on November 9, 1949.<sup>72</sup> The violent conflict resulted in

A rededication to the maintenance of civil government, the peaceful transfer of power from one popularly elected candidate to another, and a perfecting of the electoral process. . . . The bitterness engendered by the whole process of the revolution proved anew to the Costa Rican people that, even though representative government can be slow and at times unresponsive, it is an effective safeguard against government excess.<sup>73</sup>

Since that time elections have been free of the governmental tinkering

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64. BIESANZ, *supra* note 38, at 21.

65. *Id.*

66. Federico Tinoco took power in a coup early in 1917 and remained in control until August 9, 1918. *Id.* at 23.

67. JUAN CARLOS ZARATE, FORGING DEMOCRACY: A COMPARATIVE STUDY OF THE EFFECTS OF U.S. FOREIGN POLICY ON CENTRAL AMERICAN DEMOCRATIZATION 40 (1994).

68. BIESANZ, *supra* note 38, at 26.

69. *Id.* at 27.

70. *Id.* at 27.

71. ZARATE, *supra* note 67, at 44.

72. BIESANZ, *supra* note 38, at 28.

73. *Id.* at 29 (quoting JOHN PATRICK BELL, CRISIS IN COSTA RICA 161 (1971)).



that had been prevalent in Costa Rican elections.<sup>74</sup> The successful, peaceful transfer of power after the civil war helped reinvigorate the electoral process in Costa Rica, and resulted in the development of strong executive and legislative branches, but the judiciary had difficulty establishing its place within the government. The stability of Costa Rica's government provides a framework within which it is possible to attempt reform. Other Latin American nations lack fundamental stability in other parts of their governments, which makes it more difficult to make meaningful judicial reform.

## II. COMMON DIFFICULTIES FACED BY LATIN AMERICAN JUDICIARIES

There are several general deficiencies within Latin American Judiciaries. First, oftentimes they fail to reflect the social realities of the people.<sup>75</sup> The codes enacted are abstract and are difficult to apply in reality. Second, the legislature and judiciary are typically weak vis a vis the executive branch.<sup>76</sup> The judiciary often lacks the stature and power to act as an effective check on the legislative or the executive branches. Third, there is a disturbing lack of independence in the judiciary.<sup>77</sup> The judiciary has difficulty acting as an independent, objective third party when deciding cases; it lacks the resources to effectively enforce the laws and it is relegated to a subservient position to the other stronger branches of government. Fourth, there is a lack of transparency in judicial process.<sup>78</sup> Without the scrutiny of observers, it is easy for the judiciary to deviate from its ethical responsibilities when deciding a case. Fifth, corruption has plagued Latin American judiciaries.<sup>79</sup> And finally, a variety of obstacles prevent access to justice.<sup>80</sup>

### A. Increasing Pressure to Make Meaningful Judicial Reform

#### 1. Economic Incentives for Judicial Reform

In recent years there has been an increase in the amount of international

74. *Id.* at 28.

75. Linarelli, *supra* note 1, at 52.

76. *Id.* at 63. See also Nagle, *supra* note 25, at 358-60; Dawn Bennet-Ingold, *Latin American Democracy: Flourishing or Floundering?*, 28 GA. J. INT'L & COMP. L. 111, 139 (1999).

77. Dakolias, *supra* note 63, at 173-74. See Nagle, *supra* note 25, at 356.

78. *Id.* at 197. See Joseph R. Thome, *Heading South But Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691, 702-03 (2000).

79. Nagle, *supra* note 25, at 360. See generally Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L. J. 353 (2000).

80. Dakolias, *supra* note 63, at 199-217. Some obstacles that prevent access to the judiciary include the cost of participating in the legal process, a lack of information regarding individual rights and the procedural steps of the process; and a lack of confidence in the system itself. "In other words, a judicial system may present economic, psychological, informational and physical barriers for individuals who need its services." *Id.* at 139.

trade. It has become more difficult for individual nations to remain isolated. It is generally agreed that there is an "intimate link between the climate of social certainty which the rule of law can provide and long-term economic growth."<sup>81</sup> A dependable judiciary has become "a basic condition for membership in the global economy."<sup>82</sup> Participation in the international market depends upon the environment created by the rule of law.

The global community requires that a certain level of trade exist between nations.

In a global economy, the role of law as an element of rationality, calculability, and coordination becomes fundamental. It is not surprising, therefore, that a permanent tension exists between the market forces and the attempts to introduce normative and institutional elements that allow us to stabilize exchanges and to make them foreseeable. It is quite evident that traditional domestic regulation will be largely ineffective and that global, or more frequently, regional arrangements are needed to cope with the legal challenges posed by the new world economic order.<sup>83</sup>

Law must provide predictability and stability for successful economic development in the international community.

Members of the World Bank have emphasized the importance of predictability:

The rule of law is a precondition for sectoral development. It creates certainty and predictability; it leads to lower transactions costs, greater access to capital and the establishment of level playing fields. . . . Of particular importance is good governance to establish an appropriate legal and regulatory framework and maintain competent and honest civil service and judicial institutions.<sup>84</sup>

In order to sustain economic growth and benefit from foreign investment, the judiciary must enforce objective rules that have been adopted in response to the genuine needs of the people. The judiciary must consist of "well-functioning institutions that operate in a transparent way and are accountable to citizens."<sup>85</sup> One commentator has stated: "A free and robust market 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>86</sup>

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81. Hector Fix-Fierro & Sergio Lopez-Ayllon, *The Impact of Globalization on the Reform of the State and the Law in Latin America*, 19 HOUS. J. INT'L L. 785, 796 (1997).

82. Thome, *supra* note 78, at 697.

83. Fix-Fierro & Lopez-Ayllon, *supra* note 81, at 792-93.

84. Ibrahim F.I. Shihata, *Legal Framework for Development: The World Bank's Role in Legal and Judicial Reform*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 13, 13 (Malcolm Rowat et al. eds., 1995).

85. *Id.*

86. Dakolias, *supra* note 63, at 167.

## 2. *Democratic Incentives for Judicial Reform*

A functioning judiciary is essential not only to economic development, but also to democratic development. In many instances the judiciary is charged by a nation's constitution with the protection of its citizens' rights. "A strong judiciary bringing about 'an enforceable, compulsory, and foreseeable rule of law' is an essential foundation for a strong democracy."<sup>87</sup> In Latin America however, there has been a strong tradition for the judiciary to defer to the legislative and executive branches of government.<sup>88</sup> Indeed, despite fascinations with the legislative codification of law, legislatures have traditionally been weak, deferring to the will of an exceptionally strong executive. This created a situation in which the executive overpowered the other two branches of government.<sup>89</sup> The executive was therefore in a position to abuse its power without any sort of limiting influence by the other two branches. When there is such a consolidation of power without checks, there is the opportunity for extra-constitutional abuses. Costa Rican jurists claim that judicial inactions resulted in "the 'tyranny of the law' that amounted to 170 years of disrespect for the constitution."<sup>90</sup>

It is important to recognize that a well functioning judiciary is only one element needed for the establishment of the rule of law. As Thomas Carothers stated:

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.<sup>91</sup>

Latin American governments are beginning to acknowledge the importance of these features and incorporate some of them in their own judiciaries.

### *B. Costa Rica's Efforts at Judicial Reform*

#### *1. Economic Development*

Costa Rica is aware of the importance of the judiciary to economic development. At the World Bank Conference on Judicial Reform in Latin

87. Dawn Bennet-Ingold, *Latin American Democracy: Flourishing or Floundering?*, 28 GA. J. INT'L & COMP. L. 111, 139 (1999).

88. Bruce M. Wilson & Roger Handberg, *From Judicial Passivity to Judicial Activity: Explaining the Change within Costa Rica's Supreme Court*, 5 NAFTA: L. & BUS. REV. AM. 522 (1999).

89. Bennet-Ingold, *supra* note 87, at 139.

90. Wilson & Handberg, *supra* note 88, at 534.

91. THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 164 (1999).

America and the Caribbean, Hernando París Rodríguez stated:

An investor contemplating doing business in a country today does not look only at its economic indicators, communications and transport systems, taxes, customs, and workforce. Today's investor also asks whether an independent judiciary exists, whether the rules of the game are maintained over time or modified at whim, whether the judicial system functions properly, and whether there are alternative methods for solving disputes. Without legal safeguards, no investment is forthcoming, and there can be no development without investment.<sup>92</sup>

Economic developments depend on a judiciary that is able to quickly and fairly administer reliable laws in an evenhanded fashion. In order to secure investment capital sufficient to sustain economic growth the state must ensure that investors can seek protection from the law.<sup>93</sup>

While a functioning judiciary is essential to economic growth, it is important to remember that:

[B]usiness 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.<sup>94</sup>

Even in a country where a judiciary is considered to function efficiently enough for investors to rely on, there is a strong desire to avoid its use. Alternative Dispute Resolution (ADR) includes mechanisms designed to allow parties to reach an amenable solution without recourse to the judicial system. It has been popular for transnational corporations, who do not trust the judiciary in foreign lands, to use ADR rather than rely on a judiciary that is viewed as corrupt.<sup>95</sup>

While Latin America has been part of the ADR experience for years, “the inclusion of ADR as an explicit tool of international development programs, especially judicial reforms, is a relatively new phenomenon.”<sup>96</sup> Specific methods encompassed by the broad term ADR include “[A]rbitration, mediation, conciliation and, in some instances, decisions of justices of the

92. Hernando París Rodríguez, *Improving the Administration of Justice in Costa Rica*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 199, 200 (Malcolm Rowat et al. eds., 1995).

93. Thome, *supra* note 78, at 699.

94. James Cooper, *Essay: Access to Justice 1.1*, 30 CAL. W. INT'L L. J. 429, 432 (2000).

95. *Id.*

96. Anthony Wanis-St. John, *Implementing ADR in Transitioning States: Lessons Learned from Practice*, 5 HARV. NEGOT. L. REV. 339, 340 (2000).

peace.”<sup>97</sup> A comprehensive approach to judicial reform will include ADR in one form or another.

There are a variety of ways that states implementing judicial reforms can benefit from the concurrent implementation of ADR programs: ADR programs address both the economic and democratic motives that underlie judicial reform. Economic concerns are addressed by ADR because businesses prefer to utilize alternatives to litigation even when disputes arise in countries with fully functioning, independent judiciaries. This tendency increases when businesses have concerns about the predictability of a country's legal system. ADR can also address democratic development by diverting certain types of disputes from the courts and reducing backlogs; ADR can increase access to justice for individuals and groups that are disadvantaged; and ADR programs can reduce the cost of resolving disputes.<sup>98</sup>

Argentina is a leader in the fields of arbitration and mediation.<sup>99</sup> The Argentinean government reacted to what it deemed a “judicial emergency” by mandating compulsory mediation before any lawsuit, unless the case dealt with family law.<sup>100</sup> Peru has had success in its Justice of the Peace program. Lay Justices are able to arrive at equitable solutions that are amenable to the parties without formal legal training.<sup>101</sup> Costa Rica has also adopted some forms of ADR. Compulsory arbitration is required for all insurance disputes involving the Costa Rican National Insurance Institute.<sup>102</sup>

## 2. Democratic Development

Recently Latin American courts have “abandon[ed], albeit slowly, their traditional actions and are endeavoring to become aggressive protectors of constitutional rule and of citizens’ constitutional rights.”<sup>103</sup> Costa Rica’s efforts include amending its Constitution and reorganizing its highest court. In 1989, law No. 7128 created the “Cuarta Sala” of the Supreme Court of Costa Rica. This law was enacted to make it easier for the Supreme Court to ensure compliance with the constitution.

The Cuarta Sala’s Mandate was to “guarantee the supremacy of the norms and constitutional principles, international law and community law in force in the republic, their uniform interpretation and application like fundamental rights and freedoms consecrated in the constitution or in international instruments in force in Costa Rica.” The magistrates are to prevent

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97. Dakolias, *supra* note 63, at 201.

98. Wanis-St. John, *supra* note 96, at 373. See also Dakolias, *supra* note 63, at 200.

99. *Id.* at 433.

100. *Id.*

101. Hans-Jürgen Brandt, *The Justice of the Peace as an Alternative: Experiences with Conciliation in Peru*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 92, 93-98 (Malcolm Rowat et al. eds., 1995).

102. Wanis-St. John, *supra* note 96, at 434.

103. Wilson & Handberg, *supra* note 88, at 523.

abuses of legislative, executive, and bureaucratic powers, or the unconstitutional acts of private individuals or any acts that prevent an individual from exercising their basic rights as contained in the constitution."<sup>104</sup>

The statute facilitated these objectives by changing the organization and composition of the Supreme Court to allow it to more easily assert jurisdiction over and decide cases involving constitutional questions.

Not only has the Supreme Court of Costa Rica taken a more active role in protecting constitutional and individual rights, it has also taken several steps to increase its caseload so as to provide better access to the judicial process. "Improved access to justice is essential for providing basic services to society, meeting the previously mentioned goals of democratization and institutionalization, and redefining the relationship between society and the state."<sup>105</sup>

To further these ends, the Supreme Court has undertaken an extensive informational campaign to educate individuals about their rights.<sup>106</sup> Citizens cannot bring a claim before the court asserting that their rights were violated if they are not aware of what those rights are. Educating citizens of their rights is as important a part of meaningful reforms as educating legal professionals:

Part of the initial intimidation of the judicial system is often the public's lack of knowledge concerning how the system functions. Thus, public education about the courts will increase the public's confidence and the system's credibility. Some countries have implemented radio and television programs to educate the public about the laws. . . . Once the public is informed of their rights and the available legal services, they tend to be more motivated to seek assistance to address their grievances.<sup>107</sup>

As part of its campaign to educate the public, the Costa Rican government has produced a variety of publications. These include an agenda containing descriptions of governmental agencies and constitutionally guaranteed rights, a handbook for citizen participation, a version of the Costa Rican Constitution directed at children, and a story directed at you which contains information about your rights.<sup>108</sup>

Additionally, the Court has made it easier for individuals to file claims with the Cuarta Sala.<sup>109</sup> Age and citizenship requirements have been eliminated and the court receives petitions 24 hours a day, 365 days a year.<sup>110</sup> These provisions reflect the statement made by the leaders of Latin Ameri-

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104. *Id.* at 538.

105. Dakolias, *supra* note 63, at 199.

106. Wilson & Handberg, *supra* note 88, at 541.

107. Dakolias, *supra* note 63, at 223.

108. Comisión Nacional para el Mejoramiento de la Administración de Justicia, *Agenda 2001* (Oscar Arévalo et al. eds., 2001).

109. Wilson & Handberg, *supra* note 88, at 541.

110. *Id.*

can States in the Declaration of Principles and Plan of Action, which said, “[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.*”<sup>111</sup>

Part of the participation in public issues includes individuals exercising their rights and protecting those rights in the judiciary. By educating individuals about their rights and making it easier for anyone to instate a lawsuit to protect those rights, Costa Rica is promoting the participation of all its citizens in the democratic process. Teaching the populace about their rights and the effects of reform are essential to ensuring the success of any attempt at reform. These measures have allowed the judiciary to take steps to enforce “guarantees of freedom of expression, assembly, suffrage, and worship”<sup>112</sup> as well as constitutional prohibitions of *ex post facto* laws, arbitrary arrest, exile, torture, and capital punishment.”<sup>113</sup>

In addition to the efforts to educate the populace about their rights and the various institutions that exist to protect those rights, the Costa Rican judiciary is also taking steps to disseminate the results of judicial decisions. Details of recent decisions as well as recently enacted laws and decrees can be accessed without charge via the Internet.<sup>114</sup> Providing access to decisions promotes transparency in the judicial process. These efforts have a very desirable effect:

Transparency and adequate dissemination of information to the public on their activities and decision of the government branches contribute largely to their political legitimacy. First, they provide an effective form of popular oversight for judges and judicial agents, deterring the judiciary from violating due process and individual rights. Second, by bringing the community closer to judicial activities, they contribute to the promotion of trust between the community and its judicial branch. Third, they discredit the use of delay and censurable tactics by the parties in the handling of judicial processes. Fourth, they promote the education of the population about judicial procedures and philosophies, enabling educated feedback by the population on the performance of the bench, thereby removing the assessment of judicial decision making from the exclusive domain of specialists.<sup>115</sup>

Aggressive programs for constitutional education and legal principles coupled with widespread dissemination of judicial developments lend a sense of legitimacy to the judiciary.

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111. Cooper, *supra* note 94, at 1 (quoting *Declaration of Principles and Plan of Action*, 34 I.L.M. 808, 817 (1995) (emphasis added)).

112. BIESANZ, *supra* note 38, at 179-80.

113. *Id.* at 180.

114. *See, e.g.*, <http://www.poder-judicial.gov.cr>.

115. Garcia, *supra* note 27, at 1267.

The Costa Rican judiciary has also made the criminal process more transparent by revising their criminal procedure codes to include oral proceedings.<sup>116</sup> “Oral procedures have allowed for public trials, which, in turn, have helped make judges publicly accountable for their decisions. . . .”<sup>117</sup>

Another important part of judicial reform is educating the legal professionals about the principles of the reforms:

The improvement of legal education is central to judicial reform. Legal education and training for students, continuing legal education for practicing lawyers, judicial training for judges and legal awareness education for the public in particular should be emphasized. Legal education and training are important at every level, but must begin with fundamental changes in the law schools.<sup>118</sup>

While reforms may initiate within the country at various levels, the professionals who work within the judiciary on a daily basis will be the ones to implement them. Judges or attorneys who have practiced under the *status quo* for so long that a sense of complacency and comfort has resulted can merely ignore much needed reforms. This inertia may make it difficult for any significant changes to take effect.

Even those legal professionals who advocate for reform may be non-plussed at the prospect of applying the changes in their practice. A practitioner may find the skills acquired under the previous set of norms ill suited for the implementation of new procedures. These difficulties must be taken into account and provisions made for them if any judicial reform is to succeed. The skills necessary under the new procedural framework (e.g.—oral argumentation) must be identified and taught to practitioners so that they can practice successfully. A systematic effort to provide continuing legal education to both attorneys and judges is necessary to ensure that legal professionals are able to “keep abreast of legal changes and new areas of law.”<sup>119</sup>

Additionally, care must be taken that existing schools of legal education are teaching future professionals these skills. A legal or judicial education should “include courses in general subjects that all judges [and attorneys] need to master, subjects relating to specific duties (including court and case management techniques) and new developments dealing with emerging areas of law and societal concerns.”<sup>120</sup>

One reason for the success of the Cuarta Sala and the other changes that have been implemented in recent decades is the fact that the reform came from within Costa Rica. In order to succeed reforms must be the “result of local initiative and strong commitment.”<sup>121</sup> The reforms must reflect the pri-

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116. Dakolias, *supra* note 63, at 197.

117. *Id.*

118. *Id.* at 218.

119. *Id.* at 221.

120. *Id.* at 219.

121. *Id.* at 230.



orities of the country, taking into account its “political, social, cultural, and economic” needs.<sup>122</sup> This is a change from the judicial reform programs of the 1960s and 1970s. During that time, modernization attempts consisted of importing wholesale the codes of more sophisticated nations as well as the U.S. legal education system.<sup>123</sup> Little success came from those efforts because the programs were “often created by people with little or no knowledge of these developing countries legal systems and even less knowledge of their cultures.”<sup>124</sup> It is impossible to develop a successful plan for reforms without an intimate understanding of the existing system and the cultural heritage that gave rise to the system.

The need for a first hand understanding of the cultural underpinnings of the government and the judiciary also derives from treating another culture with the respect it deserves. Any schematic for reform that is imposed upon another country without due regard for the cultural identity of its citizens will likely fail. A former president of Costa Rica said:

U.S. Policy makers have a serious problem: they do not know Latin America. . . . We Costa Ricans are good friends of the United States because we have never been invaded. But the countries that have suffered the presence of the Marines are not your friends. Why is Costa Rica the United States’ best friend in Latin America? Because you have never failed to respect us.<sup>125</sup>

The success of any attempt at reform depends upon recognizing and respecting the needs of the citizenry.

### III. CONCLUSION

While Costa Rica faces many of the challenges that confront all of Latin America, it has achieved a level of success in its judicial reforms that has eluded many of its neighbors. This achievement can be attributed to aspects of Costa Rica’s development that are unique from the rest of the Latin American community. Costa Rica has developed traditions of separation of church and state, electoral integrity, free press, and individualism that have allowed its reform attempts to succeed when similar attempts in other countries have failed. These unique attributes have been bolstered by the strong support for reform within the Costa Rican legal system. Reforms have been initiated in Costa Rica, and have had enough support within the legal system to succeed. This combination of factors has permitted Costa Rica to effect meaningful reforms while other Latin American countries have faced difficulties implementing very similar programs.

Costa Rica’s judiciary has earned a reputation for stability, integrity,

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122. *Id.* at 230-31.

123. *Id.* at 229-30.

124. *Id.* at 230.

125. ZARATE, *supra* note 67, at 53.

and transparency in Latin America. Rather than rest on its laurels, Costa Rica has recognized that importance of the judiciary to strong economic growth and democratic ideals. Consequently, it has continued to strive to improve its judiciary. Costa Rica has managed to avoid the pitfalls that have beleaguered other nations in similar situations, and has taken meaningful steps to remedy judicial deficiencies. Efforts continue to improve the efficiency, independence and legitimacy of the judiciary. Additionally, aggressive steps have been taken to educate every citizen about their right to judicial recourse, and to ensure that professionals are well equipped with the knowledge and skills necessary to effectively participate in the judicial process.