IMPEDIMENTS TO JUDICIAL REFORM IN LATIN AMERICA
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Edgardo Buscaglia is Professor of Law and Economics in Washington College, U. S. A. Pilar Domingo is Researcher and Lecturer in the Division of Politics, CIDE, Mexico.
Abstract

Adherence to the rule of law is imperative to the stability of a liberal democracy. An independent judiciary is one of the core institutions assuring application of a fair and impartial rule of law. This chapter identifies some of the main obstacles Latin American countries face as they attempt to reform their justice systems.
Introduction

Judicial Reform: Definition and Substance

As Latin American countries aspire to consolidate their democratic institutions and further their economic reforms, the need for a well-functioning judiciary becomes increasingly imperative. In the wake of democratization and economic liberalization, there is a renewed interest in institutional and public sector reforms in Latin America.¹ A major area of much-needed reform is the justice system, a key factor for the establishment of the rule of law. Democratization, growing urbanization, and the adoption of market reforms have all created additional demands for court services throughout the region. These three factors, among others, have increased the complexity of social interactions, making the improvement of the judiciary’s conflict-resolution capabilities even more necessary. In addition, the shift of most economic transactions away from the public administrative sphere and towards the market domain has created an unprecedented increase in the demand for an improved definition of rights and obligations.

The rule of law is necessary for the political stabilization of liberal democracy.² Only through the establishment of an enforceable, binding, and predictable rule of law can countries in Latin America adopt the political rules required for the development of a strong competitive democracy. An independent judiciary is one of the core institutions necessary for the realization of the principle of separation of powers. This is particularly relevant for presidential forms of government, predominant in Latin America, where separation of powers is constitutionally mandated. Typically, judiciaries in Latin America are weak, over-politicized and heavily dependent on and subordinate to the executive branch. They often fail to act as effective mechanisms of political checks and controls. Only in recent years has judicial reform come to represent an important political issue.

Moreover, if liberal democracy is to be strengthened, the notion of democratic rights (political and civil) must become substantively internalized and societally embedded. This requires the existence of an impartial and predictable court system that is able to equitably protect rights and effectively administer justice. The quality

¹ The extent to which these two processes —political and economic liberalization— are inseparable is a matter of keen debate. With neither process yet fully achieved, however, it is more important to treat one institutional aspect —the judiciary— as crucial for their development.

² Few authors have paid much attention to the impact of the rule of law on the strengthening of democratic institutions in Latin America. Guillermo O’Donnell (1993, pp. 12-15) gives one account of such a relationship. In part, our analysis follows the path delineated by this author. For a useful typology of court systems in Latin America, see Verner (1984).
of a liberal democracy is largely defined by state-society relations, and thus, to a large extent, by the rule of law.

A reliable judiciary is also a key ingredient of economic development. The judicial system includes all the public-private sector mechanisms needed to interpret the laws and regulations that apply to market transactions. The judicial sector's main role within the economic system consists of resolving conflicts by providing the substantive and procedural structure to facilitate the exchanges of rights to physical and intangible assets. The judiciaries in most Latin American countries, however, are suffering from increasing backlogs, delay, and corruption, which have generated a complete distrust of the system by the private sector and the public in general. Moreover, the judiciary can also affect the behavior of private investment. The lack of access to an equitable and efficient judicial system creates added uncertainty and hampers the materialization of beneficial transactions. In the absence of a minimally impartial and efficient judiciary, mutually beneficial transactions will not occur unless the parties have well-known reputations and/or a history of repeated transactions between them. This circumstance excludes many potentially socially beneficial transactions involving previously unfamiliar parties or start-up businesses.

The policies of economic stabilization and liberalization that have swept across the continent over the past decade clearly would benefit from a predictable legal framework and a judiciary with the ability to apply those laws effectively and equitably. The prospects for long-term sustainable economic growth and development will require, then, more than just stabilization policies. The main issue here is the extent to which we can speak of sufficient state infra-structural capacity to provide a necessary backdrop of predictable and reliable legality (North, 1990). The experiences of the last decade throughout Latin America clearly indicate that economic liberalization and privatization policies will not provide the conditions necessary for economic development without legal and political stability brought about by a working rule of law.

The legal principles supporting the prevailing economic system in Latin America are nominally based on the freedom to exercise individual property rights. But legislation is meaningless without an effective judicial system to interpret it. Consistent interpretation and application of the laws by courts provides a stable institutional environment where the long term consequences of economic decisions can be assessed by businesses and the public. In this context, an ideal judicial system is composed of institutions capable of applying and interpreting the laws equitably and efficiently. Under most of the judicial systems in Latin America, however, the laws are not subject to predictable interpretation. This uncertainty, coupled with delays in

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3 The World Economic Forum (1994, p. 34) compares the public's confidence in the judicial systems in thirty-five developed and developing countries. All Latin American countries, with the exception of Chile, rank in the bottom 15% of the public confidence index.

4 Polls throughout the region show the public views judges as corrupt and judicial decision-making as inconsistent. For more details, see Buscaglia (1995a).
resolving cases, further increase the costs of access to justice and doing business within the region.

The reality of economic and social hardship, extreme socio-economic inequality, and racial-cultural cleavages, all add to the lack of homogeneity in the region's civil societies. (Argentina, Chile, and Uruguay might be considered the most homogenous cases.) Instead, we find highly fragmented societies in which the concept of democratic citizenship is weak. This is due in no small part to the varying degrees to which different social groups and sectors are immersed in or divorced from the formal and bureaucratic procedures of democratic rule. For example, immersion in the western concept of democratic rights and rule of law is a much more difficult process for a rural dweller in Bolivia or Guatemala than it is for a middle class urban professional in Buenos Aires or Sao Paolo. Despite these differences, there seems to be an emergent public awareness that democratic rights must be protected and enforced. Public awareness notwithstanding, opinion polls throughout the region place the judiciary in a dismal light regarding institutional prestige and competence (Buscaglia, 1995a). This growing awareness of rights and their abuse is partially the result of the activism that came with democratization, the work of non-governmental organizations, and growing international pressures and scrutiny of human rights abuses. Such institutions as the Comisión Nacional de Derechos Humanos (National Commission for Human Rights) in Mexico or Poder Ciudadano (“Citizen’s Power”) in Argentina also play a significant role in the observance of rights protection. Nonetheless, human rights abuses persist at levels unacceptable by democratic standards, predominantly at the level of penal justice.

The international financial community is more explicitly (and increasingly, it would seem), concerned with the issue of judicial reform and strengthening the legal institutions of the newly democratic states. In all those countries in which comprehensive reforms were being proposed, business sectors associated with foreign investment are voicing their support of judicial reform. There is a growing awareness of the need for strong and reliable legal institutions for economic planning. The effective constitutional and legal protection of property rights would enhance entrepreneurial confidence and provide a strong incentive for potential foreign investors. This support, however, is neither consistent nor representative of many other local businesses, which are still opposed to many of the reform proposals that would take away the benefits generated precisely by the lack of a rule of law—that is, from the discretionary practices of state capitalist development, where judicial scrutiny was not effective. Their concern is not with a democratic rule of law, but predominantly with

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5 A survey of sixty-eight enterprises was conducted to identify the constraints on Latin American private sector development. The results indicate that the most significant are: political instability, inflation and price instability, regulatory constraints, poor functioning of the judicial system, lack of skilled labor, lack of infrastructure, high levels of taxation, lack of access to credit, and lack of services (Buscaglia, 1995a).
whether a legal apparatus will provide a predictable and reliable definition of property rights and their protection— the two are not the same.

How these different pressures for and against judicial reform interact, and the weight of the interests at stake, will undoubtedly have a bearing on the nature and pace of legal reforms, and the types of court services most susceptible to improvement and the scope of their impact. Thus, we can anticipate that there will be major improvements in the services provided by the commercial courts used by firms linked to foreign investment. Yet the failure to address the lack of access to justice by the more marginal sectors of society—where local vested interests, such as regional cauciquismos, prevail, or where resources do not reach effectively—will prevent the future strengthening of liberal democracies within the region.

The most comprehensive attempts at judicial reform in the region are occurring in Argentina, Chile, Colombia, Costa Rica, Ecuador, and Venezuela (Buscaglia, 1995a). The term “comprehensive” is used here to describe those cases where judicial reform is being implemented at all levels of the judicial system and the scope of the reforms addresses the following factors: 1) improvements in the administration of justice; 2) the enhancement of judicial independence; 3) the development of alternative dispute resolution mechanisms (i.e., mediation, arbitration, moot courts, etc.); 4) the improvement of legal education for judges, lawyers, and the public in general; and 5) the creation of added channels of access to justice for those sectors of the population now excluded.

Despite the evident desirability of a working justice system and a rule of law regime, it is clear that Latin American countries face formidable obstacles to the appropriate reform of their justice systems. Buscaglia (1995a) observes that gaps in formal legal codes or constitutional provisions are not at the core of the problem of dysfunctional administration of justice. In all cases in Latin America where comprehensive judicial reforms are being proposed, the obstacles to the improvement of the judiciary usually lie in the existence of strong vested interests that in the past (and indeed in the present) have benefitted precisely from the absence of a rule of law. Thus, a major challenge for both democratic consolidation (politically and socially) and for long-term economic growth and stability is the establishment of a minimally independent and impartial judiciary and an operative justice system at all levels. It is, therefore, the objective of this chapter to identify some of the main obstacles to the implementation of judicial reforms throughout the region. How these factors interrelate at the various levels of state and society will, to a large extent, determine the prospects for substantive judicial reform.

Some of the problems related to the provision of court services can be traced directly to legislation (substantive and procedural laws) or the lack thereof. Other problems can also result from the lack of a proper infrastructure and resources (i.e., capital, personnel, goods-services) necessary for the justice system to function well. A third set of problems usually arises from embedded practices based on clientelism, patrimonial resolutions of conflicts, and outright corruption. These embedded practi-
ces are interrelated in ways that hamper any attempt to systematically improve the quality of the court services provided to the general population. The legal history of many countries in Latin America points precisely to the many failures of judicial reforms that did not address the problems of vested interests conspiring against judicial reforms. Historical attempts at judicial reform, therefore, have not been “comprehensive” as we have defined the word. The successful implementation of judicial reforms will undoubtedly turn upon the nature of the agents involved in the provision of court services. In this paper we address some of the problems that arise when long established vested interests within the justice system benefit from the relative absence of an impartial and independent judicial system.

**Latin American Judicial Systems**

The belief that the judicial sector in Latin America is ill-prepared to foster private sector development within a market economic system is growing. The results of questionnaire surveys throughout Latin America indicate that the judicial system is considered to be among the top ten most significant barriers to private sector development. The most basic elements that constitute an effective judicial system are missing. These elements are: 1) relatively predictable and consistent decisions; 2) access to the courts by all members of the population regardless of individual income level; 3) reasonable times to disposition; and 4) adequate court-provided remedies.

Increasing backlogs and uncertainty associated with the expected court outcomes have diminished the quality of justice throughout the region. Time delay and corruption levels within the Latin American judicial systems are increasing and reaching unprecedented proportions (Central Intelligence Agency Staff, 1993, pp. 58-60). For example, the 1993 median times to disposition within civil jurisdictions in Argentina, Ecuador, and Venezuela were 6.5, 7.9, and 8.4 years, respectively (Buscaglia, 1995a). These times to disposition represent a 85% monthly increase since 1981. The standard deviations of those times to disposition for Argentina, Ecuador, and Venezuela are 1.1, 0.9, and 1.9 years, respectively (Buscaglia, 1995a). These spreads have also been increasing at an alarming rate during the past decade, indicating a huge lack of uniformity in the quality of the services and uneven burdens found throughout the courts.

Table 1 compares the annual percentage changes in times to disposition and in case backlogs within the federal civil and commercial jurisdictions of selected Latin American countries. The average changes, in monthly terms, for the years 1983-93
show a pronounced deterioration compared to the years 1973-82. On the one hand, this explains the public's dissatisfaction with the judicial systems throughout the region. But it is also an indication of increased use of the court system in more complex societies. The changing political environments—from authoritarian rule in the 1970s toward democratization in the 1980s throughout much of the region—undoubtedly contributes to increased litigious activity.

Table 1

Quantitative Performance of Judicial Sectors in Latin America

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<td>9.2</td>
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<tr>
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<td>39.1</td>
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<tr>
<td>Chile</td>
<td>8.4</td>
<td>11.1</td>
<td>12.1</td>
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<tr>
<td>Colombia</td>
<td>3.4</td>
<td>27.8</td>
<td>9.1</td>
<td>28.1</td>
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<tr>
<td>Mexico</td>
<td>N/A</td>
<td>N/A</td>
<td>7.2</td>
<td>34.1</td>
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<tr>
<td>Venezuela</td>
<td>3.1</td>
<td>48.3</td>
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Table 1 also helps to explain why a recent survey of the region's judicial systems indicates that the majority of court users are "not inclined" to bring disputes to court because they perceive the system to be slow, uncertain, and costly, or of "poor quality". This lack of confidence in the administration of justice is more pronounced among small economic units and low income families (Buscaglia and Ulen, 1995, pp. 18-21). Not only is there a profound sense of distrust towards formal legal procedures in terms of perceived "fairness" and impartiality, but there also exist formidable economic barriers resulting from high litigation costs, and social and cultural barriers (Cappelletti, 1993). The latter is particularly true in culturally heterogenous societies in which formal litigation competes with informal justice or alternative arbitration mechanisms and is more often than not a "second best" option for conflict resolution.

Surveys conducted in Argentina, Brazil, Ecuador, and Peru show that between 55 and 75% of the public manifests a very low opinion of the judicial sector (Buscaglia, 1995a). More specifically, in Argentina 46% of the people surveyed per-
ceived the judicial sector as inaccessible (Buscaglia, 1995a). In Brazil, Ecuador, and Venezuela the percentages are 56, 47, and 67%, respectively (Buscaglia, 1995a). Of the judges interviewed in Brazil, 76.9% consider there to be “a clear crisis” within the judiciary (Sadek and Arantes, 1994, p. 9; Salas and Rico, 1993, pp. 44-49). This crisis stems from the fact that potential court users “make every effort to avoid using the courts” (Sadek and Arantes, 1994, p. 27). In this context, judges are currently expanding the use of court-sponsored alternative dispute resolution (“ADR”) mechanisms such as arbitration, conciliation, and mediation, in order to provide an escape valve for the formal system (Sadek and Arantes, 1994, p. 18). Initially, judges felt threatened by the loss of power caused by the alternate avenues provided to the litigants. Lawyers also feared ADR mechanisms because of their need to acquire new skills and play under new rules competing with mediators and arbitrators. There is a growing tendency, however, for court officers to realize that ADR mechanisms help to alleviate their caseload by removing complex and highly visible cases from their dockets (Salas and Rico, 1993, pp. 39-44). For example, 69.1% of the Brazilian judges interviewed indicated that it is important to expand the use of extra judicial conciliation in order to improve the administration of justice (Salas and Rico, 1993, p. 6).

The enhancement of the capability of the courts to satisfy the demand for dispositions is one of the most challenging and important aspects of judicial reform. Almost everywhere in Latin America, courts seem to be unable to perform their most basic function interpreting and applying the law. The inability to satisfy this demand manifests itself through the increasing backlogs and time delays observed throughout the region. These delays may be in part due to a lack of resources or, in many cases, to procedural defects. Other reasons, however, must also be considered, such as the lack of legal training, the absence of an active case management style, or even an excessive administrative burden falling on judges. For example, Buscaglia (1995a) has found that approximately 70% of Argentine judges' time is spent on non-adjudicative tasks. The same administrative duties occupy 65 and 69% of available judicial time in Brazil and Peru, respectively (1994, pp. 27-34). Excessive administrative requirements are not imposed solely on judges. Based on recent surveys of the courts in Ecuador, Venezuela, Peru, and Argentina, between 20 and 40% of the court officers interviewed seem to welcome administrative tasks, such as signing checks or requesting office supplies (1994, p. 46). It would appear that administrative duties give judges a false sense of budgetary autonomy and planning capacity (Cassaus, 1994, pp. 10-13).

Overburdened, poorly trained, and badly paid judges are particularly susceptible to corrupt influences and create an environment where the rule of law cannot be guaranteed. The use of ex parte communication is one aspect of Latin American legal practice that especially contributes to this problem. Since ex parte communication is permitted and even encouraged, parties may approach judges, and judges can request to see the parties or their lawyers separately. Some litigants believe that case outco-
mes are determined in these meetings (Buscaglia, 1995a). The problems mentioned above also add cost and risk to business transactions and thus reduce the potential size of key markets. At the same time, litigants who are not able to pay the cost of delay or simply the price imposed by corruption find their access to justice blocked.9

The state of the judiciary in many of the Latin American countries leaves much to be desired. First, we are dealing with highly heterogenous and fragmented societies that have varying levels of experience with contemporary notions of liberal democratic citizenship and the justice system. In addition, there is a well-founded negative perception of the services that might be obtained from the formal judicial system, based on the state of the judicial system itself. Structural, formal, and budgetary deficiencies in the region's judicial sectors explain much of the low levels of performance.

**Obstacles impeding the Reform of the Judiciary**

Only by defining the factors enhancing or hampering judicial reform can we propose policy prescriptions for the modernization of the judiciary. In this context, we must take into account not only the present and future costs and benefits of reforms to society and specific interest groups, but also the changes in present and future individual rents as anticipated by court officers in particular and government officials in general. This section examines several aspects of the implementation of judicial reform. First, it seeks to identify the causes of the institutional inertia that impede the much-needed reforms of the courts. Then, by identifying the costs and benefits of implementing judicial reforms, as perceived by members of the court, it explains why reforms occur in some places but not in others.

If the judiciary is to provide the impartiality and efficiency necessary for public trust, a well defined program for judicial reform needs to address the major causes of deterioration in the quality of court services. This reform effort must address the root political, economic, and legal causes of an inefficient and inequitable judiciary and not just deal with its symptoms. The basic elements of judicial reform must include improvements in the administration of the courts and case-management practices; the redefinition and/or expansion of legal education programs and training for students, lawyers, and judges; the enhancement of the public's access to justice through legal aid programs and legal education aimed at increasing litigant's aware-

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9 In many countries within the region (e.g., Ecuador), the Constitution provides for a free legal system with no official charges. Although the courts are theoretically accessible to everyone, the abolition of fees contributes in part to the problem of low pay, inefficiency, and the poor quality of justice. The lack of formal court fees creates incentives for court employees and judges to charge unauthorized fees to parties. A litigant may consider or be asked to pay such a fee in order to advance a case. This transaction fee neither inures to the benefit of the judicial system nor offsets the legitimate costs of sustaining a judicial system, but rather goes to the personal benefit of a judge or court official. This contributes to corruption in the system and effectively denies access to the courts.
ness of their rights and obligations once they approach the courts; the availability of alternative dispute resolution mechanisms such as arbitration, mediation, and conciliation; the existence of judicial independence (i.e., budget autonomy, transparency of the appointment process, and job stability) coupled with a transparent disciplinary system for court officers; and the adoption of procedural reforms where necessary.

Each component is an integral part of judicial reform as a whole. Given the opposition of vested interests from both inside and outside the judiciary, it is unrealistic to think that all the components can be dealt with at once. Stages of action must then be planned considering the costs and benefits of reform as perceived by the judiciary.

Judges often cite the main obstacles to an efficient judiciary as those aspects that are beyond their control (Buscaglia and Ulen, 1995, pp. 56-59). For example, in Argentina, court officers have recently stated that oral proceedings and alternative dispute resolution mechanisms should be introduced to improve the performance of the judiciary (Buscaglia and Ulen, 1995, p. 28). Judges in Brazil believe that information technology, revised procedures, and small claims courts are the most important elements of judicial reform, while in Chile, Ecuador, and Venezuela, judges complain about their low budgets (Buscaglia and Ulen, 1995, p. 6; Sadek and Arantes, 1994, p. 15). Below, we address some of these problems and examine what happens when long established vested interests within the justice system benefit from the absence of impartial and independent judicial systems.

**Political Stability**

The main obstacles to reform are deeply rooted in the political, social and economic environment in which the legal systems develop. An understanding of the failures of the judiciary in Latin American countries must take into account these environmental constraints.

A first recurring problem (more evident in some countries than in others,) is political instability. Such factors as regime rupture, authoritarian militarism, and repeated breaches of the most basic liberal democratic constitutional principles have contributed to institutional instability and have frequently subordinated judges to over-riding political events.

Authoritarian militarism has impacted the legal system by undermining any notion of judicial political independence and destabilizing the terms of appointment and tenure of judges and court personnel in many countries. The outright illegality of military government activities has subverted the notion of the rule of law and democratic constitutionalism. Human rights abuses are probably the most painful memory of the excesses of military government (Seider, 1995). Adherence to legality, transpa-

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10 Reforms addressing all of these dimensions are classified here as "comprehensive judicial reforms". Only the governments of Argentina, Chile, Colombia, Costa Rica, and Venezuela have proposed, what we could consider a comprehensive approach to judicial reform.
rency, and economic management were highly problematic for economic development under military rule, and have created increasing friction within the judicial hierarchies.

Long-term political instability, as experienced by Bolivia, for example, has hampered the capacity of the judiciaries to develop their own authority as an institution. Only recently, with the advent of a democratization movement, have supreme courts acquired political significance. Chile is an exception, because it experienced democratic stability for much of the twentieth century prior to the Pinochet coup. The Chilean judiciary was a fairly reputable institution, although highly insulated from the rest of society by a lack of transparency in its appointment and tenure rules (Correa 1992, pp. 25-27). Reestablishing a sense of legality in Chile faces different challenges than in other countries where the judiciary did not enjoy a previous legacy of independence and institutional strength. In Colombia, despite political instability, the formal institutions have not been subject to continuous upheaval, with the consequence that the Colombian judiciary enjoys a reputation for its relative independence (Salas and Rico, 1993, pp. 19-23). The courts in Mexico, despite relative political stability during the last fifty years, by no means can be considered politically independent. Here the judiciary has traditionally been subordinated to the executive (Domingo, 1995).

While many countries in the region have done relatively well in terms of selective democratic criteria (e.g., free and competitive elections), the issue of legal and judicial reform remains problematic. It would be wrong to claim that democratization has effectively brought about highly improved levels of transparency and accountability in public office, or adequate levels of judicial effectiveness. Clearly, judicial reform is high on the political agenda throughout the region. Recent years also show courts achieving a higher political profile amid corruption scandals in high public office. As democratization mechanisms —often in the form of conjunctural political pacts regarding electoral and regime rules— are gradually set in place, the demand for adequate judicial scrutiny of public office increases. Mechanisms that strengthen accountability and transparency in public office are increasingly valued as assets in the process of regime consolidation, yet, in the light of recent experiences in the region, applying them is a tardy and tortuous process.

The political impact of a dysfunctional legal-judicial framework is extremely complex. The absence of strong legal institutions leaves much room for political clientelism, patronage networks, and personal enrichment. Public office is not subject to judicial and public scrutiny, precisely because of the lack of transparency in the application of the law, and the absence of control mechanisms of checks and balances. Corruption by the political elites and impunity from prosecution is highly problematic for long-term democratic consolidation, as it seriously undermines regime

The fact that the Pinochet coup did not result in changing the members of the Supreme Court, as was the case in Argentina and Bolivia, is an indication of the Court's conservative reputation.
credibility and legitimacy. This becomes particularly evident in times of scarce resources, typical of the economic austerity packages that have accompanied economic liberalizing and general "state-shrinking" policies. The effect of this has been to reduce the rent-seeking capabilities and redistributivist capacity of clientelist relations with and within the state. As a consequence of this reduction in potential rents during periods of austerity, the power of vested interests opposed to judicial reforms has, in theory at least, diminished —although those who remain close to the state are among those most likely to resist reforms towards greater transparency and accountability.

The strongly rooted political habit of circumventing the law is both a symptom of and a problem for judicial reform. The political discourse reveals keen enthusiasm to reform the justice system. Even well-intended reform legislation is not always effectively implemented, however, for several reasons. First, there is the difficulty of overcoming a practice of impunity, even when it does not represent outright corruption. Second, judicial reform is a promising political card, until it represents a threat to those in power. And finally, even when governments are strongly committed to reform, enforcement remains problematic when impunity and irregular practices are endemic throughout the political system.

**Corruption and the Judiciary**

Corruption and impunity have a corrosive effect on state reform at every level, and on long-term democratic consolidation. On the one hand, the problem of corruption reflects the incapacity of the public sector to establish an authoritative legal order. On the other hand, corruption flourishes where patrimonial and clientelist relations prevail within state institutions and interest groups, and between individuals. As long as public office remains an underpaid and poorly —trained bureaucratic apparatus rather than a merit-based institution, corruption can be expected to flourish. Corruption is a consequence, therefore, of the absence of mechanisms of accountability and judicial scrutiny. It is also a powerful obstacle to the implementation of any legal reforms that would threaten existing relations networks.

In the justice system, corruption takes the form of bribery, political pressures, and personal influence at many levels. These are all sources of indirect costs to court users. Corruption is usually closely linked to infra-structural problems: low wages, instability of tenure, lack of professional merit-based evaluation, and unequal application of internal regulations. A magnification of corruption within the region's courts is caused by the drug trade and its infiltration of state institutions at various levels. The authoritative capacity of the state to confront Mafia infiltration in public office is

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12 From a purely functionalist perspective, whilst the state "pie" could still be generously shared, corruption and clientelist practices gave the impression of somewhat redistributive features of state led capitalism. As the "pie" has shrunk, so have rent-seeking opportunities within state clientelist relations.
severely undermined by the sheer volume of Mafia capital. When combined with a tradition of impunity in public office, this becomes a formidable obstacle for effective legal reform. Arguably, with democratization, recent experience shows that corruption does not always go unpunished (as in the case of the impeachment of Collor de Mello and more recently the investigations into the Samper election campaign funding). But, these public scandals by no means reflect systematic enforcement of the law or judicial scrutiny.

**Infrastructure and Critically Scarce Resources**

The executive and legislature must not be barriers to the allocation, through the budget process, of resources to the judicial sector. Many countries in Latin America provide inadequate budgets to their judiciaries, which impedes the judiciary in its efforts to ensure access to justice by the public. Inadequate budgets perpetuate the dependence of the judiciary, generate corruption among court personnel, and prevent the judiciary from attracting well-qualified judges and support staff. The judiciary must have a separate budget that it controls, manages, and proposes to the legislature.

It is essential to provide the judiciary with an adequate budget so that it can offer competitive salaries to its personnel. On average, salaries remain low compared to other private sector non-profit jobs. For example, in Ecuador and Venezuela, judges' salaries have increased threefold while support staff's salaries have increased 54% (Buscaglia, 1995a). These compensations are still considered low in comparison to lawyers' salaries in non-profit agencies — especially if inflationary pressures are taken into account. The same is true in Argentina, where salary levels in the federal system have increased at a faster pace than the growth in filings in all jurisdictions, but remain low compared to past real salaries in the 1960s (Dakolias, 1994, p. 15).

In addition, court personnel are not sufficiently trained in accounting and financial affairs. Sometime, staffers are lawyers with no specific training in budget management; in other cases, the judges themselves manage the budget. In most countries, there are no centralized administrative court procedures. This generates an immense duplication of effort and prevents judges from concentrating their available time on adjudicative tasks. Additionally, the lack of specialized personnel prevents the judiciary from planning its real budgetary needs. It is not sufficient for the executive to provide a more generous and much needed budget if the judiciary itself cannot prepare a well—reasoned detailed budget proposal each year for approval by the legislature. While the legislature has the ultimate responsibility to approve the final budget, it is essential for the judiciary to define its financial needs based on expected filings, dispositions, and pending cases.

Although some countries in Latin America have proposed allotting a pre-specified amount of the national budget to the judiciary, this is not the answer in all cases. Country-specific procedural requirements and the differences in the popula-
tion's cultural propensity to demand court services make it unwise to assume that allocating a higher fixed proportion of the national budget to the judiciary would necessarily improve the functioning of the judicial system. In fact, countries that do not suffer from delays and corruption and that enjoy a high degree of public satisfaction or confidence in their judiciaries (such as Denmark, Japan, Germany, Netherlands, and Norway) tend to devote less of their governments' budgets to the judiciary than most Latin American countries (such as Argentina, Brazil, and Mexico), which rank in the bottom 20% of public confidence levels (World Economic Forum, 1994, p. 12). More specifically, judicial spending as a percentage of the government budgets in countries with developed judicial system show the following figures: Norway 0.8%; Netherlands 0.4%; Japan 0.5%; Denmark 1.2%; and Germany 0.9% (Buscaglia, 1995a). On the other hand, judicial spending as a proportion of federal government spending in those countries with the heaviest backlogs and longest delays include Venezuela with 1.3%; Peru 2.5%; Ecuador 2.5%; Argentina 3.2%; and Paraguay 6.0%.

In fact, there is no proven significant international correlation between judicial efficiency (measured through backlogs and delays) and size of the government budget allocated to the courts (Buscaglia, 1995a). Figure 1 clearly demonstrates this lack of correlation within Latin America. The average percentage change in the median times to disposition within the commercial and civil jurisdictions is displayed on the vertical axis; the percentage change in spending in personnel is measured horizontally. As we can see, countries with the largest changes in spending are not usually those with the lowest times to disposition. For example, Brazil and Chile are clear examples of this lack of correlation.

This lack of correlation may be explained by the interplay of two factors. First, the allocation of additional resources (personnel and capital) to the judiciary, which represent a semi-fixed cost to society, may initially reduce backlogs and delay due to improvements in court productivity until economic growth and added business activity impose new demands on the courts. A more productive judiciary then attracts citizens and businesses that had been reluctant to use the courts in the days of long delays and high litigation costs. These two factors will tend to increase the average number of filings per court and increase the times to disposition once again. Thus it is difficult to determine the consequences of adding or subtracting resources without a clear forecast of demand for court services and the impact of added economic activity. It is much more sensible to implement a budgetary mechanism where courts can request funds based on projected increases in filings within each subject matter and geographical jurisdiction.
Access to Justice

A fourth factor hampering the state's capacity to reform the judiciary is created by the problem of geographic remoteness, coupled with the public sector's structural incapacity to exert an authoritative and law-abiding presence throughout its national territory and its own courts. This especially affects rural communities, isolated from channels of modernization. In order to foster an effective judiciary, the supply of court services needs to be matched by the demand for court services coming from citizens who are willing to accept the courts' procedures and judges' final decisions. The lack of popular demand for judicial reform observed throughout Latin America can be explained by the fact that, in many cases, courts have become irrelevant as
conflict-resolution mechanisms. For example, peasants in the more remote regions of the Peruvian countryside would need to travel an average of thirty-three miles to reach a courthouse (Buscaglia, 1995a). If we add the problems related to cultural and linguistic barriers, it is clear that recourse to the formal channels of justice is likely to be avoided. Moreover, it is precisely at this remote local level that the rule of law is most frequently undermined by the discretionary practices of local judges and coercion by strongmen often prevails. Under these conditions, rural communities remain marginalized from urban modern life, and remote from the supposed benefits of constitutional democracy and the rule of law. In this kind of environment, potential court users view formal legal mechanisms with great distrust, preferring to avoid them altogether. Linked to the physical lack of access to justice are the problems of cultural and social remoteness — particularly where socio-economic differences are great, or where racial and cultural cleavages remain unresolved. In these cases, formal justice is distrusted and avoided. As a result, formal legal mechanisms coexist with alternative informal mechanisms of justice (sometimes in the form of traditional community customs and laws). For example, in the urban slum areas, such as the favelas in Brazil or villas miseria in Buenos Aires, different forms of community justice emerge, but only very loosely linked to the formal mechanisms of law and order (Carbonetto, Hoyle, and Tueros, 1988, pp. 23-26; De Soto, 1989; de Sousa Santos, 1977; Rivadeneyra Sánchez, 1991). Once again, this indicates the failure of the public sector to provide an equitable system that can assure the rule of law.

Community or traditional forms of justice that operate at this local level exhibit the advantages of speed, cost-effectiveness, and, when they operate among socio-economic equals, equitably. Moreover, because they are rooted in the local traditions and mores, they often provide solutions readily accepted by the conflicting parties. As advantageous as these forms of traditional justice may be, however, their relationship with the formal justice system is complex. First, in the absence of formal recognition of indigenous or traditional forms of social organization, informal mechanisms of justice do not resolve many administrative problems, such as land title disputes. Second, they are often a symptom of the deficiencies of the formal justice system rather than an alternative means of conflict resolution. And finally, the absence of minimally impartial formal justice mechanisms, at least as a last resort, is a root cause of precisely those discretionary and arbitrary practices that allow for impunity and hinder the prospects for democratic the rule of law.

Buscaglia (1995a) provides an account of the unprecedented decrease in the public's use of court services during judicial crises in Argentina, Ecuador, and Venezuela. Surveys conducted in these countries show that courts are not used as conflict resolution mechanisms.

Many scholars give accounts of how the so-called “informal sector” grows in environments where the formal laws and regulations are completely disregarded in everyday life. This social rejection occurs in places where the formal state sponsored rules do not reflect the values and codes of conduct followed by the average citizen. For more details, see De Soto (1989).
The socio-economic barriers to the access to justice are unresolved, even in the most developed of democracies. Imperfect access to information and knowledge of legal rights and procedures, or simply the high direct and indirect cost of access to the courts, are always barriers to the use of the courts. In the context of the harsh realities of Latin American societies, it is even more difficult to envisage a rapid solution to these problems. For example, based on large samples of cases filed in courts of first instance, Buscaglia and Ulen (1995) and Buscaglia (1995a) show that the statistical correlation between family income and the procedural times and costs of litigation in civil and labor courts is significantly negative in Argentina, Ecuador, and Venezuela. This simply means that low income people tend to experience longer delays and higher costs in civil and labor courts than high income people. To this is added a dearth of readily available information about legal procedures, and a limited awareness of rights, when these are being violated, and when there is a justified reason to make a legal claim.

Vested Interests and Institutional Inertia within the Judiciaries

Much effort is devoted to the problem of information diffusion and legal aid by non-governmental organizations. Nevertheless, one key question remains: Why are the very judicial reforms that would eventually benefit most segments of society often resisted and delayed by the judiciary? The answer to this question can explain the institutional inertia observed during the implementation of judicial reforms. Major obstacles to effective legal reform in Latin America stem from vested interests within the justice apparatus, which may be threatened by any profound alteration in the existing system. To a large extent, the successful implementation of any reform depends on the agents ultimately responsible for effective law enforcement. This in tum is a reflection of broader state practices.

It is possible, at least in the short run, to envisage considerable obstruction of judicial reforms at many levels within the judicial hierarchy. The reasons for the opposition may vary considerably, rendering problematic any attempt to clearly define how the opposing interests operate. For example, judges are usually resentful when they are excluded from the legislative process (e.g., when supreme court judges are not active, or at least not even advisory participants in the reform initiatives). Reforms may also imply a loss of discretionary power, an increase in the mechanisms of control, or greater accountability at any level of the justice apparatus that will be

15 Based on information gathered from one hundred filed cases per jurisdiction in each of these countries, it was possible to link the procedural times and costs of litigation observed to socioeconomic variables (Buscaglia, 1995a; Buscaglia and Ulen, 1995).

16 Chile's first attempt to reform the judiciary during the early 1980s clearly shows how the judges' lack of active participation during the legislative proposals led to a complete failure (Correa Sutil, 1992, pp. 15-17).
regarded with considerable distrust by the affected judges, prosecutors, and clerks. Finally, measures establishing merit-based award systems for the first time will be spurned by individuals or groups who benefitted from a more clientelist or political award system. The extent to which internal resistance can “sabotage” judicial reform efforts can be considerable, and may take years of political persistence to be overcome.

There is a widespread perception throughout Latin America that courts are used by government officials as rent-seeking mechanisms. For example, because *ex parte* communication is permitted and common practice in most Latin American countries, judges can spend a good part of the day meeting lawyers and parties separately. Such communication creates incentives for corrupt behavior and lack of accountability within the courts. If the judicial sector and other members of the government use the courts for rent-seeking purposes, then we should not be surprised to find members of the bench and their clerks blocking efficiency—enhancing judicial reforms. In this context, court reforms promoting uniformity, transparency, and accountability within the process of enforcing laws would necessarily diminish the courts’ capacity to extract rents.

Previous studies have argued that the judiciary’s inertia stems from the fact that the expected benefits of reform, such as added economic growth or investment, are long-term in nature and cannot be directly captured by either the reformers or the population in the short term (Buscaglia, 1992a, pp. 23-31). On the other hand, the main costs of reform are short-term in nature and are perceived by judges as causing a decrease in rents (explicit payoffs and other privileges) flowing to their courts. This asymmetry between the short term costs and long term benefits tends to block judicial reform and explains why court reforms that eventually would benefit most segments of society, are often resisted and delayed. Under these circumstances, in order to build a powerful coalition supporting reform, the sequencing of reform must ensure that short-term benefits compensate for the short-term loss of rents suffered by the court officers responsible for implementing the changes. The first reforms to be implemented should allow for short-term benefits to flow into the hands of court officers in order to compensate for the short-term loss in their rent-seeking capacity. In turn, court reform proposals generating longer term benefits to the judiciary need to be implemented in later stages of the reform process.

During a deep crisis of the judicial system, the high costs imposed by court delay, backlogs, and the lack of informal incentives for court officers to provide ser-

17Judicial rent-seeking is basically a redistribution from the private sector to the courts, imposed as either an explicit cost (payoffs or added court fees) or as an implicit or invisible cost (productive opportunities lost). In our case, rent—seeking activities represent simple transfers of wealth from the private sector to the courts. Surveys of court users in Argentina, Brazil, Chile, and Venezuela show that an increasing proportion of litigants was forced to provide “informal incentives” to court officers in order to expedite cases that otherwise would be pending for many additional years (Buscaglia, 1995a).
vices force firms and citizens to reduce their demand for court services. Increasing amounts of rent-seeking activities by the courts also add to the costs of access to justice. Thus, a judicial crisis starts at the point where backlogs, delays, and payoffs increase the costs (implicit or explicit) of accessing the justice system. When the cost becomes high enough, people will restrict their use of the judiciary to the point where the capacity of the courts to extract rents will diminish. At this point, judicial reforms are more likely to be embraced by members of the court in particular, and governments in general, as a way to recover prestige and rent-seeking capacity. During a crisis, court officers and politicians alike tend to lose the capacity to extract rents. Because, the price paid by politicians and court officers for implementing judicial reforms decreases during a crisis, it is then that the judiciary will be more likely to be willing to conduct a deep reform of the courts, as long as the proposals for reform contain sources of short-term benefits, such as an increase in the administrative power of lower courts, judicial independence, and an increase in court resources.

This analytical framework explains why all the Latin American countries advancing judicial reforms, such as Argentina, Chile, Colombia, Costa Rica, Ecuador, and Venezuela, have experienced a deep crisis in which the above characteristics (i.e., sharp decreases across the board in average filings per civil court) occurred first. In these cases, additional short term benefits were necessary in order to guarantee the political support of key magistrates who were willing to consider judicial reform proposals only after a deep crisis diminished their capacity to serve the public. These benefits included generous early retirement packages, promotions for judges and support staff, new buildings, and an expanded budget (Buscaglia, 1995a; Correa Sutil, 1993).

Nevertheless, in order to ensure lasting judicial reform, short term benefits need to be channelled through institutional mechanisms in which the probability of policy reversals is very low. The best institutional scenario—one that makes it difficult to go back to the old state of affairs—is one in which judicial reforms are the by-product of a consensus involving the judiciary and at least one of the other two political branches. Under these conditions, the coalitions necessary for change can exist only if the identity of many of the beneficiaries of judicial reform is known by decision-makers within the judiciary, executive, and legislative branches before the implementation phase. Additionally, the political leverage of those who expect to gain

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18 A deep crisis is characterized by symptoms ranging from unprecedented backlog to unsustainable time delays. This situation reduces the demand for court services (Buscaglia, 1995a).
19 Empirical observations confirm that as backlogs and delays increase, the filings per court tend to decrease (Buscaglia, 1995a).
20 For an account of individual country experiences, see Buscaglia (1995a).
21 During a two-year reform period, Chile and Venezuela experienced a 56 and 75% increase, respectively, in real spending devoted to their judiciaries (Buscaglia, 1995a).
needs to counteract the activities of the rent-losers who are still depending on the fruits of rent seeking.\textsuperscript{22}

Here we have concentrated on the impediments to judicial reform that can be identified within the judicial structures themselves. The kind of vested interests which persist at this level, however, are a reflection of broader structural factors which characterize state internal politics and practices. Rent-seeking behavior, and practices based on discretionary clientelism and arbitrary circumvention of the law, are embedded in the habits and culture of the political elites and domestic economic interest groups of much of Latin America. Improved judicial scrutiny and more open conditions of accountability and transparency were not high on the list of political priorities of either the political elites, or of economic groups who benefitted from corruption. Economic instability and acute political crisis may be the founding blocks for creating a political will to pursue the establishment of the rule of law and improved legal institutions. Without this political will and a more sincere commitment to promote rule of law within the echelons of political power in the new democratic settings, the impact of attempted legal reforms may be severely undermined.\textsuperscript{23}

\textsuperscript{22} This assumes that judicial reform also creates losers, no matter how large the net gains may be.

\textsuperscript{23} Marvin E. Frankel (1993) stresses the idea that judges do not lead political processes without the support of the political elites or society.
Conclusion

To sum up, two counteracting forces explain why Latin American governments failed to provide a judicial sector that is able to strengthen democratic institutions and a market economy. On the one hand, efficiency-enhancing institutional change may partially explain the institutional transformation achieved by some recent judicial reforms. On the other hand, factors related to the rent-seeking capacity of the state help to account for the observed inertia or lack of institutional transformation. In short, the nature of the relationship between a society, its legal rules, and its judicial sector can be explained in terms of political activities and economic efficiency arguments. These two influences can also contribute to the understanding of the legal and judicial development of a nation.

A more efficient public court system coupled with available alternative dispute resolution mechanisms provided by the private sector can foster the much needed balance between equity and efficiency in the provision of justice. This balance is currently not found throughout Latin America. In fact, there is a general lack of access to the courts by low income sections of the population. These barriers are due to delays, backlogs, and generalized court corruption. Only a judicial reform program addressing the elements discussed in this chapter will be able to reduce these barriers and therefore contribute to the stabilization of democracy in Latin America.

24 These considerations are crucial in order to understand the failure of many pro-market reforms (Buscaglia, 1992b; 1995b).
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