

Judicial Reform in Latin America and the Caribbean

Judicial Reform in Latin America and the Caribbean

Proceedings of a World Bank Conference

Edited By Malcolm Rowat, Waleed H. Malik, and Maria Dakolias

World Bank Technical Paper Number 280break

The World Bank
Washington, D.C.

RECENT WORLD BANK TECHNICAL PAPERS

- No. 204 Barghouti, Cromwell, and Pritchard, editors, *Agricultural Technologies for Market-Led Development Opportunities in the 1990 s*
- No. 205 Xie, Küffner, and Le Moigne, *Using Water Efficiently: Technological Options*
- No. 206 The World Bank/FAO/UNIDO/Industry Fertilizer Working Group, *World and Regional Supply and Demand Balances for Nitrogen, Phosphate, and Potash, 1991/92-1997/98*
- No. 207 Narayan, *Participatory Evaluation: Tools for Managing Change in Water and Sanitation*
- No. 208 Bindlish and Evenson, *Evaluation of the Performance of T&V Extension in Kenya*
- No. 209 Keith, *Property Tax: A Practical Manual for Anglophone Africa*
- No. 210 Bradley and McNamara, editors, *Living with Trees: Policies for Forestry Management in Zimbabwe*
- No. 211 Wiebers, *Integrated Pest Management and Pesticide Regulation in Developing Asia*
- No. 212 Frederiksen, Berkoff, and Barber, *Water Resources Management in Asia, Volume I: Main Report*
- No. 213 Srivastava and Jaffee, *Best Practices for Moving Seed Technology: New Approaches to Doing Business*
- No. 214 Bonfiglioli, *Agro-pastoralism in Chad as a Strategy for Survival: An Essay on the Relationship between Anthropology and Statistics*
- No. 215 Umali, *Irrigation-Induced Salinity: A Growing Problem for Development and the Environment*
- No. 216 Carr, *Improving Cash Crops in Africa: Factors Influencing the Productivity of Cotton, Coffee, and Tea Grown by Smallholders*
- No. 217 Antholt, *Getting Ready for the Twenty-First Century: Technical Change and Institutional Modernization in Agriculture*
- No. 218 Mohan, editor, *Bibliography of Publications: Technical Department, Africa Region, July 1987 to December 1992*

Judicial Reform in Latin America and the Caribbean

- No. 219 Cercone, *Alcohol-Related Problems as an Obstacle to the Development of Human Capital: Issues and Policy Options*
- No. 220 Kingsley, Ferguson, Bower, and Dice, *Managing Urban Environmental Quality in Asia*
- No. 221 Srivastava, Tamboli, English, Lal, and Stewart, *Conserving Soil Moisture and Fertility in the Warm Seasonally Dry Tropics*
- No. 222 Selvaratnam, *Innovations in Higher Education: Singapore at the Competitive Edge*
- No. 223 Piotrow, Treiman, Rimón, Yun, and Lozare, *Strategies for Family Planning Promotion*
- No. 224 Midgley, *Urban Transport in Asia: An Operational Agenda for the 1990s*
- No. 225 Dia, *A Governance Approach to Civil Service Reform in Sub-Saharan Africa*
- No. 226 Bindlish, Evenson, and Gbetibouo, *Evaluation of T&V-Based Extension in Burkina Faso*
- No. 227 Cook, editor, *Involuntary Resettlement in Africa: Selected Papers from a Conference on Environment and Settlement Issues in Africa*
- No. 228 Webster and Charap, *The Emergence of Private Sector Manufacturing in St. Petersburg: A Survey of Firms*
- No. 229 Webster, *The Emergence of Private Sector Manufacturing in Hungary: A Survey of Firms*
- No. 230 Webster and Swanson, *The Emergence of Private Sector Manufacturing in the Former Czech and Slovak Federal Republic: A Survey of Firms*
- No. 231 Eisa, Barghouti, Gillham, and Al-Saffy, *Cotton Production Prospects for the Decade to 2005: A Global Overview*
- No. 232 Creightney, *Transport and Economic Performance: A Survey of Developing Countries*
- No. 233 Frederiksen, Berkoff, and Barber, *Principles and Practices for Dealing with Water Resources Issues*
- No. 234 Archondo-Callao and Faiz, *Estimating Vehicle Operating Costs*
- No. 235 Claessens, *Risk Management in Developing Countries*
- No. 236 Bennett and Goldberg, *Providing Enterprise Development and Financial Services to Women: A Decade of Bank Experience in Asia*
- No. 237 Webster, *The Emergence of Private Sector Manufacturing in Poland: A Survey of Firms*
- No. 238 Heath, *Land Rights in Côte d'Ivoire: Survey and Prospects for Project Intervention*
- No. 239 Kirmani and Rangeley, *International Inland Waters: Concepts for a More Active World Bank Role*
- No. 240 Ahmed, *Renewable Energy Technologies: A Review of the Status and Costs*

Judicial Reform in Latin America and the Caribbean

of Selected Technologies

No. 241 Webster, *Newly Privatized Russian Enterprises*

(List continues on the inside back cover)

Copyright © 1995

The International Bank for Reconstruction
and Development/THE WORLD BANK
1818 H Street, N.W.
Washington, D.C. 20433, U.S.A.

All rights reserved

Manufactured in the United States of America

First printing August 1995

Technical Papers are published to communicate the results of the Bank's work to the development community with the least possible delay. The typescript of this paper therefore has not been prepared in accordance with the procedures appropriate to formal printed texts, and the World Bank accepts no responsibility for errors. Some sources cited in this paper may be informal documents that are not readily available.

The findings, interpretations, and conclusions expressed in this paper are entirely those of the author(s) and should not be attributed in any manner to the World Bank, to its affiliated organizations, or to members of its Board of Executive Directors or the countries they represent. The World Bank does not guarantee the accuracy of the data included in this publication and accepts no responsibility whatsoever for any consequence of their use. The boundaries, colors, denominations, and other information shown on any map in this volume do not imply on the part of the World Bank Group any judgment on the legal status of any territory or the endorsement or acceptance of such boundaries.

The material in this publication is copyrighted. Requests for permission to reproduce portions of it should be sent to the Office of the Publisher at the address shown in the copyright notice above. The World Bank encourages dissemination of its work and will normally give permission promptly and, when the reproduction is for noncommercial purposes, without asking a fee. Permission to copy portions for classroom use is granted through the Copyright Clearance Center, Inc., Suite 910, 222 Rosewood Drive, Danvers, Massachusetts 01923, U.S.A.

The complete backlist of publications from the World Bank is shown in the annual *Index of Publications*, which contains an alphabetical title list (with full ordering information) and indexes of subjects, authors, and countries and regions. The latest edition is available free of charge from the Distribution Unit, Office of the Publisher, The World Bank, 1818 H Street, N.W., Washington, D.C. 20433, U.S.A., or from Publications, The World Bank, 66, avenue d'Iéna, 75116 Paris, France.

ISSN: 0253-7494

Cover design by Tomoko Hirata.

Malcolm Rowat is Chief of the Public Sector Modernization Unit of the Technical Department in the Latin America and the Caribbean Region. Waleed Haider Malik is sector specialist in the Public Sector Modernization and Private Sector Development Division, Country Department II. Maria Dakolias is sector specialist in the same division, Country Department I.

Library of Congress Cataloging-in-Publication Data

Judicial reform in Latin America and the Caribbean: Proceedings of a World Bank Conference / edited by Malcom Rowat, Waleed Haider Malik, and Maria Dakolias..

p. cm.—(World Bank technical paper, ISSN 0253-7494; no. 280)

ISBN 0-8213-3206-6

1. Law reform—Latin America. 2. Law reform—Caribbean Area.

3. Law and economic development. I. Rowat, Malcolm, 1945 .

II. Malik, Waleed Haider, 1957 . III. Dakolias, Maria, 1965 .

IV. Series.

KG96.J83 1995

340.3'09729—dc20

95-6392

CIPbreak

CONTENTS

Foreword [link](#)

Sri-Ram Aiyer

Preface [link](#)

Malcolm Rowat

Abstract [link](#)

Contributors and Participants [link](#)

Overview [link](#)

Waleed H. Malik

Part I [link](#)

Opening Remarks

1 [link](#)

Economic Development and Judicial Reform

Shahid Javed Burki

2 [link](#)

Legal Framework for Development: The World Bank's Role in
Legal and Judicial Reform

Ibrahim F. I. Shihata

3 [link](#)

Judicial Reform in Latin America and the Caribbean: Operational
Implications for the Bank

Malcolm Rowat

Part II	link
Economic Costs and Benefits of Judicial Reform	
4	link
Legal Systems and Economic Performance: The Empirical Evidence	
Beatrice Weder	
5	link
Tort Liability and Economic Performance: Research Challenges	
Steven Garber	
Part III	link
Procedural Reform	
6	link
Unification of Procedural Law in Judicial Reform	
Marcel Leon Storme	
7	link
Legal Reform in Uruguay: General Code of Procedure	
Enrique Tarigo	
Part IV	link
Administration of the Courts	
8	link
Governance and Administration of the Courts in Latin America	
Robert W. Page, Jr.	
9	link
Court Organization and Court Reform Experiences in Latin America	
Jesse Casaus	
Part V	link
Alternative Dispute Resolution Mechanisms and Access to Justice	
10	link
Alternative Dispute Resolution Mechanisms: Experience in the United States	
Whitmore Gray	
11	link
Alternative Dispute Resolution Mechanisms: Lessons of the Argentine Experience	

Gladys Stella Alvarez

12

Access to Justice

[link](#)

Bryant G. Garth

13

The Justice of the Peace As an Alternative: Experiences with Conciliation in Peru

[link](#)

Hans-Jürgen Brandt

Part VI

The Legal Profession, Judicial Training, and Legal Education

[link](#)

14

The Role of Bar Associations in Judicial Reform

[link](#)

Pedro J. Mantellini González

15

Training Programs for Judges

[link](#)

Rogelio Pérez Perdomo

16

Legal Education in Changing Societies

[link](#)

Neil Gold

Part VII

Judicial Reform in Industrialized Countries

[link](#)

17

Judicial Reform in Singapore: Reducing Backlogs and Court Delays

[link](#)

Ng Peng Hong

18

Reform of the Civil Code, the Legal Aid System, and Technology in the Administration of Justice in Québec

[link](#)

Yvon Mercier

19

Judicial Reform in the United States: Fairfax Circuit Court's Case Tracking System

[link](#)

Richard J. Jamborsky

20

Judicial Reform in the Basque Provinces of Spain

[link](#)

Mikel Elorza Urbina

21

Strategic Planning within the Justice System in the United Kingdom: Organizational Theory

[link](#)

Peter Graham Harris

Part VIII

Judicial Reform in Latin America and the Caribbean

[link](#)

22

Judicial Reform in Venezuela

[link](#)

Pedro Miguel Reyes

23

Judicial Reform in Jamaica

[link](#)

Edward Zacca

24

Judicial Reform in Brazil

[link](#)

José Renato Nalini

25

Judicial Reform in Argentina

[link](#)

Elena Highton with Elías Jassan

26

Judicial Reform in Peru

[link](#)

Fernando Vega Santa Gadea

27

Judicial Reform in Ecuador

[link](#)

Jaime Espinoza Ramírez with Esteban Moreno

28

Modernization of Judicial Systems in Developing Countries: The Case of Chile

[link](#)

Luis Manriquez Reyes

29

Improving the Administration of Justice in Costa Rica

[link](#)

Hernando París Rodríguez

30

Judicial Reform in Bolivia

[link](#)

Guillermo Arancibia López

Part IX [link](#)
Closing Remarks

31 [link](#)
The Role of the Judicial Reform Conference in Dissemination

Sri-Ram Aiyer

Part X [link](#)
Background Paper

32 [link](#)
Judicial Reform in Developing Countries and the Role of the
World Bank

Ibrahim F. I. Shihata

FORWARD

The Latin America and the Caribbean region is emerging from a period of major change and adjustment. In the aftermath of the debt crisis and recent changes in the external environment, there has been a profound rethinking of the role of the state and the current mode of development—creating both opportunities and risks. Central to any future model for development will be a greater reliance on markets and the private sector, with the state acting as an important facilitator and regulator of private sector activity and development. Public institutions in the region are too weak to respond satisfactorily to these development challenges, however. To support and encourage sustainable and equitable development, Latin American and Caribbean governments are striving to achieve better institutions, characterized by greater efficiency and functional autonomy and improved service provision. This, in turn, requires a major reform effort focused on such areas as public sector management, transparency, and accountability, the building of a legal framework for development, and enforcement of the rule of law.

The judiciary is responsible for delivering equitable, expeditious, and transparent judicial services to citizens, economic agents, and the state. An effective judiciary—capable of enforcing the rule of law—should be strong and independent, consistent in the high quality of its operations, adequate in size, and efficient. It must foster an enabling legal and judicial environment that is conducive to trade, financing, and investment. Judicial reform—improvement in the quality and efficiency of the administration of justice—typically involves: rationalizing laws and procedures, improving administration of the courts, enhancing the caliber of legal education and training and of the legal profession generally, strengthening the independence of judges and the impact of judicial rulings on society, providing alternative dispute resolution mechanisms, balancing the economic costs of justice, and expanding access to justice for the poor. Administration of justice is essentially a service delivered by the state to the community in order to preserve social peace and facilitate economic development through the resolution of disputes.

In Latin America and the Caribbean indicators of inefficient and ineffective administration of justice include lengthy case delays, extensive backlogs of cases, limited access to justice, a lack of transparency and predictability in court decisions, and weak public confidence in the judicial system. Poor judicial sector performance is the product of many deficiencies, including:

Archaic and cumbersome laws and procedures.

A lack of independence of the judiciary.

Inadequate administrative capacity of the courts.

Deficient case management.

A shortage of judges and other resources.

Noncompetitive personnel policies and practices.

Expenditure control systems that lack transparency.

Inadequate legal education and training.

Weak sanctions for unethical behavior.

A system of court fees that raises cost of access.

A lack of alternative dispute resolution mechanisms.

The World Bank's interest in judicial reform stems from its concern about the sustainability of the development efforts it supports in borrowing countries. Many of the programs the Bank and other development institutions and governments finance are at risk because of the lack of enforcement of the rule of law, a basic principle for sustainable social and economic development.

The conference volume will provide an overview of judicial sector problems and strategies for solving them. It will also serve as a reference on the state of the art of administration of justice in Latin America and the Caribbean and other regions. I hope that this report will help governments, practitioners, researchers, and World Bank staff in their development of future judicial reform programs.

SRI-RAM AIYER
DIRECTOR, TECHNICAL DEPARTMENT, LATDR

PREFACE

The Public Sector Modernization Unit (LATPS) in the Technical Department of the Latin America and the Caribbean Region organized a conference on Judicial Reform in Latin America and the Caribbean, which was held in Washington, D.C., on June 13-14, 1994. This regionwide conference was intended to promote the exchange of ideas among researchers, practitioners, and government officials who are working in the area of judicial reform.

The conference generated tremendous interest. Participants included representatives from twenty-one countries, including Argentina, Belgium, Belize, Bolivia, Brazil, Canada, Chile, Costa Rica, Ecuador, Germany, Guyana, Jamaica, Peru, Singapore, Spain, St. Vincent, Trinidad and Tobago, the United Kingdom, the United States, Uruguay, and Venezuela; several nongovernmental organizations, including the Tinker Foundation, the Center for Court Excellence, and the Center for Public Resources, in the United States, the Centro-Latinoamericano del Desarrollo, in Ecuador, and the Konrad-Adenauer-Stiftung, a German NGO with operations in Venezuela; and members of the international development community, including the United Nations Development Program, the Inter-American Development Bank, the International Monetary Fund, the U.S. Agency for International

Development, and more than fifty Bank staff.

The judicial reform conference addressed the need to identify effective strategies for improving the administration of justice in Latin America and the Caribbean by providing swift and fair resolution of disputes and by reducing the delays that plague many judicial systems. The conference focused on the following themes, with particular emphasis on civil and commercial judicial reforms related to private sector development: judicial reform and its role in economic development, the economic costs and benefits of judicial reform, procedural reforms, administration of the courts, alternative dispute resolution mechanisms, access to justice, the legal profession, and judicial training and legal education. The conference also presented some judicial reform experiences of select industrialized and developing countries. The conference format allowed each theme to be explored at some length, first by the speakers themselves, then through open floor discussions.

The conference successfully demonstrated that these types of seminars can be an effective means of promoting the exchange of ideas about reform. To complement the conference, this report of the proceedings has been prepared. It is hoped that this volume, which reports the judicial reform experiences of more than twenty countries both in Latin America and the Caribbean and in the industrialized world, will help judiciaries identify effective strategies for improving their administration of justice. Such efforts, in turn, should work to the benefit of law schools, lawyers, and bar associations; government officials, policymakers, and legislators; international development agencies; and nongovernmental organizations working for the modernization of states.

MALCOLM ROWAT
CHIEF, LATPS

ABSTRACT

The papers in this volume were presented at the World Bank Conference on Judicial Reform in Latin America and the Caribbean (LAC), held on June 13-14, 1994, in Washington, D.C. This conference, part of a series organized by the LAC Technical Department Public Sector Modernization Division, was intended to promote an exchange of views among researchers, practitioners, and government officials in the area of judicial reform.

Sustainable development is predicated on a judiciary that can enforce the rule of law and foster a legal and judicial environment that encourages trade, financing, and investment. The resolution of disputes must be swift and fair. Yet the judicial systems in Latin America and the Caribbean are plagued by case delays and backlogs. Court decisions are neither transparent nor predictable, and public confidence in the judicial system is weak.

The judicial reform conference identified strategies for improving the administration of justice, with a focus on these themes:

Judicial reform and its role in economic development.

The economic costs and benefits of judicial reform.

Procedural reforms.

Administration of the courts.

Alternative dispute resolution mechanisms.

Access to justice.

The legal profession.

Judicial training and legal education.

This report of the conference proceedings discusses the judicial reform efforts of more than twenty countries in both Latin America and the Caribbean and the industrialized world. It is hoped that this volume will help judiciaries in their efforts to improve their administration of justice.

CONTRIBUTORS AND PARTICIPANTS

Contributors

Sri–Ram Aiyer

The World Bank, United States

Gladys Stella Alvarez

Judge, Argentina

Guillermo Arancibia López

Minister of the Supreme Court, Bolivia

Hans–Jürgen Brandt

Carl Duisberg Gesellschaft, Germany

Shahid Javed Burki

The World Bank, United States

Jesse Casaus

Consultant, United States

Maria Dakolias

The World Bank, United States

Mikel Elorza Urbina

Vice Minister of Justice, Basque Provinces, Spain

Jaime Espinoza Ramírez

Ministro Corte Suprema, Ecuador

Steven Garber

RAND, United States

Bryant G. Garth

American Bar Foundation, United States

Neil Gold

University of Windsor, Canada

Whitmore Gray

Professor of Law, Emeritus, University of Michigan, United States

Peter Graham Harris

Lord Chancellor's Department for the Court Service, United Kingdom

Elena Highton

Judge, Argentina

Ng Peng Hong

Deputy Registrar, Supreme Court, Singapore

Richard J. Jamborsky

Chief Judge, Fairfax Circuit Court, United States

Eliás Jassan

Secretary of the Ministry of Justice, Argentina

Waleed Haider Malik

The World Bank, United States

Luis Manriquez Reyes

Director, Corporación Administrativa del Poder Judicial, Chile

Pedro J. Mantellini Gonzáles

Former Attorney General, Venezuela

Yvon Mercier

Associate Chief Justice, Court of Québec, Canada

Eduardo Moane

Ministry of Justice, Peru

José Renato Nalini

Escola de Magistratura Tribunal de Justico do São Paulo, Brazil

Robert W. Page, Jr.

Consultant, United States

Hernando París Rodriguez

Supreme Court, Costa Rica

Rogelio Pérez Perdomo

ONATI, Spain

Pedro Miguel Reyes

Magistrado Consejo de la Judicatura, Venezuela

Malcolm Rowat

The World Bank, United States

Fernando Vega Santa Gadea

Ministry of Justice, Peru

Ibrahim E. I. Shihata

The World Bank, United States

Marcel Storme

Storme, Leroy, Van Parys, Belgium

Enrique Tarigo

Montevideo, Uruguay

Beatrice Weder

International Monetary Fund, United States

Edward Zacca

Chief Justice of the Supreme Court, Jamaica

Participants

Inter-American Development Bank

Fred Aarons

Christina Bibeshiemer

Carlos Cordovez

Nestor Humberto Martinez

Paul Mungra

Eduardo Caro Muñoz

Stefano Tinari

United Nations Development Program

Seyril Segal

Resident Representative, Venezuela

U.S. Department of State and Agency for International Development

Fay Armstrong

Christos Baer

Deborah McFarland

Carl Serra

The World Bank

Ladipo Adamolekun

Mario Aguilar

Kulsum Ahmed

Carlos Bertao

Anita Bhatia

Edgardo Buscaglia

Marcela Cartagena

Krishna Challa

Jose Collell

Gerardo Corrochano

Alberto de Capitani

Donna Dowsett–Coirollo

Teresa Genta–Fons

Nancy Goodman

Gloria Grandolini

Akhtar Hamid

Tariq Hassan

Omar Hayat

Ana Pereda Hernandez

Akbar Khawaja

Paul Knotter

Roberto Laver

Michael Lubrano

Roberto MacLean

L. Mapoly–Kamulayi

The World Bank

Caroline Mascarell

Isabel Mignone

Richard Moore

Roberto Panzardi

Chris Parel

Rita Parrilli

Rosa Puech

Luis Alvaro Sanchezbreak

Geoffrey Shepherd

Kiran G. B. Singh

Mike Stevens

Alain Tobelem.

Carlos Trabucco

Douglas Webb

Other Participants and Observers Included:

Néstor Luis Alvarez

Director, Ministry of Justice, Venezuela

Lolita Anillar de Castro

Gobernadora de Estado Zulia, Venezuela

Luis Bates

Catholic University, Chile

Clinton Bernard

Chief Justice of the Supreme Court, Trinidad and Tobago

Antonio Carlos Alves Braga, D. D.

D. D. Corregedor Geral da Justiça, São Paulo, Brazil

Graeme Brister

Linklaters & Paines, United Kingdom

George Brown

Chief Justice of the Supreme Court, Belize

Other Participants and Observers Included:

Christian Burgazzi

Director, Hay Group, Venezuela

Fernando Carrillo

Former Minister of Justice, Colombia

Linda Caviness

Executive Director, National Center for State Courts (NCSC), United States

Enrique Alié Coll

Director General, SEINTEX, Spain

Jose Roman Duque Corredor

Presidente del Colegio de Abogados de Caracas, Venezuela

Robert Cote

Ministry of International Affairs, Québec, Canada

Philippa Cottle

Linklaters & Paines, United States

Ruben Craixems

Minister of Justice, Venezuela

Sergio Del Solar

Corporación Administrativa del Poder Judicial, Chile

Valeria Merino Dirani

Directora Ejecutiva, Centro Latinoamericano del Desarrollo, Ecuador

Graciela B. Frecia

Embassy of Argentina, United States

Gualberto Davalos Garcia

Supreme Court, Bolivia

Steve Griner

Democracy Unit, Organization of American States

Samuel E Harahan

Executive Director, Council for Court Excellence, United States

Oscar Hassenteufel

Supreme Court, Bolivia

Kathy L. Mays

Supreme Court of Virginia, United States

Kay McClanahay

National Order of Women Legislators, United States

Alberto Mestas
CONAPRI, Venezuela

Shirley Miller
Director, Legal Reform Department, Jamaica

Jose Manuel Mira
Director, FOCOEX, Spain

Grant Nelson
Fairfax Circuit Court, United States

Lillian Pubillones Nolan
National Endowment for Democracy, United States

Jose Maria Perez
Quito, Ecuador

Elizabeth Plapinger
Director, CPR Judicial Project, United States

Horst Schonbohm
Konrad–Adenauer–Stiftung, Venezuela

Robert Sherwood
Consultant, United States

Michael Shifter
Inter–American Dialogue, United States

Isabella Shillingford
St. Lucia

Mario Terzano
Ministry of Justice, Argentina

Iris Troconiz de Aleman
Director, Consejo de la Judicatura, Venezuela

Nancy Truit
Tinker Foundation, United States

Jennifer Tufts
EEC Office, United States

Carlos Mario Velloso
Supremo Tribunal Federal, Brazil

Bruce Zagaris
United States

Other Participants and Observers Included:

Special thanks are due for assistance in organizing the conference and with publication of the proceedings: Ibrahim E. I. Shihata, Sri–Ram Aiyer, Robert Lacey, Jose Collell, Alberto de Capitani, Edmond Benedetti, Douglas Webb, Anthony Ody, Krishna Challa, Roberto MacLean, Roberto Laver, Harald Fuhr, Rosa Puech, Rita Parrilli, Geoffrey Shepherd, Felipe Saez, Nancy Goodman, Bruce Carlson, Tim Campbell, Fresia Betancourt, Cora Pownell, Shirley Matzen, Kwai Wai, L. K. Arora, Nancy VanDycke, Edgardo Buscaglia, Ana Pereda, and Lisette Price. Thanks are also due to George Lambiris, Sarah Freedhiem Newman, Ruth Wade, and Barbara Baschieri for research support and other contributions.

We wish to also acknowledge Emilia Arriola, Teresalina Marfori, Ana Maria Wackenfeld, Ana Beatriz Iraheta, Dalila Bonilla, Analia Rodriguez, Peter Loach, Jorge Serraino, Karen Ravenelle, Gilma Unda, Michele Iannacci, Jessica Yunis, Donna Clark, Alfonso Schneider, Denise Burgess, Martine Wauters, Beatrice Putnam, Elizabeth Dvorscak, and Tomoko Hirata for organizational and logistical support with the conference and proceedings volume; Donna Brodsky, Meta de Coquereaumont, Paul Holtz, Beth Sherman, Katrina Van Duyn, and Ilyse Zable for editorial contributions; Julie Harris and Heather Imboden for publication support; Jonathan Cavanaugh, Paul Hume, Rafael Flores, Walter Betbeder, and Joseph Rio for translations; and Mary Hack and Deirdre Murphy of the World Bank Publications Department.

OVERVIEW

Waleed Haider Malik

The papers collected in this volume were presented at the World Bank Conference on Judicial Reform in Latin America and the Caribbean, held on June 13–14, 1994, in Washington, D.C. This regionwide conference was intended to promote the flow of ideas among researchers and practitioners in the judicial sector in Latin America and the Caribbean.

Economic Development and the Role of Judicial Reform

In his opening keynote remarks, Mr. Shahid Javed Burki, Vice President of the World Bank's Latin America and the Caribbean Region, discusses the fundamental changes that have taken place in Latin America and the Caribbean during the past few years and the need for a new development strategy in which public institutions, including judiciaries, play an important role. Mr. Burki provides the historical context as he points out that the region is emerging from a period of major change—following the region's debt crisis in the 1980s—and is entering a post adjustment era in which the ground rules for development have changed. He explains that the interventionist state, which was promoted in the past as a way of obtaining rapid economic development, is now recognized as weak in terms of fulfilling its basic function—providing good governance.

Mr. Burki points out that in many countries in Latin America and the Caribbean the public institutions are in crisis and are unable to respond to the most pressing development challenges: pervasive poverty, scarce human resources, weak financial markets, inadequate judicial services, environmental degradation, and inadequate basic infrastructure, including health services. He explains that the region's antiquated public institutions must also respond to changes in the external environment, such as the new GATT/WTO agreement, the implications of NAFTA, the integration of world capital markets, and the shortage of concessionary donor assistance. He stresses that the challenge for these countries is to confront today's realities with a new development strategy that is based on an orientation to the market and on openness, with heavy reliance on the private sector.

Mr. Burki cites John Maynard Keynes as he underscores the importance of the state in the new development strategy, for example, in its role as a facilitator and arbiter of private sector development. He explains that many senior leaders recognize that the provision of a legal framework for development is a central role that only the

state can fulfill. In particular, judicial reform directed at effective implementation of the law is of central importance in reforming the role of the state and implementing development strategies. He stresses that as countries improve governance, expand the role of the private sector, and create stable economic and political environments, judicial reform will be an essential complement.

Currently, judicial institutions in the region are experiencing problems—including administrative inefficiencies, lack of resources, and growing case backlogs and delays—that make them unprepared to provide services needed to promote investment, financing, and trade. Mr. Burki declares that the Bank is prepared to provide technical assistance to address these problems. He confirms that Latin American and Caribbean countries, informed by local and international experience, are developing judicial reform agendas that include a wide range of measures: strengthening the independence of the judiciary, simplifying and updating legal procedures and laws, improving administration of the courts, providing alternative mechanisms for dispute resolution, expanding access to justice, improving legal education and training, improving the

quality of the legal profession, and building user confidence. But he stresses that two issues cut across these disparate reform elements: the long-term commitment of all stakeholders and an adequate incentive system for legal personnel, including the judiciary—without these, judicial sector reform cannot be expected to succeed.

In his keynote address, Mr. Ibrahim E. I. Shihata, Senior Vice President and General Counsel of the World Bank's Legal Department, and Secretary General, International Center for Settlement of Investment Disputes, highlights the importance and relevance of the law and the judiciary for sustainable economic and social development and notes how the role of the Bank has evolved in this area of Bank assistance. Mr. Shihata explains that although the quintessential role of law in development is not new, it has taken the world a long time to recognize it. In fact, it has taken failures of governance in Africa, the collapse of dictatorships in Latin America, and profound transformations in Central and Eastern Europe to manifest that without a sound legal framework, without an independent and honest judiciary, economic and social development risk collapse. He stresses, furthermore, that the rule of law is a precondition for private sector development. Since it creates certainty and predictability, clarifies and protects property rights, and enforces contractual obligations, it leads to lower transaction costs, greater access to capital, and the establishment of level playing fields.

Mr. Shihata asserts that an understanding of these effects has helped the Bank and other development institutions to focus on conditions for judicial reform that are neither economic nor financial, but rather are related to good governance. Of particular importance in good governance are establishing an appropriate legal and regulatory framework and developing competent and honest civil service and judicial institutions. Mr. Shihata explains that the legal framework of a borrowing country is one of the areas of governance that the Bank can address as part of its mandate under the Articles of Agreement. Using a broad definition of the rule of law, he defines an appropriate legal framework for development as consisting of a clear set of rules, practical processes through which these rules are applied, and capable institutions that efficiently and equitably apply and enforce the rules. He stresses, however, that the Bank's readiness to assist in legal and judicial reform operations, and its broader involvement in these areas since 1990, are limited—the Bank does not, for instance, become involved in political reform. Mr. Shihata then discusses the Bank's involvement with legal and judicial reform issues in its capacity as a development financier and enumerates the several instruments it can employ to address the needs of member countries, including legal studies carried out by the Bank, the provision of grant funds to governments to undertake diagnosis of legal institutions, and loans for judicial sector investments.

Mr. Shihata emphasizes that the main challenges in any legal and judicial reform program in a developing country are how to increase the efficiency of the courts and how to eliminate or reduce corruption. To deal with these challenges, Mr. Shihata suggests, reform programs should be tailored to suit the local legal context. In this regard, he shares some lessons of the Bank's experience in legal and judicial reform. First, ownership is a condition of success in any field but it is particularly relevant in legal reform, which goes to the core of the social fabric of a

country. Second, reform priorities should be set by the countries themselves; the Bank should provide comparative perspective and play a supporting role. Third, the maintenance of close coordination among development institutions and agencies involved in reform programs is essential for the success of the reform process. And finally, a participatory process involving the different stakeholders—judges, judicial staff, lawyers, and the like—is crucial in ensuring the continuity of reform.

In his keynote address, Mr. Malcolm Rowat, Chief of the World Bank's Public Sector Modernization Unit in the Technical Department of the Latin America and the Caribbean Region, outlines various key elements of judicial reform and their operational implications in Latin American countries. Mr. Rowat points out that judicial obstacles to private sector development in the region include administrative inefficiency and delays, corruption, and a lack of transparency and predictability in court decisions. He suggests that reform strategies should be formulated to address the following issues: sector and court administration; training for judges and staff, standards and requirements for their appointment as well as conditions for their removal, and overall salary incentives; legal education, including entrance requirements for law school, curriculum content, ethics, the registration of lawyers in practice, continuing education for lawyers, and the legal education of the general public; judicial independence and separation of powers among the various arms of government; legal aid programs and the use of public defenders; court fees and charges; access to justice of the poor and indigenous populations; procedural codes and other legal norms, such as oral testimony; and alternative dispute resolution mechanisms. Mr. Rowat also calls attention to various judicial sector activities in progress, including, in Venezuela, a project to strengthen the judiciary's institutional capacity to plan and undertake judicial reform, develop a judicial school for training judges, counsels, and staff, reorganize courts and modernize case management, and upgrade physical facilities; and, incontinue

Argentina, a grant to carry out a full diagnosis of the judicial system. He also points out that some other countries in the region are approaching the Bank for assistance in improving the performance of their judicial sector.

Economic Costs of a Badly Functioning Judicial System

Respect for and observance of the rule of law is the basic, essential foundation on which a sound economy may be built. The ability to enforce laws and procedures, in turn, is critical for private sector-led development. Surprisingly little research has been conducted on the economic costs of a badly working legal system. The evidence is mostly anecdotal or in the form of case studies. Addressing this issue head-on, Dr. Beatrice Weder argues that even though past studies have faded to explain economic performance with political or legal variables, a weak legal system has distinct implications for economic performance. In reviewing past research projects, she emphasizes that none captured the economically relevant characteristics of a political system. Dr. Weder then elaborates on an empirical research project that she conducted with colleagues aimed at identifying the features of a legal system relevant to economic performance. She presents the findings of this study and states that judicial credibility (or the degree to which private individuals expect to be subject to vague and equivocal rules and procedures in the judiciary) is of significance in up to a quarter of the variations in per capita income among developing countries. She also contends that an arbitrary judiciary affects overall political predictability in a country, which, in turn, is costly for economic performance. Dr. Weder also emphasizes the need for more research and data to strengthen the empirical evidence.

Using an elaborate conceptual framework, Dr. Steven Garber presents the active debate in the United States concerning the costs and benefits of the civil justice system in general and the tort liability system in particular. Dr. Garber explains that a liability system—such as that for product liability, medical malpractice, or liability for automobile accidents—has two important social goals: encouraging people to be more careful while engaging in activities that can cause injuries (that is, deterrence) and compensating those that have been injured. These goals should be borne in mind in policy development. Dr. Garber also maintains that the economic effects of tort liability are a leading impetus for reform. He supports this argument by emphasizing the direct and indirect costs

of liability, both inside and outside the judicial system: direct costs include the time of judges, attorneys, and plaintiffs and the use of courtroom space; indirect costs are the costs of increasing safety. Citing the applicability in other country contexts of the conceptual framework of the U.S. product liability studies, Dr. Garber makes the case that liability policy and research should be a major concern for other countries that plan to improve the legal environment for development.

Key Elements of Judicial Reform

Key elements of judicial reform include instituting procedural reforms, improving the administration of the courts, establishing alternative dispute resolution mechanisms, expanding access to justice, strengthening the role of the bar associations, and developing and upgrading judicial training and legal education.

Procedural Reform

Adequate procedures for enforcement of the rule of law are critical to judicial reform. Professor Marcel Storme traces the development of procedural law in Europe and other countries and builds a case for worldwide approximation or unification of procedural law, based on the growing realization that a universal procedural system enables justice to be administered promptly, cheaply, and properly. Professor Storme also emphasizes the importance of a unified system of procedural law for building a foundation of legal certainty and institutional confidence within both international and internal markets. He contends, however, that a simple realization of the need for approximation is not enough; rather, approximation must be carried out with a clear sense of its limits and possibilities. Although development of a unified system of procedural law presents distinct difficulties, unification is not impossible. Professor Storme makes clear, as well, that certain components of procedural law do not lend themselves to harmonization.

Dr. Enrique Tarigo describes the major legal reforms that have occurred in Uruguay since the adoption of the General Code of Procedure in October 1988. Dr. Tarigo describes the General Code as one that replaces old proceedings with hearings that combine oral and written elements. He then comments on the supplementary reforms—for example, the addition of more specialized courts and the delegation of legislative powers to the Supreme Court; the gradual application of the new hearing system—that have been instituted to ensure effective application of the General Code. Although the results of the new code are highly favorable, ongoing problems, such as budgetary restrictions and excessive numbers of court officials, impede the administration of justice in Uruguay.

Administration of the Courts

The existing administrative and governance systems in Latin America hinder judges' efforts to deliver justice. This recognition is inspiring a movement to modernize judicial administration in Latin America. Mr. Robert Page demonstrates that as part of this modernization movement, the organizational, informational, and managerial tasks of the courts should be separated out and reconfigured into judicial and administrative responsibilities. Mr. Page cautions, moreover, that countries seeking to improve the administration of justice must understand that successful reform will probably require many years of analysis and training.

Most Latin American court systems are plagued with court organization and administration problems. Mr. Jesse Casaus reviews many of these problems and stresses the urgent need to find solutions for them. He points out that improvement in court administrative capacity and staff utilization can be achieved through reorganizing court structures and streamlining court administration. Mr. Casaus suggests a pilot or demonstration approach in which new procedures, structures, and practices are developed and tested before a large-scale replication is carried out throughout the system. He also describes several court organizational models that Latin American and Caribbean countries are piloting to improve court administration.

Alternative Dispute Resolution Mechanisms

Professor Whitmore Gray describes alternatives to traditional judicial institutions and techniques in the United States. Professor Gray details two types of alternative dispute resolution: court-annexed procedures (arbitration, mediation, early neutral evaluation, summary jury trial, and the settlement conference) and private procedures (negotiation, minitrials, mediation, conciliation, and arbitration). He then explains the benefits of each procedure from the perspective of the parties, the judges, and the general public. He argues that these alternative dispute resolution procedures allow for greater privacy, speed up procedures, expand access, and reduce adversariness and court backlogs, and that they should not be considered "second class" justice. Professor Gray stresses that even though alternative dispute resolution may still be in the early stages of development, it has already created a niche for itself and saved judicial systems substantial time and money.

Judge Gladys Stella Alvarez discusses Argentina's experience with alternative dispute resolution. Judge Alvarez explains that alternative dispute resolution mechanisms do not just help address the congestion problems in the courts; they also ease public concern about the difficulty of obtaining a just solution to conflicts. She traces the evolution of alternative dispute resolution, and, in her discussion of the Argentine National Mediation Plan, which is being pilot tested, suggests that court-annexed alternative dispute resolution techniques reduce delays in the courts. Judge Alvarez foresees a positive future for mediation in Argentina.

Access to Justice

Dr. Bryant Garth examines the access-to-justice movements of the 1960s, 1970s, and 1980s, and suggests that in the 1990s careful rethinking of access-to-justice issues will be important in light of increased globalization and deregulation of economies and greater awareness of human rights. In conclusion, Dr. Garth notes that if the rule of law is going to be the basic mechanism for legitimizing state authority, it is essential that there be universal access to the legal system. Citizens will not respect the authority of the law if they are cut off from the legal system.

Judge Hans-Jürgen Brandt details the justice-of-the-peace system in Peru. Judge Brandt suggests that this informal method of conciliation (in which about 70 percent of conciliators are nonlawyers) has become an integral part of the judicial system and is making a strong contribution (for example, about 40 percent of cases are either settled or not appealed). Looking more broadly at the international scene, Judge Brandt discusses the changing role of justices of the peace in society in general. He indicates that modern societies with a relatively higher degree of socioeconomic development show a relatively lower rate of case settlement. More traditional societies—societies that have relatively lower socioeconomic development and are characterized by low urban population and low levels of education and income—tend to exhibit a higher rate of conflict settlement. Judge Brandt concludes by outlining factors that can contribute to the development of conciliatory justice.

The Role of Bar Associations, Judicial Training, and the Legal Education

Along with stressing bar associations' obligation to fight for an honest, competent, efficient, and autonomous judiciary, Dr. Pedro Mantellini González describes their role as regulators and providers of social-legal services. He argues that bar associations are a key factor in maintaining a strong judicial system, which, in turn, is indicative of the strength and resilience of a democracy. With this role in mind, Dr. Mantellini discusses depoliticization, voluntary versus compulsory membership, and the institution of a continue

code of ethics and discipline in bar associations. He concludes by listing the roles that bar associations can and should play in the legal profession, the judicial system, and the community at large.

Professor Rogelio Pérez Perdomo reviews sociological research on training programs for judges and other court

officials. He first considers training programs in the framework of comparative legal systems and explains that training must match the specific needs determined by a legal tradition, noting, for example, differences in the traditions governing the selection of judges under Anglo-Saxon and Roman Common Law legal systems. Professor Perdomo then focuses on the general criteria that can serve as guidelines in designing training programs for judges. He stresses that programs should be practical and address specific needs through a mixture of on-the-job training, observation, and formal instruction. He draws attention to the ethical dimension of being a judge, acknowledges the importance of ethics education in judicial training, and offers suggestions about ways to encourage frank debate about difficult ethical issues. Finally, Professor Perdomo discusses methods of program evaluation and his perception that there has been little assessment of the impact of training in the judicial sphere.

Dr. Neil Gold outlines a comprehensive planning framework for developing broad schemes for legal education in changing societies, including programs for public legal education, professional development, and education reform. Dr. Gold first acknowledges the important relationship between judicial reform and legal education, stressing the need to incorporate the values of the reformed legal system into the educational process. Educational projects should be strategic, systematic, universal, and concerned with quality, Dr. Gold writes. And he suggests a process for determining the appropriate formulation of educational programs so that, by changing knowledge, skills, and attitudes, they can create highly qualified legal and judicial professionals.

Examples of Judicial Reform in Industrialized Countries

Singapore has in recent years carried out an extensive program to reduce case backlogs and delays in the court system. Dr. Ng Peng Hong reports on the various measures that were instrumental in achieving favorable results. (Dr. Hong's paper is based on the remarks of the Honorable Yong Pung How, the chief justice of Singapore, delivered at the Fifth Commonwealth Chief Justices' Conference, May 3, 1993, in Cyprus.) The different elements of the judicial reform exercise include improving case management, restricting the types of cases that must be heard before a judge, streamlining the appeal process, increasing the number of judges and staff, increasing the number of courtrooms, changing working hours and habits, amending legislation governing the composition or jurisdiction of courts, computerizing court processing, and introducing court hearing fees. Dr. Hong also defines a safeguarding mechanism that has been put in place so that remedial measures can be taken if backlog problems appear likely to re-emerge.

The Province of Québec in Canada has more than twenty years of experience in modernizing the administration of justice. After providing the historical context, Associate Chief Justice Yvon Mercier presents recent advances in three broad areas: reform of the civil code, reform of the legal aid system, and improvement in technology. He first describes the massive undertaking involved in preparing professionals (judges and lawyers) for the adoption of Québec's new civil code. In his discussion of Québec's legal aid system Justice Mercier recounts the beginnings of volunteer legal aid in the 1950s and tells of the passing of Québec's legal aid act in 1972. He also highlights changes and conditions since the introduction of Québec's formal legal aid system and suggests a number of solutions to the problems of establishing eligibility and managing the benefits of legal aid. Finally, he describes the different information technologies and computer-assisted decisionmaking tools that are in use in the justice sector and offer an account of their development.

Judge Richard Jamborsky discusses the Fairfax County Circuit Court's innovative Differentiated Case Tracking Program, which was developed in response to the increasing caseload and mounting backlog. Judge Jamborsky reports that the tracking program drew upon research suggesting that early classification and court control of the docket moves court cases quickly through the judicial system. The program monitors civil cases and schedules an individualized series of status conferences, settlement conferences, and neutral case evaluations based on case complexity. Since its inception in 1989, the case tracking program has raised by 28 percent the number of civil cases completed within one year. Judge Jamborsky explains how the natural resistance to change was overcome by working closely with lawyers and others. He concludes that the new tracking program has yielded tremendous savings of time and money for the court.

Spain comprises seventeen autonomous states that have traditionally fallen under the authority of one unified jurisdictional system. After detailing the unique structure of Spain's judiciary, Dr. Mikel Elorza Urbina describes the achievements of a judicial sector modernization program in the autonomous region of the Basque Provinces (Paíscontinue

Vasco). Dr. Elorza discusses the process that was adopted to diagnose problems in the judicial system subsequent to a royal decree (1987) that permitted the provinces to take on certain judicial powers. He then outlines the main problems identified, including poor court organization and lack of such resources and remedies as streamlined and automated court processes, adequate court facilities, and necessary training and professional development. Finally, Dr. Elorza reports the three factors that contributed to the success of the modernization effort: widespread recognition in the provincial society of the need to improve the administration of justice, consensus among the institutions involved, and the manageable scope of the plan itself.

According to Dr. Peter Graham Harris, strategic long-term planning maximizes the chances of institutional improvement. After giving highlights of the development of the Lord Chancellor's Department's strategic plan for the courts in England and Wales, Dr. Harris outlines the steps necessary in preparing an effective strategic plan. He suggests that commitment and communication among all levels of management plays a major role in successful judicial planning. As he reviews the obstacles and risks to strategic planning, he stresses that most failures arise from the misconception that plans are a substitute for management, rather than a management tool. Dr. Harris also cites centralism and rigidity of the judicial system as other factors contributing to plan failures.

Judicial Reform Experiences in Latin America and the Caribbean

Dr. Pedro Miguel Reyes discusses Venezuela's problems in judicial administration. He points out that the court system suffers from a lack of administrative and oversight capacity, a poorly defined court organizational structure, partisan justice, deficient training, and procedural complications. Dr. Reyes suggests that overall judicial reform depends on measures that will increase the efficiency, reliability, and availability of court services and modernize the legislative process. He stresses that the real challenge facing the judicial sector is accelerating the modernization program without waiting for new laws, which can be prepared in parallel. Dr. Reyes also describes some of the features of the modernization program developed with Bank assistance and the obstacles that were encountered during the process.

In an overview of Jamaica's judicial system, Chief Justice Edward Zacca notes that the judiciary enjoys notable independence that has been strengthened by reforms in judicial salaries and conditions of service. Justice Zacca also reports on reforms—both completed and in the planning stages—on other fronts, including the appeal process, judicial review, court administration, mediation, judicial training, and legal aid reform. He indicates, however, that even though Jamaica's judicial system is strong and independent and enjoys the government's support, a lack of funds, the weak institutional capacity of the courts, and the slow pace of legal reform could cause the public to lose confidence in the administration of justice.

Judge José Renato Nalini reviews historical attempts to reform Brazil's judiciary and raises issues that might lead to a feasible approach to judicial sector improvements. Judge Nalini reports that after several false starts at reform, the judicial system is once again at the center of controversy. Users perceive the system as too slow, excessively secretive, complicated, inaccessible, and expensive. Judge Nalini suggests that removing these deficiencies would require several initiatives: adopting a businesslike approach in judicial administration, resource management, and financial control; simplifying or introducing flexibility into the judicial process to reflect regional characteristics such as size and heterogeneity; expanding small claim courts and other informal mechanisms to increase access to justice; and improving training and educational program to enhance the quality of judges and staff.

Judge Elena Highton and Secretary of Justice Elías Jassan summarize legal and judicial reforms taking place in Argentina. Judge Highton and Secretary Jassan analyze the improvement of the judicial system in the context of an overall process of institutional adjustment in the country. They stress that in revamping the judicial system, a comprehensive approach is needed, with particular attention to legal education and training, alternative dispute mechanisms, legislative reforms, and access-to-justice issues. The authors discuss the judicial sector study financed by the Bank through an institutional development fund grant. They also suggest areas that could be candidates for future Bank assistance to improve the administration of justice.

Drawing on Peru's judicial reform experiences, Minister of Justice Vega Santa Gadea stresses the importance of individualized, rather than standardized, judicial reform measures. Minister Santa Gadea points out that reform programs should be tailored to the historical and cultural circumstances of a particular country. He reviews the social and economic effects of Peru's deficient administration of justice and provides a background to the country's judicial reform efforts. He then details current reform measures designed in light of Peru's unique circumstances, including reforms in such areas as judicial procedure, education and training of judges, and the appointment system continue

of judges, as well as establishment of a committee for restructuring the administration of justice.

Supreme Court Minister Jaime Espinoza Ramírez (with Esteban Moreno) breaks down Ecuador's problems in the administration of justice into organizational, management, and administrative problems. Minister Espinoza describes recent judicial reform efforts, such as a series of constitutional amendments aimed at modernizing the administration of justice and making it more agile and efficient, and the establishment of the Joint Working Group of the Ecuadorian Judiciary, which was formed to design a comprehensive judicial reform project. He also stresses the importance of judicial reform for economic development. Minister Espinoza then describes an agenda for future reform activities that includes introducing oral proceedings in courts, streamlining the judicial process, computerization, developing the arbitration process, and designing education programs both for those in the legal profession and for the general public.

Using Chile as an example, Dr. Luis Manriquez Reyes discusses the diagnosis of problems and the design of strategies for modernizing judicial systems in developing countries. Dr. Manriquez Reyes stresses that modernization must guarantee complete respect for the independence of the judiciary, access to justice for all, and more effective use of judges' time. The Administrative Corporation of the Chilean Judiciary, a technical body that advises the Supreme Court and was created at the Supreme Court's own initiative, has provided a technical framework for the modernization of the country's judicial system. Dr. Manriquez Reyes concludes that judicial modernization efforts in Chile and other developing countries cannot be successful without the consensus and a sense of shared responsibility for reform.

Dr. Hernando París Rodríguez focuses on a number of problems with the administration of justice in Costa Rica, most notably: case delays and backlogs, cumbersome procedures and excessive formalism, insufficient access to justice, administrative inefficiency, and outdated resource management systems. Dr. París suggests that reform of the judiciary can succeed only with the leadership of top officials, using a comprehensive approach that encompasses every area of judicial activity, and enlisting the broad participation both of members of the judiciary and of society at large. He concludes by mentioning the role that international cooperation can play in fostering judicial reform in Costa Rica.

Closing Thoughts

In his closing remarks, Mr. Sri-Ram Aiyer, Director of the World Bank's Technical Department in the Latin America and the Caribbean Region, comments on the excellent quality of the judicial reform conference presentations and emphasizes the importance of shared learning through such activities. He urges those involved in

judicial reform to continue the discussion process upon returning to their countries, because it is fundamental to build coalitions for reform and to arrive at consensus on strategies. Mr. Aiyer concludes that the continued effort to learn and to improve is what makes some countries modern and developed and others less developed.

Background Paper

For the benefit of participants and to stimulate discussion, a background paper by Mr. Ibrahim F. I. Shihata, "Judicial Reform in Developing Countries and the Role of the World Bank," was circulated at the conference. It is included in this volume of proceedings as the final chapter.

PART I— OPENING REMARKS

1— Economic Development and Judicial Reform

Shahid Javed Burki

The timing of this conference is, I believe, particularly opportune given the fundamental changes that have taken place in the region during the past few years and the challenges that lie ahead. I would like this morning to comment briefly on these developments and the challenges as I see them. Let me say a word about the background.

Latin America and the Caribbean is emerging from a period of major change and entering a postadjustment era. In the aftermath of the 1980s debt crisis, countries have been faced with the need to revisit their models of development. As part of this process there has been a rethinking of the appropriate role of the state. The debt crisis revealed that despite some initial successes the old development strategies, based on import substitution and heavy state intervention in the economy, needed to be reassessed. Economies that were inward-looking and protectionist had proved unable to respond to changing world conditions. The earlier development paradigm had also failed to address many of the region's most basic problems—problems of poverty and income distribution, degradation of the environment, low savings rates, and weak institutional capacity.

There is a paradox of the Latin American experience that needs to be addressed. The interventionist state promoted in Latin America as a way of obtaining rapid economic development has become a weak state in terms of its basic function—providing good governance. The state has devoted a great deal of its attention and energy to performing a role for which it is poorly endowed, that of economic entrepreneur. It has spent correspondingly little time in providing good government. But the leaders of Latin America have begun to deal with this situation. It is gratifying that most Latin American countries have devoted a good deal of effort to restructuring the state. In many countries public institutions are in a crisis and unable to respond to the most pressing development challenges: pervasive poverty, scarce human resources, weak financial markets, and inadequate judicial services. They are also faced with environmental degradation and lack of basic infrastructure, including health services.

These antiquated public institutions must respond to changes in the external environment, such as the new GATT/WTO agreement, the implications of NAFTA, the integration of world capital markets, and the shortage of concessionary donor assistance. These realities have changed the ground rules for development. The challenge for the countries of Latin America and the Caribbean is to confront today's realities with a new development strategy. Such a strategy must be based on an orientation to the market and on openness, with a heavy reliance on the

private sector. At the same time, however, the role of the state under the new strategy may need to be more carefully delimited than before, particularly with regard to its participation in the economy's productive sectors. Still, with the greater reliance on markets and the private sector, the state will play an important role in providing basic services, including infrastructure and social services, and as a facilitator and arbiter of private sector development. As John Maynard Keynes noted, the important thing for government is not to do things that people are already doing and do them a little better or a little worse—but to do those things that at present are not done at all.

In the past few months I have had the opportunity to have a number of conversations with senior leaders in Latin America. It is their strong belief that the provision of the legal framework for development is a central role that only the state can fulfill. As the countries of Latin America and the Caribbean improve governance, expand the role of the private sector; and move toward more stable economic and political environments, judicial reform will be an essential complement. Judicial reform benefits all users. It benefits the private sector by making business transactions more predictable, and it benefits the public sector by continue

establishing better regulation and accountability. Finally, it benefits the people by increasing access to legal aid programs and services. The rule of law establishes the basic principle essential for a sound economy. In particular, judicial reform directed at achieving effective implementation of the law is of central importance in reforming the role of the state and implementing development strategies.

A review of the experience of both industrial and developing countries reveals several elements that are key to any successful judicial reform effort:

- Strengthening the independence of the judiciary.
- Simplifying and updating legal procedures and laws.
- Improving the administration of justice.
- Providing alternative mechanisms for dispute resolution.
- Improving legal education and training.
- Expanding access to justice.
- Improving the quality of the legal profession.

The legal reform agenda being developed by the countries of Latin America includes most of these elements.

We at the World Bank are prepared to provide technical assistance for building legal institutions to advance this agenda. Two issues cut across the disparate reform elements that are fundamental to judicial reform. The first is long-term commitment to reform. Successful implementation requires that the reform be sequenced over a significant period. Moreover, judicial reform requires broad consensus among different users and providers, and it is important that the consensus be maintained throughout the process. The second fundamental issue is that of providing adequate compensation for legal personnel, including the judiciary. Without the active involvement of competent and motivated judges, judicial reform cannot be expected to succeed.

These are just a few initial observations about some of the aspects we see as critical for successful judicial reform. There is no doubt that over the next two days additional light will be shed on these and other issues by the distinguished group of judges and other specialists who have assembled for this conference. On behalf of the

Bank and the organizers of the seminar, I would like to welcome you and wish you well in your deliberations. Thank you very much.break

2—

Legal Framework for Development: The World Bank's Role in Legal and Judicial Reform

Ibrahim F. I. Shihata

In February 1993 I had the pleasure of attending the conference on judicial reform in San José, Costa Rica, organized by the Inter-American Development Bank, which I believe many of you also attended. The general theme of that conference was the relevance of judicial reform to economic development. Since then, awareness has grown, especially in Latin America, of the importance and relevance of law and the judiciary for sustainable economic development. At the World Bank, the leadership of Shahid Burki as the new Vice President of the Latin America and the Caribbean Region will be important to judicial reform efforts in the region. Mr. Burki has had the experience of initiating a major judicial reform program in China, which we are working on now, and has shown his belief in and commitment to legal and judicial reform for sustainable development. I am sure this will be reflected in his work for Latin America and the Caribbean.

The importance and relevance of legal and judicial reform is not new, but somehow it took the world a long time to recognize it. It took the failures of governance and development in Africa, the collapse of dictatorships in Latin America, and the great transformations of Central and Eastern Europe to recognize that without a sound legal framework, without an independent and honest judiciary, economic and social development risk collapse. I am glad that, late as it is, this fact is now generally recognized, especially in the World Bank and in other international financial institutions.

In Latin America and the Caribbean, as in other regions, experience has clearly demonstrated the quintessential role of law in development and, especially, the need for the rule of law and for well-functioning judicial institutions. This is particularly evident in the private sector, where the rule of law is a precondition for sectoral development. It creates certainty and predictability; it leads to lower transaction costs, greater access to capital, and the establishment of level playing fields. In fact, worldwide experience confirms the importance to rapid and sustainable development of the clarification and protection of property rights, the enforcement of contractual obligations, and the enactment and application of rigorous regulatory regimes. This experience has helped focus attention—in the World Bank, the Inter-American Development Bank, and other institutions—on conditions for judicial reform that are neither economic nor financial. Of particular importance is good governance to establish an appropriate legal and regulatory framework and maintain competent and honest civil service and judicial institutions.

As you all know, law is not simply a servant of the past. It is also the vehicle to the future. The alternative to law is chaos. Law is not only a reflection of the prevailing forces in a society; it can also be a proactive instrument to promote change. The question of how law can be utilized to achieve economic growth in the short run and sustainable development in the longer run addresses the key concepts of the rule of law. In this context I like to define the rule of law in a broader manner than is usual—as a system based on three pillars: rules, processes, and institutions.

The first pillar consists of objective rules that not only are known in advance but are actually enforced and are subject to modification or termination pursuant only to previously known practices. The second pillar consists of the processes that ensure that the rules are not arbitrary, in other words that they are adopted in response to genuine needs of the people and applied and enforced to serve these needs. As you know, it is often the case that

sound, objective rules, once written, are applied in such a way as to serve special interests or interests other than those for which the rules were adopted. The third pillar consists of well-functioning institutions that operate in a transparent way and are accountable to citizens, institutions that adhere to and continue

apply regulations without arbitrariness or corruption. This is where the judiciary enters the picture.

The rule of law is not only the sum of written legislation, regulation, and decrees. It also includes the manner in which these rules are implemented by government agencies and adjudicated by judges and arbitrators. A well-functioning judiciary in which judges apply the law in a fair, even, and predictable manner without undue delays or unaffordable costs is part and parcel of the rule of law. The rule of law requires that rules be interpreted and applied—or departed from—according to established procedures. It requires that an independent body resolve disputes. These requirements constitute the core function of a judicial system. The judiciary may also identify inconsistencies that exist between specific rules and the basic law or constitution of a country. Finally, the judiciary may serve as the final arbiter in allegations of corruption, arbitrariness, and lack of accountability on the part of other branches of government. In sum, the execution of these judicial functions helps create an atmosphere of social peace in which economic development can flourish.

The World Bank has long been concerned with the implementation of objective rules and the establishment of processes and well-functioning institutions in its borrowing member countries. In the past it has addressed these matters in the context of public sector management. More recently the Bank has recognized that good governance is central to fostering development and is an essential complement to sound economic policies. Thus, the legal framework of a borrowing country is one of the areas of governance that the Bank considers it can address as part of its mandate. It should be reiterated, however, that the Bank's readiness to assist in legal and judicial reform operations, and its broader involvement in this area since 1990, are limited by its mandate as defined in its articles of agreement. The Bank is not a supranational organization with an unlimited mandate. The articles of agreement—the World Bank's charter—specify its purposes and explicitly prohibit it from taking political considerations into account in its decisions or otherwise interfering in the political affairs of its members.

The principal mandate of the Bank, as you know, is to promote economic development, which has been broadly interpreted to include social development as well. This mandate is not so broad as to cover support for every possible reform in the Bank's member countries. In particular, the mandate does not include political reform. Rather, the articles of agreement define the Bank's role in economic development as that of facilitating investment for productive purposes, promoting private foreign investment, promoting equilibrium in the balance of payments, and fostering international trade.

Support for legal and judicial reform is not mentioned in the Bank's charter. But as I have mentioned, experience has shown that such reform cannot be ignored in the process of economic development or adjustment. Successful implementation of fundamental policy changes in the business environment and in the financial sector normally requires equally fundamental changes in the overall legal and institutional framework. More broadly, civil service reform, legal reform, and judicial reform are often prerequisites for the facilitation of investment. They also contribute to the orderly management of a country's resources. For these reasons I advised the Bank in 1990 that assistance with these reform activities might readily fall within the Bank's mandate if requested by an interested borrowing member country.

The Bank's attention to legal and judicial reform issues has thus been associated with its role as a development financier. The Bank has used several instruments to promote legal and judicial reform. The simplest and most obvious is the Bank's studies on legal reform, specifically, on the legal requirements for introducing reform in a certain country. These studies are undertaken by the Bank on its own and do not often take the form of a loan or a grant. Some of the studies are done through grants, however. In 1992 the Bank established a special facility—an institutional development fund—through which it can provide grants for these kinds of studies (and studies in

other fields as well); I believe the judicial system in Argentina is being studied in depth under a grant from this fund.

Another instrument for promoting legal and judicial reform could be in the form of a loan, either for general reform of the judicial system or for reform of a specific sector. Although not commonly used, this instrument has on occasion been applied—in fact, the first use was in Latin America, in Venezuela. An investment loan can include a component for legal reform that relates to the investment project or the appropriate sector. More generally, an adjustment loan, which basically provides support to a country in the context of the introduction of reforms, can include changes in legislation or improvements in the judicial system or the civil service as part of the adjustment supported by the loan. So the Bank has a number of instruments that afford a great deal of flexibility in dealing with countries on how best to support legal and judicial reform.

The scope of the Bank's intervention is also wide. It can address a country's legal system as a whole—for example, in Laos, which was embarking on a complete change to its economic and social system and needed a parallel overhaul of its legal system. But the Bank can also limit its intervention to legal reform in a given sector, continue

particularly the financial sector where the widespread need for modernization seems to be well recognized.

The Bank's intervention has also concentrated on reform of the judicial process, specifically alternative dispute resolution mechanisms—arbitration, facilitation, mediation, and so on. As adjudication becomes more costly and time-consuming, there is interest worldwide in moving toward arbitration and other alternative mechanisms, especially in investment disputes. And even though in Latin America there has traditionally been resistance to international arbitration—an example is foreign investment under the Calvo Doctrine—in recent years this resistance seems to have given way to a more flexible attitude. This is evident in the membership of the International Center for Settlement of Investment Disputes (ICSID), which is an affiliate of the World Bank. Until recently none of the Latin American countries belonged to the ICSID—except Jamaica, which has been a member for a long time and was a party to two disputes submitted to ICSID in the past; but now twenty-one Latin American and Caribbean countries have joined the membership.

The main challenges in any legal and judicial reform program are how to increase the efficiency of the legal system and the courts and how to reduce or eliminate corruption. These challenges are not simple and cannot be addressed merely by changing laws or constructing new court buildings. The details of each program have to be tailored to the circumstances of each country. Recently, the Bank has undertaken an overall review of its support of legal and judicial reform in order to identify issues of concern and draw lessons that can guide future efforts in this area. The conclusions of that review are several. First, it is essential that any reform program be owned by the country. In other words, the problems have to be identified by the authorities in the country through consultation with the people involved. The reform then has to be designed by the country. The Bank can support but should not impose legal reform. This is an important element to keep in mind because if imposed, legal reform measures will invariably differ from what was intended by the in-country practitioners.

Ownership is a condition of success in any field, but it is particularly relevant in legal reform, which goes to the core of the social fabric of a country. Reform of a judicial system requires a profound knowledge of country conditions and preferences, which only the local people can provide. As has been clear in the countries that are starting from scratch—the countries of the former Soviet Union, Laos, and so on—there are difficult choices to be made about the direction legal reform will take: Should a country embrace the civil law system or the common law system? What should be the role of the state? These are the broader issues Mr. Burki referred to.

These "hard" choices must be made by the reforming country. What the Bank can do is to provide knowledge about comparative experiences, about what works better. As a country sets its priorities for legal reform, based on

its own needs, the Bank should provide systems that fit with these needs and with the Bank's country assistance strategy. Ideally, such assistance should be based on a prior in-depth diagnostic study of the situation in the country—of the forces behind the rules, of what is likely to work and what is not.

Another issue is who should be involved in legal reform. From the Bank's perspective, it is generally useful to be able to deal with a legal judicial focal unit in charge of the country's reform. We have found that when too many people speak for the reform, it is difficult to get things done efficiently. Some countries have addressed this issue by establishing a unit in the cabinet, the ministry of justice, or sometimes even the ministry of finance to act as interlocutor between foreign donors and local authorities. But the reform should not be a closed operation between a ministry and the Bank. It is equally important to others in the country who are particularly concerned with reform: the judiciary, the bar association, law professors, groups likely to be affected by certain legislation, and so on. This participatory process is crucial in ensuring the continuity of the reform.

These are some of the lessons of the Bank's experience with judicial reform. I am sure Mr. Rowat will expand on this over the next two days' deliberations and will also glean from you further lessons that can guide the Bank's work.

In conclusion, I would like to assure you that the World Bank will continue to develop and further integrate the legal and judicial reform program approaches I have just described. And I am particularly pleased that Mr. Burki—with his proven commitment and devotion to judicial reform—is now in charge of the Latin America and the Caribbean Region in the Bank.

3—

Judicial Reform in Latin American and the Caribbean: Operational Implications for the Bank

Malcolm Rowat

The Latin America and the Caribbean region today is emerging from a period of major change and adjustment. In the aftermath of the debt crisis there has been a profound rethinking of the role of the state and the essential mode of development. The debt crisis revealed that development strategy based on import substitution and heavy state intervention in the economy—despite some initial successes—needed to be reassessed. The approach had created economies that were inward-looking and protectionist, unable to respond rapidly to changing world conditions. It had also failed to address serious problems of poverty and income distribution, relied too heavily on subsidy controls, generated anemic savings rates, and used foreign borrowing and inflation to fund its expanding government budget deficits.

Economic and Political Reforms

In almost all the countries of Latin America and the Caribbean, reform programs have been undertaken to balance the budget, reduce the size and influence of the public sector, and make the economies more open to foreign trade. In most of the countries import duties have been lowered, interest rates and subsidy controls eliminated, and exchange rates brought in line with market conditions. Major efforts have been made to privatize enterprises and the productive infrastructure sectors, including airlines, telecommunications, and banking. Some of the reform programs date from the mid-1980s, but many were only begun late in the decade and are still being expanded and consolidated. And in a few countries reform has yet to begin. The reform programs have been successful in realigning basic macroeconomic and sector policies and setting right the systems of incentives, but more fundamental institutional changes have remained unaddressed.

Over the past decade there has been a remarkable movement toward political systems based on democratic forms of government. Today nearly every country in Latin America, with a few exceptions, is democratic. But the political situation in many countries is unstable and recent reform efforts are very fragile. Dramatic changes in economic policies have created a backlash. Reform programs can have an adverse impact on power bases and vested interests. The results of privatization can be seen as benefiting a few. In several countries opposition leaders are arguing that the reform process should be halted or substantially revised. The effects of recent national and international adjustments have provoked social unrest in some areas.

The countries of Latin America and the Caribbean remain diverse in terms of their rural development, institutional capacity, wealth, and individual problems. (Per capita income ranges from less than US\$400 to more than \$6,000.) Likewise, reform efforts have varied in the seriousness of initial conditions, the speed of reforms, and the results achieved. For the most part, the return of economic stability, the adoption of major structural reforms, and the resolution of the debt crisis have led to a new optimism about Latin America's prospects for the near future. However, despite substantial progress in correcting distortions and opening the economies to foreign trade, a number of problems remain. One of the most serious concerns is the public sector. Public sector institutions are generally weak throughout Latin America as a consequence of past tendencies toward overstaffing, low salaries, and underfunding of key programs. Legal and judicial systems are particularly weak and a constraint on private sector development. In addition, a number of recent changes in the external environment have drastically changed the ground rules for development, creating both opportunities and risks.

Opportunities for Development

Events such as NAFTA and the Uruguay Round of the GATT have the potential to give the Latin American and Caribbean region greater access to North American and European markets. In general, tariffs and trade barriers in the region are much lower now than in the past. This has led to a number of promising regional agreements for freer trade and a sharp increase in intraregional trade. Such agreements also imply an enhanced commitment to legal, regulatory, and judicial reform on the part of the signatories, as evidenced by the far-reaching legal and regulatory provisions of the recently concluded NAFTA agreement.

At the heart of the new model for development for Latin America is fundamental change in the role of the state. The new model is based on greater reliance on markets and the private sector, with the state as an important facilitator—and regulator—of private sector activity and development. With the advent of privatization, deregulation, and decentralization, governments have begun to take on much more responsibility as market regulators for the private sector. This in turn is requiring significant legislative reform, including the development of a legal institutional framework for competition policy and the regulation of utilities; for the clarification of property rights, including intellectual property rights; and for the creation or reform of laws concerning secured transactions, negotiable instruments, corporations and corporate governance, bankruptcy, foreign investment and trade, antidumping, countervailing duties, and the like.

As legal reform has advanced, it is significant that in this region, long dominated by the Calvo Doctrine, twenty-one countries have signed the International Center for Settlement of Investment Disputes (ICSID) convention and twenty-two countries have become members of the Multilateral Investment Guarantee Agency (MIGA), mostly in the past five years—a good show of their commitment to opening to world trade and fostering a healthy investment climate. Nonetheless, neither legal reform nor accession to regional and international conventions will have much impact unless supported by an effective enforcement mechanism that includes a well-functioning judiciary that can adjudicate new areas of the law within a reasonable time frame.

Key Elements of Judicial Reform

Over the next two days, we will be discussing a number of elements of judicial reform. Let me highlight what I think are some of the important ones. I think the principal obstacles to private sector development, in terms of the functioning of the courts, are inefficiency and delays, corruption, and a lack of transparency and predictability in decisions. Also significant are the nuts and bolts of court administration: court management, recordkeeping, case flow management, budgetary allocations, human resources, staff training and compensation, information management and court technology, and overall infrastructure, among others.

Also key to judicial reform are the quality of training for judges, the standards and requirements for their appointment, the conditions for their removal, and the overall salary structure for them. Another area of concern is legal education—the training of lawyers—with a wide range of issues demanding attention, including: entrance requirements for law school; curriculum content, including whether there is sufficient emphasis on commercial ethics in addition to practical clinical programs that stress methodology; graduation requirements; and finally, continuing education for lawyers and general legal education for the public.

Problems that can stand in the way of reform of the judiciary often center around questions about judicial independence, separation of power and, in some cases, the politicization of the higher courts. Another issue affecting legal practitioners is the proper role of the bar association in licensing attorneys, offering seminars, making pro bono services available in the community, and disciplining attorneys in cases of misconduct. Questions of access to justice arise in this context. Is sufficient legal aid provided? Are public defenders a useful innovation? Are court fees reasonable for the poor segments of the community? What is done to ensure that a country's indigenous populations, who may speak a different language, have access to the court room?

Alternative dispute resolution raises other questions. Can it serve as an additional vehicle for reforming the judicial system by providing alternatives to the courts, particularly for small claims?

And finally, what effects are the procedural code having on legal reforms? Many countries are currently reviewing their procedure codes. Argentina, for instance, has allowed oral testimony in criminal cases in the past couple of years, which is having a dramatic impact on the efficiency of its court system.

Role of the World Bank in Judicial Reform

The Bank's interest in and support of judicial reform goes back many years. Its first *direct* financial assistance for a continue

judicial reform effort was a component of a 1988 public sector management loan to Argentina that was to be used, among other things, to improve the information systems in courts. But Bank support of legal reform goes back much farther than this and has often formed part of structural adjustment lending. (It should be emphasized that the Bank under its articles of agreement has limited its support to reform of countries' civil justice systems. We have not, for example, financed prisons, criminal justice reform, or the training of judicial police.)

A recent loan of US\$30 million to Venezuela will upgrade institutional infrastructure of the judiciary, improve judicial training, and modernize court management, in addition to financing further studies on judicial reform. A grant of \$500,000 approved in 1993 supported a diagnostic study of judicial reform in Argentina.

There is wide recognition of the importance of judicial reform to ensure successful development in Latin America and the Caribbean. It is also critical to ensure coordination of the efforts of external agencies, many of whom are represented here today. A sense of ownership for the reform must be engendered by active participation of local legal and judicial officials. (The Steering Committee in Argentina may be instructive in this area.) Over the next

two days we will have a chance to discuss these things in greater depth. We particularly look forward to the sharing of experiences by our many representatives from Latin America and the Caribbean.^{break}

PART II— ECONOMIC COSTS AND BENEFITS OF JUDICIAL REFORM

4— Legal Systems and Economic Performance: The Empirical Evidence

Beatrice Weder

The World Bank has organized this meeting to identify strategies for strengthening the legal systems, specifically judiciaries, in Latin America and the Caribbean. Although there are many good political reasons for a strong judiciary, international financial institutions do not involve themselves in this type of reform. But the legal system influences economic performance. The main issues addressed here are the economic case for legal system reform and the economic costs of a badly working judiciary.

There is no clear, empirical evidence of the economic costs of weak legal systems, nor are the impacts of political systems on economic performance fully understood. And research conducted on the economic costs of a badly working legal system is mostly anecdotal or in the form of individual case studies. For instance, many of you are familiar with the detailed analysis of the informal sector in Peru made by Hernando De Soto and his team (De Soto 1989). This study is an impressive account of the bureaucratic and legal obstacles that informal entrepreneurs have to cope with. In a similar vein, Robert Klitgaard wrote a description of the idiosyncracies of the political system in equatorial New Guinea (Klitgaard 1990). Another example is Keith Roseen's "Jeito Revisited," a study of Brazil's legal culture (Roseen 1984). Such studies generally suggest that the economic costs of a badly working legal system are large. In fact, a weak legal system is likely one of the prime obstacles to economic development and growth. This thesis is supported by the property rights, contract rights, and general "rules of the game" that form the basis of a well-functioning market economy.

However, there is little cross-country empirical evidence to support this thesis. Studies that have analyzed the link between political systems and economic performance across countries have not produced strong results. Still, the failure to explain economic performance with political variables should not be attributed to a weak link between these two variables, but to a measurement problem—existing measures do not adequately capture the economically relevant characteristics of a political system.

In this paper I present results from a research project conducted at the University of Basel over two and a half years.¹ One aim of this project was to identify the features of a political system that are relevant to economic performance and to quantify these features into an indicator that could be compared across countries. These issues have important implications for the judiciary and more research is needed to determine their impacts.

Mixed Evidence from Current Political Variables

The relationship between the political system and the economic performance of a country has long been the subject of academic interest and controversy. The literature on the relationship between political-institutional variables and economic growth can be divided into two approaches: the democracy approach and the political instability approach.²

The literature on the effects of democracy on economic growth is theoretically and empirically ambiguous. From the 1950s to the early 1970s, mainstream development theory held that rapid economic growth and the evolution of a democratic process were incompatible. This theory blamed the backwardness of less-developed countries on market failures that could only be corrected by strong, paternalistic states.³ The idea that an authoritarian state is better able to adopt necessary but painful policies remains popular.

However, the mainstream of current economic development theory finds compatibility between democracy and growth. Advocates of this view argue that state-led development strategies (such as import substitution) have continued

failed and free market economies have prevailed over state-planned autocratic models. This triumph of the market economy has reinforced a belief in democracy, which advocates of the compatibility thesis attribute to autocratic governments' failure to deliver economic prosperity. But empirical evidence does not support the compatibility thesis or the conflict thesis. In Brunetti and Weder (1994) we reviewed twenty empirical studies on the relationship between democracy and economic growth. Of these studies, two found a negative relationship, ten found no relationship, five found a conditional relationship,⁴ and three found a positive relationship.

The second, more recent branch of literature focuses on political instability instead of democracy and takes an important step toward better understanding the economically relevant aspects of a political system. The literature argues that political instability negatively affects productive decisions and leads governments to adopt myopic policies. An example is Alessina and Tabellini (1991), who explain how the simultaneous occurrence of large external debt buildup, capital flight, and low domestic investment makes government uncertain about its survival. The evidence produced by this literature is more homogenous than the evidence produced by the literature with the democracy approach. Studies indicate that political instability induces governments to use suboptimal policies that have negative effects on investment and growth. Still, the relationship between political instability and growth is not statistically robust—instability does not significantly affect growth when a number of control variables are included in the regression.⁵

There could be no systematic relationship between the economic performance of a country and its political institutions. More likely, however, existing measures simply do not capture the economically relevant features of political systems.

What do the existing variables measure? Indicators of democracy focus on the election process.⁶ They measure whether political leaders are elected in a free, competitive, and meaningful voting process. Indicators of political instability reflect disorderly political events such as the number of revolutions, coups, political assassinations, riots, and demonstrations.⁷ Both approaches emphasize changes in governmental power: measures of democracy evaluate the election quality, and measures of political instability focus on the probability of government collapse. Both approaches emphasize changes of politicians and tend to neglect policy changes. Both approaches measure only a small part of the potential political uncertainties faced by private business and underestimate the effects of volatile politics on private sector activity and growth.

Economically Relevant Features of a Political System

As mentioned, our research sought to identify the characteristics of a political system that influence economic performance and to construct a measure that could quantify the economic cost of bad politics. To better understand what private agents perceive as bad politics, we interviewed representatives of the private sector, the government, nongovernmental organizations, and journalists in Latin America and Southeast Asia. Interviews were conducted with companies ranging from small businesses to large conglomerates and multinational companies. Our main question to entrepreneurs was What are the obstacles you face in your economic activities that derive from your country's political system? The most common obstacle to private investment perceived by

entrepreneurs was uncertainty resulting from discretionary state action.

Entrepreneurs throughout Latin America routinely reported instances where they suffered because agents of the state had large discretionary powers. Discretionary interventions included bureaucrats' arbitrary enforcement of rules and laws, large, unpredictable swings in rules and policies, and uncertainties about judiciary enforcement. Entrepreneurs in Southeast Asia did not fear arbitrary policy changes. One entrepreneur who had worked for a multinational company in both Latin America and Southeast Asia provided this insight:

Do you want to know the crucial difference between Indonesia and Brazil? In Brazil I would run into my office every morning and hastily scan the newspapers' headlines to check whether some new rule or policy had been issued which could destroy our market. In Indonesia no such thing could ever happen; the general thrust of policies is known and the government's commitment to follow them is completely credible. Here I don't even read the newspapers.

Political systems must produce policies and regulations in a predictable way and enforce them credibly. This helps explain why existing political measures are imperfect proxies for the economically relevant characteristics of a political system. Democracy indicators concentrate on the election process, but elections do not ensure that the discretionary power of the state is reduced. Throughout Latin America, elected governments have exercised considerable discretionary powers by governing by decree. But Southeast Asian countries, some of which do not have

meaningful elections, are less subject to discretionary state intervention and unpredictable swings in policies.

Political instability measures are more closely associated with the uncertainty resulting from discretionary state intervention than are democracy measures. The threat of a coup or a revolution can cause an unpredictable policy swing. But still, the association is weak. Policies can be unpredictable under a government that is not threatened, and they can be predictable in a system characterized by political unrest and overthrows.⁸

Our study of the existing literature, data, and case studies indicated that additional data are needed that more accurately reflect the investor's problem—the problem of arbitrary changes in the rules of the game.

Economic Costs of Unpredictable Rules: A Cross-Country Analysis

After an extensive search for objective indicators of discretionary state intervention, we decided to ask entrepreneurs directly about their expectation of policy surprises. A questionnaire that focused on two general questions about the entrepreneur's perception of arbitrary rules was distributed to private entrepreneurs in twenty-eight developing countries.⁹

The first question asked whether the entrepreneur regularly had to cope with unexpected changes in laws or policies that could seriously affect his business. The six possible responses ranged from a completely predictable to a completely unpredictable institutional framework. This question attempted to use policy surprises as a general indicator of the discretion in the political system. However, it may be difficult for entrepreneurs to distinguish between policy surprises and other exogenous shocks not caused by the government.

The second question focused on the perceived credibility of the government. It asked whether the entrepreneur expected the government to adhere to major policy announcements. Again, the six possible responses ranged from the government's announcements never being credible to the government's announcements always being credible. The responses to these two questions were coded on a scale from 1 (lowest perceived arbitrariness) to 6 (highest perceived arbitrariness) and averaged to yield an indicator of political predictability.¹⁰

The results of ordinary least squares regressions using average growth rate of per capita real GDP during 1981-1990 as a dependent variable are shown in table 4.1.

The first regression shows that POLPRED has the expected sign and is significantly related to the growth performance in our sample of countries.¹¹ In fact, POLPRED

TABLE 4.1
Political credibility and economic growth

<i>Test variable</i>	Coefficient	Standard error	t-statistic	R ²	Number of observations
POLPRED ^a	-2.22	0.42	-5.29	0.50	28
DEMOC ^b	0.001	0.35	0.00	-0.40	28
RIOT ^c	0.37	0.29	1.26	0.02	27
COUP ^c	-8.48	5.96	-1.42	0.04	27

Note: The dependent variable is the growth rate of real per capita GDP between 1981 and 1990.

a. POLPRED is political predictability.

b. DEMOC is the average of the index of political and civil liberties for 1981-1990.

c. RIOT and COUP are.

Source: Growth rates: Summers and Heston (1991); DEMOC: Gastil (1991); RIOT and COUP: Barro and Woff (1989).

explains 50 percent of the variance in the average per capita growth rate.¹² The other three regressions produce the result we found in the literature: indicators of democracy and of political instability are not related to economic performance (Gastil 1991). In fact, DEMOC and RIOT have the wrong sign, neither is significant, and each explains only a small percentage of the variation in per capita GDP growth. We conducted a series of sensitivity tests, which included several rival explanatory variables, by estimating multiple regression. In Brunetti and Weder (1993) we tested the strength of political credibility against the most important determinants of growth used in the empirical literature.¹³ We also conducted the formal sensitivity test for cross-country growth regressions proposed by Levine and Renelt (1992). These tests indicated that political credibility is closely associated with economic growth.

Economic Costs of an Arbitrary Judiciary

One source of arbitrary changes in the institutional framework can be capricious law enforcement. In other words, our analysis can also be applied to judiciary law enforcement. To determine and quantify the arbitrariness a private agent has to cope with, the questionnaire included specific questions on institutional uncertainty in law enforcement. One symptom of potential arbitrariness is a lack of transparent rules and procedures. When rules and procedures are unclear, complicated, or contradictory, civil servants have a large scope for arbitrary decision-making. Other symptoms of arbitrariness include large-scale corruption or clientelism. The following two questions were included in the questionnaire:

JUD-1. Imagine a private conflict is brought to court with the evidence being very clearly in your favor.
Do continue

you have confidence that the assigned judge will enforce the law objectively, that is, according to transparent rules?

JUD-II. Please consider the following quotation for your country: "The party who pays more will win the case. Even if the evidence is clear, money can change the result."

Answers to the questions were coded from 1 to 6, with 1 being the lowest perceived arbitrariness and 6 the highest perceived arbitrariness.

The results of ordinary least squares regressions of these two questions with the real per capita growth rate as the dependent variable are shown in table 4.2.

The first regression shows that *JUD-I* has the expected sign and is significantly associated with the growth rate. The degree to which private individuals expect to be subject to vague and equivocal rules and procedures in the judiciary explains 23 percent of the variation of per capita growth in the countries surveyed.¹⁴ This indicates that arbitrariness in judiciary rules and procedures, and the ensuing uncertainty, are an important part of the overall political predictability.

JUD-II is significantly related to growth and explains 14 percent of the variation in growth rates. In other words, perceived judiciary corruption seems to affect economic growth performance. But the relationship between corruption and economic performance is not as close as the one between equivocal rules and procedures and economic performance. Our interviews also revealed that corruption and political predictability are not necessarily closely associated. The problem lies in distinguishing between forms of corruption. Those interviewed distinguished between corruption that acts as a tax or an added transaction cost and corruption that induces a high degree of uncertainty. One entrepreneur put it this way:

There are two kinds of corruption. The first is one where you pay the price and you get what you want. The second is one where you pay what you have agreed to pay and you go home and lie awake every night worrying whether you will get it (what you agreed to) or if it's going to be used against you and you will be blackmailed.

Research is needed to distinguish between forms of corruption.

Other approaches were used to measure the economic costs of an arbitrary judiciary, though with less success. Measurement problems are particularly difficult in the judiciary. An objective indicator, such as the number of cases brought to court, indicates how much a judiciary system is working, but it cannot discriminate between a good and a bad system. It is a kind of "Laffer curve" problem: both extremes are zero, but it is difficult to identify where we are on the curve. In an ideal system with perfect information and foresight, trading partners would anticipate the outcome of court decisions and write their contracts accordingly. The result would be that nobody would ever go to court. But we find the same result when nobody can foresee anything and judiciary outcomes are completely random. Many of the objective criteria for measuring and comparing the functioning of judiciary systems across countries have this "Laffer curve" problem.

Another reason the costs of an arbitrary judiciary are difficult to assess is that there are informal institutions that substitute for a poorly functioning judiciary. Private enforcement mechanisms can be very effective in small groups or well-organized "clubs" (Weder 1993). These clubs can be a partial substitute for a formal legal system by enforcing rules through reputation and mutual control. For example, the club may impose sanctions on a group member who does not behave according to the rules by excluding him or her from club benefits. In some instances large groups have succeeded in institutionalizing this informal enforcement mechanism, but in most cases the groups are rather small.¹⁵

The most predominant club is probably the extended family. Throughout Latin America, families play an important role in doing business. For most this is not only a cultural preference, but an economic necessity. Where the formal legal system does not provide a solid and predictable framework, it must be replaced by other rule systems, like social enforcement. However, a person who has always lived in an informal institutional environment based largely on reputation and trust will have difficulty withdrawing from it and living in a system based on formal, impersonal enforcement.¹⁶

While arbitrary enforcement of rules may be an important source of uncertainty, it is certainly not the only one. Our findings suggest that a country's entire political system must be considered.^{break}

TABLE 4.2

Judiciary arbitrariness and economic growth

<i>Test variable</i>	Coefficient	Standard error	t-statistic	R ²	Number of observations
JUD-I	-1.29	0.46	-2.82	0.23	28
JUD-II	-1.08	0.52	-2.07	0.14	28

Note: The dependent variable is the growth rate of real per capita GDP between 1981 and 1990.

Source: Author's calculations.

Conclusion

A badly functioning political system has important economic costs. Our results suggest that the most economically relevant characteristic of a political system is its propensity to arbitrary swings and outcomes. Our sample indicates that political predictability is a significant and substantial determinant of economic growth. An arbitrary judiciary is an important factor in overall political predictability and has significant costs in terms of economic performance.

Further research and data are needed to strengthen the empirical evidence. If our results can be verified in a larger sample, they will have strong policy implications. Not only do they provide an economic rationale for the development community's involvement in legal reform, they suggest that establishing political predictability—stability in the rules of the game—should be a primary reform goal for developing countries.¹⁷

Notes

This study was conducted while the author was a research fellow at the University of Basel, before joining the International Monetary Fund (IMF). The views expressed are the author's and do not necessarily reflect those of the IMF.

1. This study was a joint work with Silvio Borner and Aymo Brunetti of the University of Basel. See Borner, Brunetti, and Weder (1994).

2. See Brunetti and Weder (1993) for a detailed overview of these positions and their respective exponents.

3. See Dick (1974), who reports that the literature of that time almost unanimously accepted that an authoritarian form of government is more conducive to economic development.
4. A conditional relationship means that in some subset or under special assumptions a positive or negative effect can be found.
5. See Levine and Renelt (1992) for a sensitivity analysis of different determinants of growth. The authors show that political instability is not substantially related to growth.
6. See Gastil (1991), which is the most frequently used indicator of democracy. Ten out of the twenty studies we analyzed used Gastil's indicator of democracy. Interestingly, they did not receive the same results: five reported no relationship, two reported a conditional relationship, and three reported a positive relationship between Gastil's democracy indicator and economic growth.
7. Taylor and Jodice (1983) assembled such a data set. More recent studies work with the data of Barro and Wolf (1989).
8. The case of Thailand is illustrative. Since becoming a constitutional monarchy, Thailand has had thirteen constitutions, seventeen military coups, and several mass riots. However, interviewed entrepreneurs agreed that economic policies remained foreseeable and property rights consistently enforced throughout political turmoil.
9. The countries included in the sample are Argentina, Bolivia, Brazil, Cameroon, Chile, Colombia, Costa Rica, Ecuador, Ghana, Guatemala, India, Indonesia, Jordan, Malaysia, Mexico, Mozambique, Nigeria, Panama, Peru, Rwanda, Senegal, Singapore, Sri Lanka, Sudan, Tanzania, Thailand, Turkey, and Venezuela.
10. Our intention was to test whether political predictability is a determinant of growth of GDP per capita. For this purpose, time series data would have been ideal. In order to correct for changes in political credibility, we included a question that asked whether uncertainties had increased, remained the same, or decreased during the last ten years. This question was used to correct for the trend in the indicator. See Brunetti and Weder (1993) for a detailed description of the sample and the data.
11. Remember that the political credibility indicator is coded from 1 to 6. Therefore, we expect it to be negatively correlated with the growth rate.
12. That political credibility and per capital growth are significantly correlated and have the expected sign does not imply that political credibility is actually the cause of higher growth rates. The causality problem is inherent in all of this literature. Our data do not enable us to carry out refined causality tests because we have no long-term time series. We conducted a simple test, which supported our result.
13. The determinants of growth include rate of investment, GDP per capita in the base year, average rate of population growth, primary and secondary school enrollment, illiteracy, black market premium, rate of openness,

state consumption, rate of inflation, and continental dummies.

14. The same caveat regarding causality applies as in the first set of regressions.

15. Well-known examples of these large groups are the overseas Chinese in Southeast Asia.

16. See Sherwood, Shepherd, and de Souza (1994) for suggestions on how to overcome this measurement problem, as well as for a discussion on methods of measuring the cost of the judiciary.

17. My colleagues at the University of Basel and I are working on the construction of a more detailed indicator. Our goals are to refine our measurement in different areas of government, to broaden the data base and, eventually, to have time series data that allow more involved analysis.

References

Alesina, Alberto, and Guido Tabellini. 1989. "External Debt, Capital Flight and Political Risk." *Journal of International Economics* 27:199220.

Barro, Robert, and Holger Wolf. 1989. "Data Appendix for Economic Growth in a Cross Section of Countries." Harvard University, Cambridge, Mass.

Borner, Silvio, Aymo Brunetti, and Beatrice Weder. 1994. *Political Credibility and Economic Development*. MacMillan: New York.

Brunetti, Aymo, and Beatrice Weder. 1993. "Credibility and Growth." Wirtschaftswissenschaftliches Zentrum (WWZ) der Universität Basel Discussion Paper no. 9316. Basel.

De Soto, Hernando. 1989. *The Other Path*. New York: Harper and Row.

Dick, William. 1974. "Authoritarian and Nonauthoritarian Approaches to Economic Development." *Journal of Political Economy* 83:81727.

Gastil, Raymond. 1991. *Freedom in the World: Political Rights and Civil Liberties, 1990/1991*. Lanham: Freedom House.

Klitgaard, Robert. 1990. *Tropical Gangsters*. New York: Basic Books.

Levine, Ross, and David Renelt. 1992. "A Sensitivity Analysis of Cross-County Growth Regressions." *American Economic Review* 82:94263.

Roseen, Keith. 1984. "Brazil's Legal Culture: The Jeito Revisited." *Florida International Law Journal* 17:72144.

Sherwood, Robert M., Geoffrey Shepherd, and Celso Marcos de Souza. 1994. "Judicial Systems and Economic Performance." *Quarterly Review of Economics and Finance (U.S.)* 34, Special Issue: 10116.

Summers, Robert, and Alan Heston. 1991. "The Penn World Tables: An Expanded Set of International Comparisons, 1950-1988." *Quarterly Journal of Economics* 106:327-68.

Taylor, Charles, and David Jodice. 1983. *World Handbook of Political and Social Indicators*. New Haven and London.

Weder, Beatrice. 1993. *Wirtschaft zwischen Anarchie und Rechtsstaat*. Chur: Verlag Ruediger.

5—

Tort Liability and Economic Performance: Research Challenges

Steven Garber

There is active debate in the United States concerning the costs and benefits of the civil justice system in general and the tort liability system in particular. Two areas of tort that are particularly prominent and contentious are product liability and medical malpractice. These forms of liability are hoped to reduce the incidence and severity of personal injury while providing compensation to (at least some of) those injured in the course of product use or medical treatment. Reforms in both areas have been enacted in many states and are under consideration in several other states and at the federal level.

Proponents of reform of the product liability or malpractice system often claim that the current legal arrangements lead to major detrimental effects on the U.S. economy. In the case of product liability, concerns include limitations on the availability of products, increases in product prices, and discouragement of innovation. In the case of medical malpractice, a prominent concern is the possibility that liability fears induce health care providers to use medically inappropriate tests and procedures, thus undermining the quality of health care and driving up its costs. Opponents of reform often claim that the liability system is doing its jobs of preventing injuries and compensating those who are injured, at an acceptable cost to society.

In fact, concerns about the economic effects of tort liability are a leading—if not predominant—impetus for reform. Much of the policy debate reflects fundamental disagreement about the economic effects of the prevailing liability system. Of central concern for policy deliberations is how these effects would differ if some combination of dozens of proposed doctrinal and procedural reforms were instituted.

This disagreement might be narrowed—and policy improved—by research focused on the economics of the tort system. This chapter emphasizes product liability, the area in which the author has been working, but occasionally refers to medical malpractice and other types of liability. The focus here is on studies of the United States. For reasons that become clear, substantive results from such studies may be misleading guides for policy in other countries. However, it appears that the conceptual underpinnings of studies of the United States can prove useful for design and implementation of studies of other countries.

The chapter looks in general terms at how the tort system can affect the economic performance of a nation and briefly reviews some findings for the United States on the most direct and obvious of economic costs: the costs of operating the judicial sector itself. The discussion then elaborates on more subtle effects that may be even more important: the indirect effects on behavior and economic outcomes outside the judicial sector. Finally, the implications of U.S.-based research for other countries are considered.

Economic Effects of Liability: Direct and Indirect

A liability system—such as that for product liability, medical malpractice, or liability for automobile accidents—has two major social goals: leading people to be more careful when engaging in activities that can cause injuries and compensating (some of) those who are injured. These goals are often referred to as the deterrence and compensation functions of liability.

When a tort system is evaluated in terms of national economic effects, the central concern is how the system contributes to or detracts from the social objective to use productive resources—such as human labor (time and effort), land, materials, buildings, and machines—in ways that are most beneficial to society. Economists refer to this as the pursuit of economic efficiency. This objective

can be thought of in terms of maximizing national economic performance or national standards of living.

Injury compensation raises both noneconomic and economic issues. Regarding the former, much of the policy concern about compensation focuses on the fairness or justice of different patterns of compensation, issues that lie outside the realm of standard economic analysis. Nonetheless, economic analysis is of potential use in designing compensation systems. This is because it is socially desirable to achieve whatever compensation is, in fact, performed in ways that use up as few productive resources as possible (i.e., compensation measures that are as efficient as possible).

The deterrence function is concerned with how a liability system affects behavior bearing on the incidence and severity of injuries. For example, injuries might be reduced by more cautious automobile driving; the exercise of more care by those delivering medical services; or additional efforts in product design, better control in product manufacturing, and development and dissemination of information concerning product hazards and how to guard against them. Viewed broadly, injuries can typically be reduced (in frequency, severity, or both) by devoting more productive resources to that end. Thus, injuries can generally be reduced, but only at a cost to society. Pursuit of economic efficiency requires a balancing of the costs of injury reduction against its benefits.

Product liability arrangements affect safety-related decisions of manufacturers by influencing their incentives to invest in safer product design, manufacture, and information. Ideally, those focusing on the economic effects of liability would seek to design a system that provides manufacturers with the socially appropriate incentives to invest their money and effort in injury reduction. But real-world liability systems may affect economic outcomes other than the incidence of injuries. Such potential incidental economic effects of liability are a major concern in policy debate and research.

In sum, a liability system can affect a national economy in several ways. Most obviously, the system directly uses up or absorbs valuable resources in the operation of the judicial sector (e.g., time and effort of attorneys, plaintiffs, judges, jurors, and witnesses; office and court-room space). The value of these resources is referred to as the transaction cost of the system. Perhaps even more important, a liability system affects a national economy through effects on behavior outside the judicial sector. These indirect effects of liability—deterrence effects and incidental effects—can be beneficial (e.g., increases in safety) or detrimental (e.g., costs of increasing safety, some incidental effects).

Transaction Costs of Liability: Some Research Findings

Several quantitative studies provide information about transaction costs of operating the United States liability system.¹ In order to develop such estimates, it is typically necessary to obtain information that is not in the public domain. Such information has been developed through special surveys or access to proprietary information of insurance and industrial companies, attorneys, and individual litigants.

Estimates of two general sorts have been developed, motivated by different issues of central policy concern. First, the dollar value of resources absorbed by liability activity within the judicial sector (by lawyers, court personnel, etc.) provides perspective on the issue of the total costs of such activity to the economy. Second, comparing transaction cost estimates with the net amount of money received as compensation by injured people provides perspective on the issue of how well the system performs in terms of the social goal of providing compensation at as low a resource cost as possible.

Kakalik and Pace (1986) provide broadly based cost estimates of the first sort: dollar transaction costs of a year's worth of tort litigation in the United States.² In particular, they provide estimates of the total transaction costs of all tort cases in federal district courts or state courts of general jurisdiction that were terminated in 1985.³ Two different estimation methods yielded a range of \$16 billion to \$19 billion.⁴ Of these totals, \$8 billion to \$10 billion were litigation costs borne on the defendants' side, such as legal fees and expenses, costs of processing insurance claims, and costs of defendants' time; \$6 billion to \$8 billion were payments to plaintiffs' attorneys, other litigation expenses of plaintiffs, and the value of plaintiffs' time; and about one-half billion dollars were court costs net of court fees paid by litigants.

Policy evaluation of such figures depends ultimately on what is accomplished by the activities that generate these costs and whether there are less costly means of gaining the same social benefits (e.g., deterrence, justice). With this caveat it is noted that \$19 billion represented just about one-half of one percent of the United States gross national product in 1985 or just over \$100 per capita (in 1994 dollars). Such figures indicate how much economic performance could possibly be improved through decreases in transaction costs alone.

Some perspective on the second issue—the resource cost (efficiency) with which compensation is accomplished—can be obtained by asking: How much compensation was accomplished through the use of these

resources? Kakalik and Pace (1986) estimate a range of \$14 billion to \$16 billion in net compensation received by plaintiffs in 1985. Thus, their study suggests that of the total expenditures on tort litigation (i.e., transaction costs plus net compensation payments) somewhat less than half was actually transferred as compensation.

Such fractions vary considerably by type of case; for example, Kakalik and Pace (1986) estimated net compensation to be 52 percent of all expenditures for suits concerning automobile accidents (slightly more than half of the cases) and 43 percent for all other torts taken together. Danzon (1985) reports similar estimates for medical malpractice. Kakalik and others (1984) focused on asbestos litigation, where transaction costs appear to be even higher; they estimate that net compensation was 37 percent of total expenditures.

Transaction costs have also been estimated for a quite different domain in which the United States has chosen to rely on a liability-based approach: cleanup of inactive hazardous waste disposal sites under the so-called Superfund program.⁵ Acton and Dixon (1992) obtained confidential data from four large insurance companies and five very large industrial firms (all with annual revenues of more than \$20 billion). These were used to estimate the proportions of Superfund-related expenditures that reflected transaction costs rather than costs directly related to cleaning up sites. For the insurance companies, transaction costs averaged 88 percent of total expenditures; for the industrial companies the corresponding figure was 21 percent. Dixon, Drezner, and Hammitt (1993) examined the experience of 108 smaller industrial companies (annual revenues of less than \$20 billion), estimating an average transaction cost share of 32 percent. In both studies, the authors present alternative estimates under various assumptions and emphasize that the estimates rely on experience to date in a program where most sites have yet to be cleaned up. Thus, there is considerable uncertainty about what transaction cost shares will be once cleanups are completed.

Many conclude that liability is a very inefficient means of injury compensation. For example, transaction costs for private health or disability insurance involve much lower fractions of total expenditures.⁶ However, liability is not merely a compensation device; it is also intended to provide social benefits by changing behavior affecting the incidence of injuries. In some contexts, the indirect economic effects of liability—desirable and undesirable—may be of even more policy importance than the transaction costs of the judicial sector.

Indirect Economic Effects of Liability: Challenges for Researchers

Economic analysis of tort law, then, requires consideration of how legal doctrines and procedures affect behavior outside the judicial sector. Liability systems are hoped to benefit society by inducing behavior that reduces injuries. However, there is widespread concern that United States liability systems also have unintended behavioral effects that are socially detrimental. Thus, analysis of the indirect economic effects of liability requires attention to various types of behavioral changes outside the judicial sector, some of which would be socially beneficial and others that would be socially detrimental.

Analysis of such effects is very challenging. This section provides an overview of some difficulties that seem not to be widely appreciated. First, it considers what policymakers need to know in order to identify policy reforms that promise to lead to improved economic outcomes. Then it presents a general framework for analyzing these issues, a framework that breaks the essential questions into pieces that seem best analyzed individually. The focus then narrows to product liability, specializes the framework accordingly, explains how research might proceed using this framework, and reports on past and ongoing research along these lines.

What Policymakers Need to Know

In considering reform of the United States product liability system, policymakers are confronted with sharply conflicting claims made by proponents and opponents of reform. Many who call for reforms claim that liability reduces the availability and usefulness of products, increases prices, discourages innovation, and undermines the competitiveness of United States industry. Other, similarly complex issues are raised by proponents of reform in other liability spheres. Numerous reforms aimed at reducing liability burdens on businesses and health providers have been proposed. Those who oppose reform claim that liability improves national well-being, because it accomplishes the objective of making products or services safer at acceptable costs.

To evaluate proposed reforms, policymakers need answers to three questions:

What are the actual economic effects of liability?

How does the system produce these effects?

Can policies be structured to increase the benefits of the system while reducing the costs—and if so, how?

Regarding the first question, it is clear that policymakers would wish to consider the full range of important economic outcomes that may be sensitive to liability policy. What seems much less clear from the policy debate is that policymakers need to know a lot more than that. Answering the first question would reveal at most the relative importance of the desirable and undesirable economic effects within the prevailing policy environment. Even if this were known, an essential task remains: determining how to do better. The third question above states this in economic terms.

Identifying policy reforms that promise improved economic outcomes is especially challenging because it requires prediction of economic outcomes that would occur under liability regimes that have not been tried. There is no direct evidence concerning such outcomes. Predicting them requires an empirically grounded understanding

of how business or professional decisions are influenced by factors that liability doctrine and procedures can shape. The best hope for developing such an understanding appears to be studying the workings of the prevailing liability system with a particular emphasis on why the system produces the effects that it does; this is the second question above.

A General Conceptual Framework

Analyzing the second question requires a conceptual framework linking liability to decisions to economic outcomes of social concern.

Liability affects decisions of companies or health care providers through its potential to impose costs on them. A liability system influences decisions as part of a complex environment within which potential liability combines with the potential activities of regulatory bodies and market forces to create actual incentives for companies.⁷ However, the effects of liability rules and procedures on decisions also depend on how liability potential is perceived by decisionmakers. Perceived incentives are shaped both by the information decisionmakers have about the operation of the liability system and by psychological factors.⁸

Decisions reflect fundamental objectives of decision makers such as profit or income maximization, their perceived incentives, and their attitudes toward risk. The economic outcomes of these decisions affect national economic well-being or standards of living.

To emphasize the seemingly broad applicability of the general framework, figure 5.1 lists very diverse types of economic outcomes. The first four are relevant to product liability and medical malpractice. The last three are related to liability spheres that have not been mentioned, but have raised claims of substantial, detrimental economic effects: liability for financial injury from securities fraud, where concerns are raised about effects on costs of capital and investment; liability for wrongful termination of employees, where concerns are raised about effects on labor costs and employment levels; and liability for environmental damage, where concerns are raised about relocation of manufacturing activity abroad.

According to this framework, understanding how liability affects economic outcomes requires analysis of:

What incentives are created by potential liability within a complex system of incentives.

How liability potential is perceived by decisionmakers.

How decisions are affected by the kinds of prospects suggested by perceptions of liability potential.

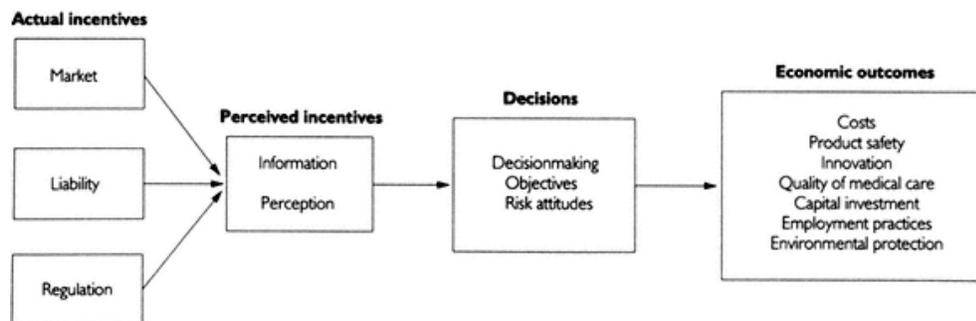


Figure 5.1
 General conceptual framework for assessing economic effects of various types of liability
 Source: Author.

How economic outcomes of social concern are affected by decisions that are sensitive to the liability environment.

How this general view specializes in the case of product liability.

Indirect Effects of Product Liability: A Research Strategy and Some Findings

In Garber (1993) the author used this framework specialized to the context of product liability to study the United States prescription pharmaceutical and medical devices industries, two industries that are particularly prominent in policy debates concerning potential detrimental economic effects of product liability.⁹ The discussion here emphasizes substantive conclusions that seem likely to apply more broadly than to these two industries and lessons for future research. Examples are provided from the United States drug and medical devices industries, as well as the United States automobile industry, another industry where concerns about detrimental economic effects are widespread.¹⁰

Background on Product Liability

Manufacturers can reduce product hazards in three basic ways: improving manufacturing quality control, changing product design, and providing information or warnings to product users. These categories underlie a standard distinction in product liability law;¹¹ in general, liability can result from injuries attributable to any one of three types of product defects: manufacturing defects, design defects, and warning defects.

The relative importance of these types of defects varies substantially across industries. Consider the three industries emphasized here. Liability for manufacturing and design defects is of paramount importance for autos, not uncommon for medical devices, and relatively rare for drugs. For devices and especially drugs, warning defects are typically the central issue in court.

Conceptual Framework Applied to Product Liability

These differences across industries in the relative importance of the different types of defects suggest that the economic effects of product liability are likely to differ substantially across industries. In fact, the economic effects of product liability depend on numerous factors that vary from industry to industry and sometimes among products within specific industries. Such factors include regulatory policy, aspects of the market environment such as the degree of competition or the ability of customers to detect product hazards, and the technology and costs of developing new products and improving product safety. Since many of these factors also differ across countries, substantive results from studies of the United States may not provide much policy guidance for other countries.¹²

Since policymakers need to know why product liability has the effects that it does and how effects are expected to differ across industries, analyses at a highly aggregated level (e.g., the entire manufacturing sector or a group of industries) cannot provide the necessary information. Analyses at the industry level—paying attention to potential differences across products within the industry—seem required for the kinds of detailed understanding necessary for policy formulation.¹³ Thus, the conceptual framework is best employed at the industry—or even product—level. Each component—actual incentives, perceived incentives, company decisionmaking, and economic outcomes (figure 5.2)—can be analyzed separately, applying insights from economics, psychology, and management science as well as empirical information about the industries under study. Consider each component of the framework in turn, moving from left to right in figure 5.2.

Actual incentives for manufacturers to provide safer products come from the market, regulation, and the product liability system. In fact, events in these spheres interact in complex ways.¹⁴ For simplicity, the discussion here ignores several of the potential interactions.

The market can provide incentives for companies to improve product safety because products whose hazards are apparent to consumers will find fewer buyers or command lower prices. Thus, improvements in a product's safety increase the demand for the product—and reward the company that makes such improvements—to the extent that potential buyers are able to judge product safety.

In the United States products that are associated with many or severe injuries—the same products for which product liability is thought to be of major economic significance—are directly regulated by a federal agency. Pharmaceuticals and medical devices are regulated by the Food and Drug Administration (FDA) and automobiles by the National Highway Traffic Safety Administration (NHTSA).¹⁵ A prescription drug or medical device can—not be marketed in the United States without the approval of the FDA based on its judgment that the product is sufficiently safe and effective. The NHTSA promulgates safety standards that apply to all automobiles, and automobiles that are found by the NHTSA to involve safety-related defects can be ordered recalled and repaired at the expense of the manufacturer.¹⁶ Thus, the continue

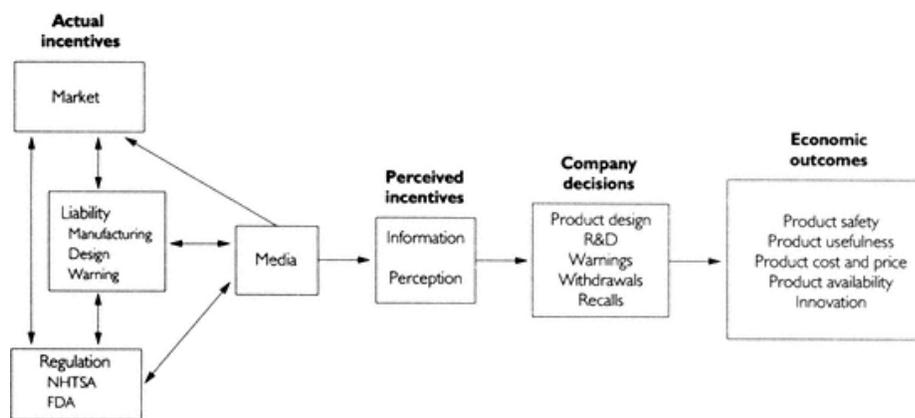


Figure 5.2
 Conceptual Framework for Assessing Economic Effects of Product Liability
 Source: Author

regulatory system provides companies with incentives to make safer products.

The liability system operates in conjunction with these other incentives for product safety. Liability can directly impose costs on companies such as payments of claims by injured product users (which often involve at least the implicit threat of a lawsuit), costs of defending liability suits, and payments of damages awarded as the outcome of suits. The liability system can also trigger events in the regulatory sphere (e.g., by calling attention to a possible defect in an automobile and leading to a recall) or in the market (e.g., a lawsuit that is highly publicized may lead to decreases in demand for the product involved by making consumers more aware of possible safety hazards).

Company decisions are driven by perceived incentives, which may be quite different from actual incentives. This may be especially the case with regard to liability because decisionmakers have especially limited information about the operation of the liability system; the operation of the system involves substantial unpredictability; and all decisionmakers operate subject to well-documented psychological biases.¹⁷ With regard to the last of these, companies in many industries may tend to overestimate the incidence of large jury awards or punitive damage awards because of the attention paid to such cases in policy discussions and media accounts.¹⁸ In the context of pharmaceuticals and medical devices, court outcomes based on controversial scientific views concerning injury causation are also highly publicized and are likely to be perceived to be more likely than they actually are.

Within this environment, companies make decisions about innovative effort, product design and testing, provision of information about product hazards, product withdrawals, and product recalls.¹⁹ The fundamental objective of companies is assumed to be profits. However, maximizing profits is precluded by the complexity of the decision environment and the considerable uncertainties and risks involved.

The management literature provides insight into how liability risk is likely to be conceptualized and what the responses might be. Threats to firm survival are particularly important. For example, March and Shapira (1987) report that more than 90 percent of executives interviewed said they would not take risks where a failure could jeopardize the survival of their firm.

Thus, in studying company decisions we must pay special attention to uncertainty and risk, and especially to those risks that may be perceived as threatening the survival of a company. In fact, product liability risk can be even more of a concern to decisionmakers than many other types of business risk. The potential liability costs stemming from a particular decision—for example, not incorporating a new design element that might increase the safety of a particular medical device—are effectively unlimited.²⁰ Several factors can contribute substantially to the risks associated with liability. Direct costs of liability alone can threaten the viability of even relatively large companies because of the possibility of very large numbers of suits involving a particular product (so-called mass torts), the unlimited nature of punitive damages in individual cases, and the fact that punitive damages can be assessed in multiple cases for the same continue

behavior. Financial disaster can also result from events triggered by liability. For example, efforts to win liability suits against companies can lead to widely publicized allegations that may lead to costly responses of regulators or may severely damage a company's reputation and undermine demand for its products.

Such factors seem fundamental to understanding how liability can have major incidental effects. However, the plausibility and relative importance of such scenarios appear to differ considerably across industries. This is well illustrated by contrasting pharmaceuticals and medical devices with automobiles.

With pharmaceuticals and medical devices, it is clear that direct liability costs can become large enough to threaten the viability of major companies. In particular, these industries have been the setting for several mass torts. For example, the drugs DES and Bendectin have generated litigation extending over decades and this litigation continues today. Medical devices, such as the Dalkon Shield intrauterine device and, quite recently, silicone gel breast implants and the Shiley heart valve, have also generated mass litigation. These products alone have involved hundreds of thousand of claims and billions of dollars in litigation costs and compensation payments.²¹

Apparently, there have been no comparably costly mass torts for individual automobile models.²² With automobiles the leading possibility for liability to lead to financial disaster may involve the potential indirect costs of liability on company reputation and sales. Such effects seem more plausible for automobiles than for drugs or devices. This is because physicians, who are very influential in determining the demand for prescription drugs and medical devices, may be less influenced than automobile buyers by mass media accounts suggesting product hazards or corporate misconduct and because individual automobile models—unlike many drugs and devices—typically have close substitutes.

In the face of such risks, liability may affect a wide range of decisions and, in turn, several economic outcomes of social concern. The economic outcome that product liability is intended to alter is product safety. Consider other economic outcomes that may be sensitive to liability policy.

Decisions influenced by liability may have important implications for product costs and prices. Design changes or improvements in manufacturing quality control that reduce injuries often increase the cost of designing or

manufacturing products and, in turn, product prices.²³ For example, injuries might often be reduced by more extensive testing of drugs or medical devices in clinical trials before marketing, but increasing the sample size or duration of such a test involves additional costs.

Liability can have more subtle, unintended consequences, such as reducing the usefulness of products. For example, the rate and severity of automobile injuries can be reduced by making automobiles larger and heavier or designing them to have maximum speeds of, say, 40 miles per hour. But the former change sacrifices fuel efficiency and the latter requires automobile users to spend more time in travel.

Other unintended consequences of product liability can result because liability can be imposed in circumstances that are inappropriate from either a legal or economic point of view. Legal doctrine itself may specify liability for behavior that is socially desirable. For example, manufacturers can be held liable for failure to warn of drug side effects that are either too doubtful, rare, or numerous for such warnings to be economically appropriate.²⁴ The possibility of liability for socially desirable behavior leads to concerns about unintended consequences such as withdrawals of products that are socially worthwhile (e.g., some vaccines and intrauterine devices) and discouragement of socially desirable innovation efforts.²⁵

A Research Strategy and Some Tactics

The research questions how various product liability policies would affect several economic outcomes. The most direct empirical evidence is that generated by liability policies that have been in effect. There are two direct research approaches; unfortunately, neither seems promising.

The first would be to ask decisionmakers directly how liability affects their decisions and how their decisions might differ under different policy regimes. This approach is not promising because decisionmakers may be largely unaware of the effects of liability on their decisions, may find it difficult to describe these effects, and may be hesitant to discuss such sensitive matters with outsiders. Moreover, because the business community is actively campaigning for liability reforms, the credibility of their responses to questions about such effects could reasonably be doubted.

The second direct approach to studying the effects of liability would be to measure the decisions that drive the economic outcomes of interest or the outcomes themselves and relate these quantitatively or qualitatively to features of the market, regulatory, and liability environments. However, this is not feasible for many outcomes for a variety of reasons:

Many of the decisions driving the economic outcomes of interest cannot be observed (e.g., decisions involving R&D or regulatory compliance).

Some of the outcomes cannot be observed (e.g., innovations that might have emerged but did not).

The social value of some outcomes that can be observed cannot be objectively characterized (e.g., the safety of various design features).

It may not be possible to develop objective measures of actual or perceived incentives.

It seems that the most promising way to assess many of the economic effects of interest is an indirect approach: to characterize how the liability system influences the decisionmaking environments of companies and to draw inferences about how these influences alter decisions and economic outcomes. This strategy can rely on the well-developed literature in managerial decisionmaking. But productively applying this literature requires a detailed understanding of actual and perceived incentives in the specific contexts under study. Combining such

information with what is known about company decisionmaking more generally allows inferences about how the incentives and risks created by liability affect decisions and, in turn, economic outcomes of social concern.

Characterizing decisionmaking environments requires collecting, analyzing, and synthesizing information from diverse sources and using a diverse set of analytic approaches. The aspects of a decisionmaking environment deserving emphasis may differ from industry to industry. As a consequence, the most relevant information differs across industries. This is illustrated by contrasting the study of pharmaceuticals and medical devices (Garber 1993) with the work in progress on the automobile industry.

For reasons discussed above, the study of pharmaceuticals and medical devices emphasized direct liability costs of companies. It relied on publicly available empirical information, primarily of two basic types. The first is information about the liability environment, including the litigation history of individual products, for example, published decisions, numbers of suits, sizes and factual bases of awards; legal briefs, commentaries, and analyses; and descriptions of litigation by participants in the policy debate. The second type of information relates to company decisions. This includes product introductions and withdrawals; information provided to physicians and patients; descriptive accounts of company actions; time series data on prices; and numerical simulations of R&D investment evaluation using pharmaceutical industry data.

As discussed above, indirect liability costs appear to be of primary importance for understanding the economics of liability in the automobile industry. Accordingly, the work in progress on that industry focuses on the potential for events in the liability domain (such as jury verdicts) to trigger regulatory or market responses that are very costly to companies. Mass media coverage of liability events is viewed as a crucial factor in determining the potential responses of automobile customers and a contributing factor to the potential responses of the NHTSA. A data base is being constructed that will allow statistical analyses of various relationships. It will contain information for all automobile and light truck models detailing their liability histories (primarily from litigation reports), regulatory treatment (primarily from official NHTSA reports), mass media coverage (from transcripts of articles from several dozen newspapers and several national magazines), monthly sales levels, and daily stock prices of their manufacturers. This information is expected to allow development of systematic empirical evidence concerning the determinants and nature of mass media accounts of liability events and product safety issues, and the effects of liability events and their media coverage on NHTSA activity, sales of individual automobile models, and company stock prices. The results are expected to be informative about the kinds of liability developments that generate particularly large indirect costs; the mechanisms involved; and the implications for incentives, company decisions, and economic consequences of product liability.

Basic Conclusions about Drugs and Medical Devices

Garber (1993) presents numerous, detailed conclusions—many relying heavily on inference—about the effects of the prevailing liability system on the economic performance of the United States pharmaceutical and medical devices industries. In the public debate, the issue is generally framed in terms of whether there is "too much" or "too little" liability burden on business. The analysis indicates that liability has substantial, socially desirable and socially undesirable effects, and that the standard framing is not a useful guide for policy.

A few of the substantive conclusions suggest the intricacy of the policy task. The effects of the liability system that have desirable economic consequences include hastening the withdrawal of unacceptably hazardous products and deterring the distortion or withholding of company reports to the FDA. Among the economically undesirable aspects of the system are encouraging overload of safety information to physicians, restricting safety information for patients, and discouraging innovation efforts for some medically valuable products.

The policy problem is one of increasing the system's desirable effects while decreasing the undesirable ones. In terms of economic effects, it seems to matter greatly how the liability burden on business is decreased or increased. In fact, some economically promising policy reforms would involve decreases in the overall burden

and others would involve increases.

Conclusions about the economic effects of the prevailing system and why they arise were used to consider continue

the types of reforms that seemed promising in terms of improving the economic performance of the pharmaceutical and medical devices industries. From among the numerous claims made by those who propose policy reforms, the analysis pointed to three particular sources of concern:

The potential for liability to do more harm than good for those products that are especially strictly regulated.

The potential for misperception created by how the law characterizes the standards for the availability of punitive damages.

The potential for misunderstanding due to difficulties in resolving scientific disputes about injury causation within an adversarial process.

Reforms aimed at these sources of concern—discussed in Garber (1993)—might substantially improve the economic performance of the United States pharmaceutical and medical devices industries.

What about Other Countries?

The studies discussed above all pertain to the United States experience. The research strategy outlined was developed to study product liability in United States industries. Some observations about implications for other countries are in order.

It seems obvious that the substantive conclusions of studies of the United States are very unlikely to be revealing about the economic effects of liability elsewhere in the world. The United States liability environment is widely claimed to be unique.²⁶ Moreover, it is emphasized above that the economic effects of liability also depend on several other elements of decisionmaking. Some of these elements may be quite similar across countries, for example, the psychology of decisionmakers, their objectives and willingness to take risks, and the technology for improving safety. But other elements may be very different, including the nature of public regulation, the costs of improving safety from the level that would prevail without liability, and the degree of market competition.

However, much of the underpinning of the United States studies seems to apply widely. Both transaction costs of the judicial sector and indirect effects of liability on behavior are likely to be of substantial policy importance in many countries. Estimation of transaction costs is likely to require information that is not generally in the public domain. Policymakers need to know how liability affects decisions if they are to craft legal rules that have desirable behavioral effects. The direct approaches to studying behavioral effects are likely to encounter difficulties similar to those enumerated for the United States context. Research on behavioral effects is likely to require substantial doses of inference.

The general conceptual framework outlined in the section on indirect economic effects of liability seems promising for organizing analyses of behavioral effects in a broad range of circumstances. Much of the economic impact of liability will depend on how liability affects decisions in business or professional settings. Whenever liability potential confronts decisionmakers, it will influence decisions according to how it affects their perceptions about rewards and penalties of different choices (in terms of their own objectives). The literature on risk perception is helpful in judging whether liability potential is perceived to be sufficiently large to warrant the attention of decisionmakers and, if so, how perceptions of liability potential and risk are likely to relate to actual incentives embedded in the legal system. As in the United States context, research on economic effects of liability

seems best conducted for specific industries, products, or services.

Notes

1. Much of this work has been done at the RAND Institute for Civil Justice. (See Saks 1992, pp. 128183.) See Hensler and others (1987) for an interpretive synthesis.
 2. This includes all cases alleging injury (e.g., personal or property)—except breach of contract—for which civil damages could be assessed.
 3. This included about 886,000 cases, among which 39,000 were in federal courts. As the authors note, their estimate ignores litigation in other courts (which accounts for about 8 percent of compensation paid in all tort litigation) and costs associated with damage claims that did not result in lawsuits.
 4. It is emphasized that these figures do not include the (net) payments received in compensation by injured plaintiffs. (Net compensation payments do not involve resource costs to the economy as a whole; they represent a transfer of money from defendants to plaintiffs.)
 5. The original federal legislation is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.
 6. Danzon (1991, p. 52) reports that for large plans transaction costs are roughly 20 percent of compensation paid.
 7. In the context of medical services, practitioners and institutions are regulated through licensing requirements. Market forces come into play because service providers with better reputations for avoiding injuries are more attractive to patients (i.e., potential customers).
 8. Actual incentives are the structure of rewards and penalties that are embedded in the decisionmaking environment. Perceived incentives are the mental images decisionmakers have about this structure of rewards and penalties.
break
- Perceptions may differ from reality because decisionmakers have incomplete information about the history of liability events and because of various cognitive biases that have been documented by psychologists studying behavioral decisionmaking.
9. Others have analyzed indirect economic effects of product liability using different research strategies than that suggested here. Among the most notable are several of the chapters in Huber and Litan (1991). See also Viscusi and Moore (1993).

10. This is the focus of the author's work in progress with Anthony Bower. Dungworth (1988) provides quantitative information about product liability burdens across industries and over time.

11. In the United States product liability law is an amalgam of state case (common) and statutory law, which varies across states. There is no federal product liability law. However, the United States Senate has considered product liability bills during every Congress for over ten years.

12. See section on the implications of U.S.-based research for other countries, at the end of the chapter.

13. Differences across products seem relatively unimportant within the automobile industry, but they appear to be very important in analyzing the pharmaceutical and medical devices industries. In the case of pharmaceuticals, differences in legal doctrine and in the types of patients using different drugs are particularly important. Among medical devices, differences in regulatory treatment are especially important.

14. Empirical examination of such interactions are a major emphasis of the work in progress on the automobile industry.

15. Other hazardous products are regulated by the Consumer Product Safety Commission.

16. In fact, recall orders by NHTSA are quite rare, but automobile recalls by manufacturers (often motivated by the prospect of a recall order or the desire to maintain customer relations) are common—dozens occur in a typical year.

17. See, for example, Kahneman, Slovic, and Tversky (1982).

18. Especially important in this regard is the availability heuristic documented by psychologists. As explained by Slovic, Fischhoff, and Lichtenstein (1987, p. 19): "People using this heuristic judge an event to be likely or frequent if instances of it are easy to imagine or recall." Events like those that are repeatedly recounted in vivid terms are especially easy to imagine.

19. The nature of these decisions differs markedly across the industries. For example, auto manufacturers provide product warning information directly to buyers while prescription drug and device manufacturers warn physicians, but generally not patients. The technologies used in design and innovation are very different among the three industries. Companies in all three industries can stop producing and selling a product, and automobiles and some devices that have already been sold can be recalled and modified; but recalled drugs and many recalled devices are destroyed rather than fixed.

20. Typical business risks—such as those associated with an investment project—involve risking amounts of money explicitly committed by the decisionmakers. In such cases, the worst-case scenario is losing (only) the entire amount committed.

21. Liability for injuries associated with the Dalkon Shield led its manufacturer into a bankruptcy reorganization within which more than \$2.5 billion was allocated to a fund to compensate injured women. A settlement is pending in the breast implant litigation in which several manufacturers and suppliers would contribute to a fund to provide more than \$4 billion over the course of several years.

22. Perhaps because—unlike the case of drugs and medical devices, in which injuries with long latency periods are possible—injuries caused by automobile accidents are evident immediately, and automobiles that have already been sold can be recalled to remedy defects.

23. Liability may also increase product prices directly because liability costs are a cost attributable to selling the products.

24. See, for example, Viscusi (1991a, 1991b).

25. With regard to automobiles, for examples, concerns have been raised that liability has subtle effects on the design process and may even discourage safety-enhancing innovations because new technologies are more susceptible to liability precisely because they are unproved.

26. Here, "U.S. liability environment" should be interpreted broadly. Schwartz (1991) compares product liability and medical malpractice across several countries (emphasizing the United States, England, France, Germany, and Japan). His conclusion begins: "To summarize, general features of the American legal system seem to be far more influential than actual differences in tort doctrine in explaining the enormous difference between the number and cost of product and malpractice claims in the United States and their number and cost in the other countries here under review" (Schwartz 1991, p. 76).

References

Acton, Jan Paul, and Lloyd S. Dixon. 1992. *Superfund and Transaction Costs: The Experiences of Insurers and Very Large Industrial Firms* . Report R-4132-ICJ. Santa Monica, Calif: RAND.

Danzon, Patricia. 1985. *Medical Malpractice: Theory, Evidence and Public Policy* . Cambridge, Mass.: Harvard University Press.

———. 1991. "Liability for Medical Malpractice." *Journal of Economic Perspectives* 5 (3):5 169.

Dixon, Lloyd S., Deborah S. Drezner, and James K. Hammitt. 1993. *Private Sector Cleanup Expenditures and Transaction Costs at 18 Superfund Sites* . Report MR-204-EPA/RC. Santa Monica, Calif: RAND.

Dungworth, Terence. 1988. *Product Liability and the Business Sector: Litigation Trends in the Federal Courts* . Report R-3668-ICT. Santa Monica, Calif: RAND.

Garber, Steven. 1993. *Product Liability and the Economics of Pharmaceuticals and Medical Devices* . Report R-4285-ICJ. Santa Monica, Calif: RAND.

Hensler, Deborah R., Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson. 1987. *Trends in Tort Litigation: The Story behind the Statistics* . Report R-3583-ICJ. Santa Monica, Calif: RAND.break

Huber, Peter W., and Robert E. Litan, eds. 1991. *The Liability Maze: The Impact of Liability Law on Safety and Innovation*. Washington, D.C.: The Brookings Institution.

Kahneman, Daniel, Paul Slovic, and Amos Tversky, eds. 1982. *Judgment under Uncertainty: Heuristics and Biases*. Cambridge, U.K.: Cambridge University Press.

Kakalik, James S., Patricia A. Ebener, William L. F. Felstiner, Gus W. Haggstrom, and Michael G. Shanley. 1984. *Variation in Asbestos Litigation Compensation and Expenses*. Report R-3132-ICJ. Santa Monica, Calif: RAND.

Kakalik, James S., and Nicholas M. Pace. 1986. *Costs and Compensation Paid in Tort Litigation*. Report R-3391-ICJ. Santa Monica, Calif.: RAND.

March, James G., and Zur Shapira. 1987. "Managerial Perspectives on Risk and Risk Taking." *Management Science* 33(11):140418.

Saks, Michael J. 1992. "Do We Really Know Anything about the Behavior of the Tort Litigation System—and Why Not?" *University of Pennsylvania Law Review* 140(4): 128183.

Schwartz, Gary T. 1991. "Product Liability and Medical Malpractice in Comparative Context." In Peter W. Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation*. Washington, D.C.: The Brookings Institution.

Slovic, Paul, Baruch Fischhoff, and Sarah Lichtenstein. 1987. "Behavioral Decision Theory Perspectives on Protective Behavior." In Neil D. Weinstein, ed., *Taking Care: Understanding Self Protective Behavior*. Cambridge, U.K.: Cambridge University Press.

Viscusi, W. Kip. 1991a. *Reforming Products Liability*. Cambridge, Mass.: Harvard University Press.

———. 1991b. "Risk Perceptions in Regulation, Tort Liability, and the Market." *Regulation* (fall):5057.

Viscusi, W. Kip, and Michael J. Moore. 1993. "Product Liability, Research and Development, and Innovation." *Journal of Political Economy* 101(1):16184.break

PART III— PROCEDURAL REFORM

6— Unification of Procedural Law in Judicial Reform

Marcel Leon Storme

In the 1970s the world became aware of the fundamental problem of providing access to the courts. The access-to-justice movement¹ undoubtedly reflected the growth of a corresponding undercurrent in society. For many people, addressing the courts was, and still is, a last resort, whether it be citizen against the state and the public authorities, wife against husband, child against parent, employee against employer, consumer against producer, patient against doctor, the small residence against the twenty-story building, the pedestrian against the

heavy-goods vehicle, and so on.

Before the 1970s, procedural law had been stagnant. Moreover, it had been of interest to only a small circle of practitioners and incapable of inspiring serious academic research.²

The access-to-justice movement did not, however, succeed in gaining access to the common legal system. On the contrary, procedural law, in the broadest sense of the term—that is, judicial organization, jurisdiction, and rules of procedure—was expressly excluded from the scope of several international treaties. It is worthwhile to consider the reasons for this negative attitude in order to assess whether or not it was justified.

For many years procedural law was regarded as an area of the law that had a specifically national character. This view elicited from Bordeaux, in his nineteenth century comment on the Code de procédure civile (Bordeaux 1657), the observation that it was impossible to cite any precedent for the successful export of procedural law.

But even as Bordeaux wrote these words, there was significant evidence to the contrary, since in 1890 the German Code of Procedure (adopted in 1877) had been translated and incorporated by Japan. More recent examples of such incorporation include the Benelux Uniform Law (1980), legislation based on the Dutch model;³ the Mareva injunction, modeled on the continental *saisie conservatoire*, or "seizure of goods"; and examples from South America.

The same school of thought holds that procedural law is fraught with political overtones, and thus not transferable. The best example of this was the fundamental distinction made between the procedural law of continental Western Europe and the so-called socialist procedural law of Eastern Europe. In general terms, it can be said that Western Europe applied the accusatorial system, while Eastern Europe enforced the inquisitorial system. But this distinction is gradually disappearing. The political nature of procedural law no longer justifies any divergence in the legal rules that apply in countries where the freedom and equality of citizens are guaranteed.

Even so, procedural law can be used to carry out a particular policy aimed at applying certain values or attaining certain objectives. (This issue will be dealt with at greater length later in the chapter.)

It has been rightly stated that the formal aspects of procedural law were the guarantors of freedom. On this subject, Montesquieu wrote in his *Esprit des Lois* (LXXIX, chapter 1): "Les formalités de la Justice sont nécessaires à la liberté." This concept was subsequently restated by von Jhering (*Esprit du droit romain*, transl. by Meulenaere, p. 164): "Ennemie jurée de l'arbitraire, la forme est la soeur jumelle de la liberté." But this formalism explains why countries were more interested in substantive than in procedural law.

There is a strong movement in favor of almost total abandonment of formality in procedural law, a trend that finds its expression in the recent rule whereby defective procedural formalities may bring about the annulment of the instrument only where the result contemplated by these formalities is not achieved.⁴

The boldness of the case law of some international courts—for example, the Strasbourg European Court—provides adequate guarantees for the protection of some

fundamental rights, such as the right of the defendant to a fair trial before an impartial and independent judge. From this point of view, too, the disparate nature of procedural law in Europe is clearly an unnecessary obstacle within a common or internal market.

Finally, it is claimed that procedural law is part of the sovereign prerogative of the state, since the judiciary is one of the three fundamental powers in the *trias politica*, and as such the structural expression of national sovereignty. This reasoning can be sufficiently convincing to deter from consideration any proposal relating to

judicial organization and the jurisdiction of the courts.

However, it must be conceded that it is not always easy to draw such a sharp line of demarcation. A case in point is the procedural remedy of appeal, which is directly linked to the issue of organization of the courts.

Approximation of Procedural Law: A History

Although comparative law had for a century been considered an established method for achieving the unification of various legal systems, it can hardly be claimed that a comparative study of procedural law was a realistic proposition. In 1910 Albert Tissier wrote that "les bibliothèques sont vides quant à la procédure civile comparée."⁵

This has changed radically as people around the world have become increasingly aware of the urgent need to improve access to justice. A universal desire has grown for a system of procedural law that will enable justice to be administered promptly, cheaply, and properly.⁶

Witness, for example, the Tratado de Asunción (Treaty of Asunción) on the constitution of a common market for 1995 between Argentina, Brazil, Paraguay, and Uruguay (the Mercado comun del sur, or Mercosur, countries), in which the intention of the states was to expand access to justice. The treaty makes clear that the expansion of national markets through integration, and the consequent economic development, call for an accelerated development of the social justice system.

This concern had been expressed earlier in international agreements. It was not realized at the time, however, what an explosive series of events would be set in motion by these agreements, particularly through the case law developed not only by the international courts, but at the domestic level as well. This applies to both the European Convention on Human Rights of 1950 and the International Covenant on Civil and Political Rights, signed in New York, December 1969. The first of these instruments received its main stimulus from the decisions of the Strasbourg Court in the 1970s, whereas the second, by virtue of the precedence accorded international over domestic law, achieved a breakthrough via the case law of national courts in those countries where the International Covenant on Civil and Political Rights had been given legal effect.

However, it was especially the provisions of the Treaty of New York (1958)—more than the general principles of good procedural behavior as expressed in the two aforementioned international treaties—that achieved significant uniformity in the field of procedural law. Although this treaty concerns international arbitration (where there is a pronounced need for unification in the business world), this does not alter the fact that it is a splendid example of successful world-scale unification.⁷

True unification was subsequently achieved on a broad regional—not world—scale in Europe and Latin America. In Europe the European Enforcement of Judgments Convention was signed and its territorial scope has continued to widen.⁸ And in Latin America a model code was adopted—the Código tipo Iberoamericano (1988)—which, although not binding, is a model for any reforms in procedural law in Latin America.⁹ This is illustrated by the new Código general del proceso en Uruguay of November 1989.¹⁰

It seems clear that the possibilities for, and the scope and limitations of, unification of procedural law are dependent on specific conditions—that unification must be dictated by the requirements of the practitioner. Furthermore, it should preferably be attempted in areas that are linked both geographically and by legal culture.¹¹

Arguments for Approximation in Common Markets

Various characteristics of, and developments in, countries with integrated markets cry out for the establishment of a unified system of procedural law.

Harmonization of Procedural Law to Make Common Markets Work

An issue highlighting the need for a unified system of procedural law is that courts may apply the substantive law, but not the procedural law, of another country. Thus, it is possible for all the courts in Europe to apply Italian substantive law on the basis of the rules of international private law, yet none of them may apply any rules of procedural law other than those applicable in the ruling judge's own country (Kerameus 1990, p. 49 and n. 10).

But many of the rules of procedural law—those relating to jurisdiction, evidence, exequitur, enforcement, continue

and so forth—could be employed across national borders and require only an international or uniform system for their application.

A uniform system is essential to the settling of disputes in a common or international market, where different procedural laws govern such disparate areas as the gathering of evidence, the conduct of arbitration proceedings, the determination of legal jurisdiction, or the credentialing of lawyers, judges, and other legal officials. Approximation could prevent surprises from occurring in many of these areas.

Uniformity might also be required in purely national disputes, where the systems of procedural law are in permanent contact with each other. This is certainly the case within the European Common Market and the Mercosur, where the interpenetration of law firms, the mobility of persons and enterprises, the disparate rules of procedural law—all call for approximation, or even harmonization, of the procedural legal systems in force.

Unification to Build Confidence in the Judiciary

With the integration of markets in Europe, the need for legal certainty has increased exponentially. Citizens and enterprises need extensive legal protection in the marketplace, both in their own internal market and in the markets of other member states.

Confidence in institutions, and in particular in judicial systems, is a major building block of an integrated market. This confidence can be gained only if citizens trust that throughout the market there exist equivalent or similar judicial procedures that give citizens and enterprises equal access to a system of procedural law that operates straightforwardly, swiftly, efficiently, and economically. Thus, trust in the judicial system is built through the approximation of procedural law.

More particularly, two specific areas needing attention stand out in this context: economic law and judicial process. In addition, a number of impending dangers make approximation a matter of urgency as states continue to reform their national procedural laws.

Approximation to facilitate the conduct of business. The world of international business requires an effective and transparent system of procedural law. This is all the more necessary with the proliferation of transnational contacts. Unification will be unavoidable as soon as such commercial contacts assume a permanent character. In Europe and South America internal barriers have been removed from the internal market; all the more reason, then, for potential litigants to expect a judicial system that is available to them on more or less equal terms.

But if we analyze the various systems of procedural law, we are struck by their diversity and by the starkly different answers obtained to the three vital questions that must precede any litigation:

What will it cost?

How long will it take to complete?

What benefit will I get from it or what will I be required to pay in the way of compensation?

Cost, delay, and vexation form the "three-headed hydra" to which Sir Jack Jacob refers in connection with present-day court proceedings (Jacob 1985).

An overview of the cost of litigation under various procedural systems reveals serious distortions, which in turn distort conditions of competition. Furthermore, unequal access to the courts results in wrongful discrimination and encourages firms to engage in forum shopping—and therefore also in market shopping. Obviously, foreign firms will prefer to trade with or invest in countries whose systems of procedural law offer the greatest advantages in terms of time, cost, and efficiency.

But what firms are finding instead is that internal disparities and lack of transparency in procedural law still exist for litigants. Three examples illustrate this point: proceedings in absentia, orders for payment, and the consequences of appeal proceedings.

A defendant who chooses not to put forward a defense will have a decision awarded against him. In some countries this will be by means of proceedings in absentia.¹²

In some countries it is possible to obtain an ex parte payment order against debtors from one of the other member states; in others, such an order can be obtained only against citizens of the same member country; and in still others, the order can be obtained only after a full hearing on both sides.

The consequences of appealing a court decision also differ from country to country. In some states, appeal proceedings defer the enforceability of court decisions; in others, an appealed decision can be enforced in spite of appeal proceedings; and in yet others, a decision can be enforced only with the express authorization of the court. But in some states, appeal proceedings actually suspend enforcement of an appealed decision unless it is provisionally enforceable; in others, although an appeal does not operate automatically as a stay of execution, a stay can be granted by the court.

Thus, it is conceivable for a creditor to be faced with very different rules on proceedings in absentia, payment orders, or appeal processes, depending on the state in which a case is brought.

Approximation to protect against disparities in legal process. Procedural law is currently in a state of considerable continue

fermentation, because throughout the world, particularly in Europe and South America, efforts are being made to achieve better functioning of the judicial machinery.

In most cases, these efforts follow one of two courses: the traditional course of designing legislation to improve the rules governing procedure, and the more recently developed course known as alternative dispute resolution. Both trends have resulted in still greater diversity, making wide-ranging action in the field of procedural law a matter of urgency.

Ongoing Reforms of Procedural Law.

Belgium was the first to break away from the old procedural law—the French Code de procédure civile, dating from 1806—by introducing a completely new judicial code (1967). Since then, new laws have brought about a number of changes to this code,¹³ the most recent being the amendment of July 18, 1991, concerning the

selection and appointment of judicial officers and that of August 3, 1992, concerning the proceedings thereof.

Other reforms to codes have been made in Spain (Ley de enjuiciamiento civil); Italy (Provvedimenti urgenti per il processo civile); France (Nouveau code de procédure civile); the Netherlands (the new law on enforcement); and England (new developments in the traditional "adversary system") (see Jolowicz 1993).

If swift action is not taken to approximate a number of procedural rules, further separate development of procedural law will accentuate the existing differences.

Alternative Dispute Resolution.

To address the explosive increase in disputes and lawsuits and the mounting backlog of court cases, litigants are turning to alternative dispute resolution, that is, settlement by persons and institutions other than officially appointed judges and courts. Though possibly not regrettable in itself, this development is deplorable in the context of internal markets. The point can best be illustrated by taking the optimum form of alternative dispute resolution, namely, resolution by arbitrators.

Arbitration proceedings have been marked by a refusal to link up with international law in two matters of principle. First, it was argued that under the preliminary ruling procedure set out in Article 177 of the European Economic Community (EEC) Treaty the arbitrator is denied access to the Court of Justice. Second, it was decided that the EEC Treaty is likewise inapplicable in arbitration proceedings (pursuant to Article 1 of the Treaty), even in cases brought before an officially appointed judge and relating to an arbitration procedure.

What applies to arbitration procedures applies a fortiori to all other alternative forms of dispute resolution, including mediation, conciliation, rent-a-judge, and the like (Storme 1990). Thus, a great many cases have been excluded from the uniform functioning of European Community law.

This trend can be curbed only if uniform rules of procedure are introduced in Europe that ensure equal and straightforward access of judges in all member states.

A Common Policy to Strengthen the "Fabric of Justice"

Europeans cherish the hope that a common policy will serve not only economic purposes but also a properly functioning "fabric of justice" (see Jacob 1987).

If citizens believe that those in authority are pursuing harmonization of policy in procedural law, their confidence in the court system will be bolstered. Adherence to consistent, transparent procedural rules will also engender respect by and for all judges in the internal market. Finally, approximation can contribute to the improvement of the national procedural law of each member state.¹⁴ It is clear, for instance, that the uniform introduction of "*astreinte*"—that is, a system of penalties for breach of contract—would be an improvement in the field of enforceability of nonmoney judgments.

A Common Procedural Law to Embody Common Values

The law traditionally has been characterized as a set of instruments that can be used to fulfill sociopolitical aims; it can also introduce or stress certain values.

First and foremost, ensuring the legal protection of all citizens constitutes a major European value in itself: consider the tremendous influence Article 6 of the European Convention on Human Rights—the right to fair trial—has had on the case law of the Council of Europe countries.

Equal access also means increased access, in which efforts are made to abolish all exceptions that hamper procedure, thus answering the complaint voiced by Lord Devlin: "Where injustice is to be found is not so much in the cases that come to Court, but in those that are never brought there. The main field of injustice is not litigation but non-litigation" (Devlin 1970, p. 72).

Approximation of the rules of procedural law can lead to a common legal culture in which, for example, more value is attached to the decisions of state courts than to those of private judges.

More important still are aims that lie beyond the proper administration of justice, including:

Protection of the consumer and of the environment . The possibility for class action in all member states would be a valuable instrument in this regard (Goyens and Vos 1991; Storme 1992).break

Uniform rules on confidentiality among lawyers . Common practice in this regard would make it easier to settle disputes amicably.

Uniform rules on court costs . Cost-free proceedings, for example, could be formulated as a principle. The contingency-fee system could be either confirmed or rejected as a common rule. Furthermore, a general rule could be postulated stating that lawyers' fees must be paid by the losing party.

Provisions for compensation of damages . Complainants, particularly the victims of traffic accidents, should be able to obtain compensation in a single action in which the criminal conviction and the award of damages are pronounced at the same time.

From these examples it can be seen that new social and ethical values can be framed through the medium of uniform procedural law.

In conclusion, there must be a widening of the scope of the "quest for justice" (Tunc 1981, p. 115). Deliberation and preparation for approximated procedural law can provide the necessary impetus.

Feasibility of Approximation

There are already a number of indicators of the high degree of feasibility of harmonization. It is also clear that even where difficulties can be expected, unification is not impossible. But it must also be recognized that certain components of procedural law do not—or do not as yet—lend themselves to any form of harmonization.

High Degree of Feasibility

Acceptance of uniform rules of procedure will come more easily as the need for standardization is felt. There is already a degree of uniformity, for example, in procedural laws in EEC countries and Mercosur where wide-ranging economic association has required and given rise to an interactive process. (The results of interactions in an integrated market can be seen in the conversion of the Dutch concept *dwangsom* into a uniform Benelux law [1980; see Jacobsson and Jacob 1988, particularly pp. 254 and following]; the French legal principle of *astreinte administrative* incorporated in Belgium [1990]; and the French *référé-provision* making its way to Belgium and the Netherlands [see Versteegh 1992, pp. 1380 and following].)

A distinguishing feature of procedural law is its fragmentary character (Kerameus 1990, p. 55), making it feasible to unify if not an entire area of procedural law, then a portion thereof. This explains why harmonization or unification efforts often center on discrete portions of procedural code—complete reworking of the code is not a matter of immediate necessity. (This is more difficult in substantive law, where overall standardization is usually

necessary: the laws of contracts and of bankruptcy, for instance, form a coherent whole, which argues against partial reforms.)

Furthermore, procedural law can be abstracted and detached from the rest of the legal system, because it is not bound up with well-defined constitutional or substantive rules of law. This permits free selection of the rules of law to be harmonized, thus allowing preference to be given to rules most easily unified.

The feasibility of approximation will be bolstered by the involvement of trial lawyers and judges—the practitioners of procedural law. It is encouraging that lawyers and judges have for years sought structures to ensure the proper functioning of the bar councils and the judiciary.

And as more and more trial lawyers are confronted with case law, the need for unification is becoming even clearer. (To date, it appears that economic interests and office mergers are shouldering the responsibility for—and are shaping—the coming unification.)

And finally, the feasibility of approximation is enhanced by the existence of an exceptionally important instrument that does not exist on such a wide scale anywhere else in the world: the preliminary ruling procedure. In the event of harmonization of procedural law, a preliminary ruling procedure referring to a single court could ensure uniform interpretation of the provisions set out by the court.

Surmountable Obstacles

Today, the approximation process is intensifying in the light of what I have described as "il principio del finalismo" (Storme and Coester-Waltjen 1991, p. 405): "Instead of arguing about the dogmatic bases of procedural law, it is better to adopt a pragmatic line, which leads straight to what is wanted, namely an end to the dispute." The following scenario illustrates the point.

One party decides to submit a dispute to a judge's ruling. Together with his colitigants, the complainant demarcates the ground on which the case will be conducted (dispute, object).

From the moment a judge comes into play, however, a certain amount of cooperation will be injected into the proceedings. To make this cooperation clear at the outset, the judge calls the parties together and draws their attention to the need to adjust procedures, add other relevant facts or underlying evidence, or bring in third parties. The judge then points out what in his opinion are the appropriate legal bases of the dispute (*rechtsgespräch*).break

From that time, the judge directs the proceedings with due regard to the rights of the defendant, the other parties remaining free and independent as to the content and scope of their claim. Procedural formalities are guided by the *principio del finalismo*—with a view to achieving a timely resolution of the dispute.

This scenario roughly outlines the steps in a simplified, ordinary procedure. Unfortunately, we have not yet advanced to this point. But I contend that despite a number of intractable technical problems, we must nonetheless opt resolutely for *a rapid approximation of some priority rules in procedural law*.

Limitations to Approximation

It is customary in treaty texts to specify what fields fall outside the scope of the treaty. In this spirit, I note the following limitations to the scope for approximation:

First, approximation cannot concern itself with specific rules of judicial organization and competence. These are the province of the state. Thus, unification is limited to general harmonization of laws governing the ordinary course of proceedings.

Second, approximation cannot concern itself with procedures that are closely interwoven with substantive law. There are procedures that are conditioned by the views taken of certain legal concepts or institutions. These include, for instance, marriage and divorce. Any move toward drafting a uniform family procedural law would therefore appear to be ruled out.

Valuable guidance in the task of delineating this area is found, for example, in the Brussels Convention, Article 1, which states:

[The] Convention shall apply in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs, or administrative matters.

[The] Convention shall not apply to:

The status or legal capacity of natural persons, property rights in the context of a matrimonial relationship, wills, and inheritance rights.

Bankruptcy proceedings.

Social security.

Arbitration.

Conclusion

The foregoing ideas and proposals on unification of procedural law are applicable not only to the European common market, but also to that of the South American countries, Mercosur. Moreover, important synergies are to be gained from the sharing of experience, and the harmonization of procedures, between these regions.

The formulators of the Treaty of Asunción were fully aware of this when they elected to be guided by the experience of the European Community: "In referring to the future creation of a common market by 1995, the Treaty of Asunción determined that the proposal should follow the lines of the European Community experience. The authentic 'Community of Law' developed in Europe since the 1950s constitutes a well-tried example of what must be done in order to progress toward a single market."

Breaking new ground in the approximation of procedural law, calling attention to both the need for and the limits of such approximation, and mapping out an initial course—these must become the preoccupation of countries in an internal market.

It is to be hoped that the taboo that has long been an encumbrance to wide-ranging approximation of civil procedure can finally be removed.

Notes

1. That this movement achieved a breakthrough was confirmed by the magnum opus of Mauro Cappelletti, who, together with Bryant Garth, compiled the six-volume *Access to Justice* (Milan, 1978), and later added an appraisal, *Access to Justice and the Welfare State* (Florence, 1981).

2. I naturally except from this statement the eminent Italian authors on procedural law, as well as a number of creative individuals such as Franz Klein in Austria.
3. See, in this connection, Marcel Storme, *L'astreinte del diritto belga*, Riv. trim. dir. proc. civ. (1986).
4. See, for example, the (new) Italian Codice di procedure civile, Art. 156: "La nullità non può mai essere pronunciata, se l'atto ha raggiunto lo scopo a cui è destinato"; compare the Belgian Judicial Code (in its new version, effective January 1, 1993), Art. 867: "s'il est établi que l'acte a réalisé le but que la loi lui assigne. . ."
5. This has changed. See, for example, H. J. Snijders, *Toegang tot buitenlands burgerlijk procesrecht* (Arnhem, 1992); and W. Habscheid, *Introduzione al diritto processuale civile comparato* (Rimini, 1985).
6. In his book *Judges, Legislators and Professors* (Cambridge, 1987), R. C. Van Caenegem sets out the eight characteristics of good law; naturally these include accessible justice (op. cit., pp. 157 and following, particularly pp. 162-63).
7. The Treaty of New York was subsequently ratified in eighty-six countries. For further comments, see A. J. Van den Bergh, *The New York Arbitration Convention* (Deventer, 1981).
8. The Brussels Convention of 1958 entered into force on February 1, 1973, was amended in 1982 and 1989, and is currently in force in every member state.
9. See in this connection *El código procesal civil modelo para Iberoamérica: Historia, antecedentes, exposición de motivos, texto del anteproyecto* (edited by E. Vescovi, Montevideo, 1988); see also on this subject the excellent lecture delivered by Carlos de Miguel y Alonso, "Hacia un proceso civil universal" (Valladolid, 1991).
10. See the accounts of E. Vescovi and M. del Carmen Rueco, "Los primeros resultados de la reforma de la justicia en Uruguay: Un balance a los dieciocho meses de la entrada en vigencia del Código general del proceso" (Montevideo, 1991); and E. Vescovi, "Il nuovo sistema giudiziario dell'Uruguay," Riv., dir. proc. (1991).
11. See on this subject the marvelous contribution by K. Kerameus, "Procedural Unification: The Need and the Limitations," in *International Perspectives on Civil Justice: Essays in Honour of Sir Jack I. H. Jacob* (London, 1990).
12. On the subject of the marked differences in proceedings in absentia, see Kerameus 1990.
13. Over a period of twenty-five years, from 1967 to 1992, 150 amended laws were passed in Belgium.

14. Kerameus (1990) underlined the fact that quality does not always go hand in hand with unification: "Unification on the practical level is deprived of any quality aspiration" (p. 49). But I do not subscribe to this far too radical pronouncement.

References

- Bordeaux, R. 1657. *Philosophic de la procédure civile: mémoire sur la réformation de la Justice*. Evreux, France.
- Devlin. 1970. "Who Is at Fault When Injustice Occurs?" In Michael Zander, ed., *What's Wrong with the Law?* London, B.B.C. 72.
- Goyens, M., and E. I. L. Vos. 1991. "Transborder Consumer Complaints." *European Consumer Law Journal*, p. 193.
- Jacob, J. 1985. "Justice between Man and Man." *Current Legal Problems* (London) pp. 211 and following.
- . 1987. *The Fabric of English Civil Justice*. London.
- Jacobsson, U., and J. Jacob. 1988. *Trends in the Enforcement of Non–Money Judgements and Orders*. Deventer. (Holland): Kluwer.
- Jolowicz, J. A. 1993 "La Réforme de la procédure civile anglaise: Une dérogation au système adversatif?" In P. Legrand, ed., *"Common law," d'un siècle à l'autre*. Paris.
- Kerameus, K. 1990. "Procedural Unification: The Need and the Limitations." In K. Kerameus, ed., *International Perspectives on Civil Justice: Essays in Honour of Sir I. H. Jacob*. London.
- Storme, Marcel. 1990. "Contractuele mogelijkheden om geschillen alternatief op te lossen." In M. Storme, Y. Merchiers, and J. Herbots, eds., *De Overeenkomst*: Antwerp (Belgium): Kluwer. Antwerp.
- . 1992. "The Legal Authority of the European Community to Intervene in the Matter of Group Actions for Consumers and the Voice of Legal Instrumentation." In *Group Actions and Consumer Actions*. Brussels: Kluwer.
- Storme, Marcel, and D. Coester–Waltjen. 1991. "Relatorios gerais." Report presented at the Fourth World Congress on Judiciary Law, Coïmbra, Portugal.
- Tunc, A. 1981. "The Quest for Justice." In M. Cappelletti and B. Garth, eds., *Access to Justice and the Welfare State*. Alphen aan den Rijn (Holland): Sijthoff..
- Versteegh, L. 1992. "*Haken en ogen aan het incasso–kort geding.*" *Nederlands Juristenblad*, pp. 1168 and following.

7—

Legal Reform in Uruguay: General Code of Procedure

Enrique Tarigo

Legal reform in Uruguay has grown out of the adoption, in 1989, of the General Code of Procedure. Approval of the new Code was preceded by two milestones. The first was the draft Code of Civil Procedure, drawn up in 1945 by Eduardo J. Couture, the highly distinguished Uruguayan authority on procedural law and one of the most out-standing jurists in Latin America. The draft Code laid bare the shortcomings and defects of legal procedures in Uruguay.

The second milestone had its beginnings in 1969, when a series of drafts were drawn up, the first of which was written by an extraparliamentary commission created at the suggestion of the sitting chairman of the House of Representatives and composed of professors and judges. That draft was revised and amended by the Uruguayan Institute of Procedural Law.

Then, in 1986, the executive branch appointed to the commission Adolfo Gelsi Bidart, Enrique Vescovi, and Luis A. Torello, all professors or former professors and highly qualified authorities on procedural law. These three experts came up with a draft that incorporated the best of the earlier work and this was submitted to the executive branch in February 1987. (Two of the authors had written the preliminary draft model Code of Civil Procedure for Ibero-America at the behest of the Ibero-American Institute of Procedural Law, and naturally there is considerable similarity between it and Uruguay's new Code of Procedure.)

The executive branch endorsed that draft and submitted it to Parliament on April 28, 1987. In my capacity as then-chairman of the General Assembly, I ordered that it be studied by the Senate, on the basis of an agreement reached between the two houses of Parliament, whereby the Senate commission would study in depth the draft General Law of Procedure and the Chamber of Deputies commission would study the draft Law of Commercial Companies. That agreement was honored and, as regards the Code of Procedure, the Constitutional and Legislative Commission met twenty-four times between May 1987 and March 1988, with the authors of the draft participating, and produced the final version.

The Code was approved by general acclaim in the Senate, was then approved in the same manner by the House of Representatives on October 6, 1988, and was promulgated by the executive branch on October 18, 1988. Its entry into force, which according to the Code was scheduled for February 1, 1989, was postponed by a later law until November 20, 1989.

General Code of Procedure

The General Code of Procedure attempts to shorten proceedings and ensure a more effective and procedurally more correct administration of justice.

Field of Application

The General Code of Procedure applies to civil and commercial proceedings, family law, indemnity claims under administrative law, and labor law cases. The Code contains some specific or special rules regarding family, labor, and agrarian suits, as well as cases involving juveniles and disabled persons (Article 350, General Code of Procedure [CGP]).

Main Features

The main feature of the new system enshrined in the Code is the replacement of the old proceedings, with their emphasis on documents, with hearings that take into account a combination of written and oral elements.

Translated from Spanish.

Judicial Reform in Latin America and the Caribbean

The written side has two basic aspects: active petitions consisting of filings of complaints, replies and, possibly, counterpleas and replies to them; and the brief, which is the court clerk's record of oral proceedings.

Oral proceedings include the two principal kinds of hearings in a regular trial: the preliminary hearing, with evidence, and the summary hearing. In special proceedings there may be only a single hearing.

The principal characteristics of oral hearings, which are expressly sanctioned and duly applied by the Code, include: the predominance of the spoken word, tempered by the use of preparatory or petitionary documents and records; the concentration of a case in a single or limited number of audiences held close together; the immediacy in the relationship between the judge and the people whose arguments he is to assess; the unappealable nature (at least, with enforcement being suspended pending appeal) of interlocutory judgments; the requirement that the same judge preside throughout the case.

In addition to the foregoing, the Code upholds the rule of law and the principles that go with it: due process of law; unavailability; the principles of preclusion and fortuitousness; the rule that parties must furnish all necessary evidence; the guidelines governing court proceedings, including that procedures must economize on time and cost; equality before the law and the principle of good faith in application of the law; and the new principles that guarantee the right to a trial, that it be of reasonable duration, and that it settle the claims that gave rise to it.

Main Mechanisms

The new Code has instituted a number of mechanisms to ensure that the system functions properly:

Firm procedural deadlines for the parties.

Pronouncement of a single interlocutory judgment in any preliminary hearing to free the case of all encumbrances, objections, nullities, or other issues that might impede a ruling on the merits of the case.

Clarification in the preliminary hearing of the object of the case and of the evidence.

Empowerment of the judge to reject, on the occasion of the preliminary hearing, evidence put forward by the parties that he considers inadmissible or manifestly unnecessary or irrelevant.

Pronouncement of the final verdict upon completion of the complementary hearing or audience for evidence and summing up, with the possibility of deferring until later either the exposition of the grounds for the verdict or the whole verdict, but with the obligation to pronounce a verdict in a hearing held soon afterward, and not later than forty–five days after the complementary hearing.

Replacement of virtually the only appeal method recognized by the old Code of Civil Procedure—that is, appeal with enforcement suspended, resulting in cases losing all momentum whenever an appeal was lodged against an interlocutory judgment—by a system offering three modes of appeal: appeal with judgment suspended pending the results of the appeal, which is now reserved exclusively for appeals against final verdicts and against interlocutory judgments that have the same force as final verdicts, in other words, those that put an end to a trial and make it impossible to continue; appeal without suspension of judgment, that is, with no more than a devolutionary effect, for straightforward interlocutory judgments; and appeal with a deferred effect for straightforward interlocutory judgments when the law explicitly prescribes this.

Complementary Reforms

The success of the new system instituted by the General Code of Procedure is in part attributable to complementary reforms that helped ensure the proper functioning of the system. Let us consider four of these.

Creation of Additional Courts

The predominantly oral hearings, which replaced the written proceedings that had been the rule for more than a century, necessarily meant that more courts and judges were needed. With this in mind, when Parliament approved the General Code of Procedure, numerous budget laws were enacted creating new organs of jurisdiction to ensure that procedural reforms and the much-needed transformation of judicial infrastructure kept pace with one another. The result was a significant growth in the number of courts in Uruguay between 1972 and 1994. For example, civil courts of the first instance increased from eighteen to twenty-four and provincial civil courts of the first instance increased from twenty-eight to seventy-five. First- and second-instance courts, both in Montevideo and throughout the country, tripled in number, entailing a heavy outlay by the state. But it was believed that without this investment, the modernization of procedural norms would not be realized in the administration of justice.

Establishment of More Specialized Courts

Under the old system Uruguay's only specialized courts were in Montevideo; provincial courts were completely without specialization as to subject matter.

Article 22.4 of the General Code of Procedure prescribed that "depending on the nature of the subject, its continue

practical importance, and the volume of cases to be dealt with, in any department of the country, efforts will be made to set up specialized courts, of both the first and second instance. . . ." With approval of the Code, provincial courts became increasingly specialized, so that currently only five provincial towns have courts with jurisdiction for all types of cases. Overall, the Uruguayan court system now counts five courts with special jurisdiction over criminal and juvenile cases, twenty-four courts with jurisdiction over criminal, juvenile, and customs cases, six courts that deal with family and labor law cases, seven courts that specialize in civil, commercial, and administrative law, and twenty-seven courts with jurisdiction over civil and commercial law cases and in family, labor, and administrative lawsuits.

Gradual Application of the New Hearing System

The General Code of Procedure laid down that recently created courts handle only cases begun since the Code went into force, and that preexisting courts continue handling lawsuits predating the Code. As the older suits move beyond the court of first instance, the Code authorizes the Supreme Court to redistribute them among older appellate courts. As the number of older cases dwindles, the older courts can begin handling new cases using the Code's new (oral) hearings system.

The Code also stipulated that second-instance courts and the appellate instance for preexisting lawsuits must adapt to the rules of the new hearings system. Generally, this avoids having older cases and cases brought after enforcement of the Code tried in the same court but under different systems—in other words, trials following written procedures conducted alongside trials through hearings. In that way contamination or distortion of the new system is avoided.

Delegation of Legislative Powers to the Supreme Court of Justice

The delegation of some legislative powers to the Supreme Court of Justice predates the General Code of Procedure; and the Code reinforced this provision in Article 544.3, which states that "the (legal) norms which authorize the Supreme Court of Justice to organize the chambers, arrange their distribution or division, and establish systems of shifts, notifications, and communications among the different courts and judicial services" are to remain in effect. Subsequent to adoption of the Code, the legislative branch delegated everything to do with

the denomination and jurisdiction of the courts and with their geographical location to the Supreme Court of Justice. This has the distinct advantage of permitting solutions to be adopted quickly if need be.

Ongoing Problems

Five years after the introduction of the new trial system based on the General Code of Procedure, the results are, in our opinion, highly favorable. The average duration of trials has dropped and, more important, justice is being administered more effectively. Judges are no longer mere spectators throughout the trial, expected to issue a verdict and do little else. Rather, they now direct the progress of each case, keeping in constant touch with the parties, their lawyers, witnesses, and so on. They are, moreover, obliged to be present at each hearing; otherwise there is the risk that everything done in their absence will be declared null.

There are, nonetheless, still problems with the trial system, most notably the excessive number of court officials and the severe limitations imposed by budgetary restrictions.

Excessive Numbers of Court Officials

In their prologue to the draft that later became the Code, the authors pointed out that "the philosophy underlying the preliminary draft is that a trial should be carried out by judges and lawyers. Court officers carry out ancillary tasks, but it is up to the magistrate and the lawyers to conduct the fundamental aspects of the trial. The courtroom ceases to be the place where documents are submitted and exchanged so as to form, along with the clerk of the court's minutes, the file on the case, and becomes instead, as it should be, the place where the case is tried, in the effective presence of the key protagonists."

They added, significantly, this stipulation: "It must obviously be concluded that the system put forward in the preliminary draft implies . . . increasing the number of judges, but not the number of court officials."

As regards court officials, this advice was not followed. Article 135 of Law no. 16.002 (November 25, 1988), for instance, ordered the creation of "three hundred Administrative Level VI posts and one hundred Ancillary Level III posts to be distributed by the Supreme Court of Justice." Sagely, the provision added: "After the General Code of Procedure has been in effect for one year, the vacancies occurring in the following six semesters will be suppressed until an equal number of new posts is reached." However, Law no. 16.170 (December 28, 1990) canceled with the left hand what the right hand continue

had written and stipulated that "officials contracted more than two years before January 1, 1991, and serving in administrative or ancillary positions, will be included in the budget. . . ."

If bureaucracy was one of the most criticized aspects of written proceedings, as Couture pointed out back in 1945, it would seem that not enough has been done to get rid of it.

Budgetary Restrictions

The issue of budgetary restrictions is clearly linked to that of the swollen numbers of court officials: with numbers so high, officials will never be paid enough to reward them adequately for a job that is time-consuming and carries a lot of responsibility.

Budget restrictions on the wages for court officials—and well as on judges' wages, although here considerable progress has been made and today judges earn decent salaries—have a tremendously negative impact on the administration of justice. Stoppages, strikes, and reduced shift work cause major disruption in the judicial system. A system based on hearings calls for regular, orderly, uninterrupted services to function efficiently; but in

Uruguay the orderly conduct of hearings frequently breaks down, forcing the Supreme Court to suspend deadlines, prolong audiences, and so on.

As one of the powers of state, the judiciary should have greater financial autonomy than it is granted under the Constitution. Still, alleviating budgetary restrictions would not guarantee that the bureaucracy would be pared down—that remains a cause that the Supreme Court of Justice must take on.

In any event, it would be useful to carry out a rigorous study of the number and level of officials needed by each type of court. Determining with some precision how many officials are needed, and for what functions, in the offices of a justice of the peace or a departmental justice of the peace, in a civil law court of first instance, in a family, juvenile, or labor court, or in an appellate court in any of these areas, could well be the starting point for allocating functions among the various courts and for reducing the number of court officials and, consequently, increasing their wages so as to eradicate, once and for all, the regular interruptions in judicial administration stemming from the wage demands of court officials.

PART IV— ADMINISTRATION OF THE COURTS

8—

Governance and Administration of the Courts in Latin America

Robert W. Page, Jr.

In recent years the philosophical premises of the legal systems in Latin America have been the subject of much discussion and change. Judicial, academic, civic, and political activists have disputed whether proceedings should be primarily oral or written, whether judicial and investigative functions should be separated, and whether less formal alternative dispute resolution systems should be introduced. This has given rise to reforms of dispute resolution processes in many Latin American countries.

Although less publicly debated, the governance and administration of court systems have as much potential impact on the delivery of justice to the citizens of Latin America. Judges and administrators are realizing that, at all court levels, the existing administrative and governance systems hinder rather than support judges' efforts to deliver justice. This recognition is inspiring a movement to modernize court administration in Latin America. In the past several years organizations such as the World Bank, the Inter-American Development Bank, the U.S. Agency for International Development (USAID), and the U.S. Information Service (USIS) have sponsored analyses, study tours of other judicial systems, and conferences to search for appropriate solutions to these issues.

Because the judicial systems in Canada, Europe, and the United States have developed more rapidly, their governance and administration can serve as models for analysis. Ultimately, Latin American court systems must of course develop their own models to serve their unique societies. However, even though the solutions ultimately adopted may differ, the issues to be confronted are similar. They are in fact the very issues the North American and European systems are designed to resolve.

A Historical Perspective

A quick review of the development of governance and management models in the United States system illustrates that the process of reform requires time. In 1939 United States Chief Justice Charles Evan Hughes took the first

important step toward developing an independent administration for the courts by creating the Administrative Office of the Courts. This body took over the responsibility of administering the federal courts from the Department of Justice, giving the federal courts their own internal administrative capacity.

In the 1950s Chief Justice Vanderbilt, recognizing that he could no longer perform both his judicial and administrative duties, appointed the country's first state court administrator. This appointment preceded the creation of a trial court executive position in the Los Angeles Superior Court in 1957. Other major metropolitan courts gradually named court administrators in the following years.

The movement toward participatory governance of the judicial branch began with the formation of judicial councils, the most notable being the California Judicial Council created in 1961 by Chief Justice Phil Gibson and the state court administrator, Ralph N. Kelps. The concept of participatory government, as opposed to hierarchical government, reflected the concern that all levels of the judicial branch, not just the supreme court, participate in setting governance and administrative policies.

The court administration movement accelerated in the 1970s with the creation of the Law Enforcement Assistance Administration (LEAA) under the Nixon administration. LEAA provided grants for court improvement projects. The funds initially obtained from LEAA supported critical elements of the movement, including the creation of the National Center for State Courts, the publication of the American Bar Associations' *Caseflow Management Standards* and other similar publications, and the creation of court administrator positions in many of the major courts.

Participatory governance and court administration are now accepted components of the court system. However, the process in the United States is not complete

and the solutions are far from perfect. Court systems continue to lag behind other sectors of government and industry in such critical areas as adopting new technologies and ensuring accountability to the public.

In many respects Latin American court systems are at a stage of development resembling that of the United States in the 1970s. There is similar dissatisfaction with the administration of justice and recognition of the need to modernize. In support of this movement, international development organizations have made funds available for reform programs.

Issues Confronting the Courts

The most critical issues that reformers must confront is separating judicial and administrative responsibilities and establishing an appropriate hierarchy for their conduct. In the United States a judicial officer's administrative role is to establish general policies within oversight bodies and day-to-day-policies at the trial court level. Operational responsibility is then delegated to professional managers. Managers and administrators thereby free judicial officers from duties that impede their work on court cases.

In Latin America judges are burdened by administrative decisionmaking, which at times takes priority over judicial decisionmaking. As evidence, a study of the Argentine Supreme Court found that more than 70 percent of a sample of decisions made by the court were administrative in nature.

This system may be a remnant from a more paternalistic period when the officers of the highest court were the patrons of the system and the administrative systems were simpler to manage. As the complexity of the court system has grown, supreme court justices are unable to perform both administrative and judicial functions effectively. Rather than attend to the critical job of judging, judges are forced to administrate, although they are neither trained nor equipped to do so.

Judicial Reform in Latin America and the Caribbean

Many Latin American countries have established a *consejo de la magistratura* (judicial council) in an attempt to solve the problem. The structure of this system is still evolving and appears to be developing differently than the U.S. judicial council system. In the United States, the courts are governed by judicial councils or conferences made up of sitting judges from all the courts (Supreme, appellate, trial) and possibly members of the bar. These councils are generally chaired by the chief justice, and other members of the Supreme Court may be involved if they are granted membership. Members serve on these councils for a specific period in addition to performing their work as judges. The deliberations of the periodic council meetings are made public to ensure their transparency.

In most of Latin America, the *consejo de la magistratura* functions separately, though alongside the supreme court. The *consejo* in Venezuela, probably the oldest functioning *consejo*, consists of five full-time magistrates charged with the overall governance and administration of the system. The Venezuelan magistrates work full-time in the *consejo* as do the members of the *consejos* in Columbia and Peru.

This model removes administrative responsibilities and decisions from the supreme court justices, although operational authority remains with the judiciary. In Peru, where a highly skilled director has been employed, clearer distinction must be made between the *consejo's* role of establishing policy and the director's role of executing policy. The existing overlap inhibits the process of improving court administration. Ultimately, greater operational authority must be delegated to the professional managers.

The established *consejo* models have not been permitted greater participation in the establishment of policies governing the judicial branch. The hierarchical governance system is still in place as membership does not extend to all regions of the country nor to all court levels.

In the United States, council members are deliberately chosen to ensure that a breadth of opinion is represented. The fact that the members are sitting judges also ensures that the policies adopted will be considered from a practical point of view. Furthermore, councils often consult advisory committees, consisting of judges and court administrators with specialized knowledge in particular subject areas, before they propose a solution.

Organizational Issues

There are a number of essential organizational issues that must be addressed to enable the court systems to modernize. In almost all court systems each judge functions independently, managing his or her own caseload with the assistance of a private clerical staff. Individual courts do not pool their resources to carry out common duties and thus the system does not achieve economies of scale. Columbia's judicial system was forced to confront the organizational issue when they created a roster of anonymous judges to handle drug cases. The judges, to protect their identity, worked with only a small subset of the general staff. The remaining employees ran newly established central clerk offices maintaining all the case files and responding to public inquiries. This reorganization enabled the judges to cut their support staff from six to only two or three. Such a change would have an even continue

greater financial impact in court systems employing ten to twenty staff members per judge.

The court system must also be decentralized to allow the administration to function effectively. One commonly hears stories of judges who are unable to get leaking roofs fixed, obtain funds to travel, and get necessary paper and supplies from the central administrative offices in the capital. Often, repairmen from the capital must be sent several hundred kilometers to repair a broken window because there is no delegated budget or contracting authority. Judges, even in the capitals, must use their own funds to obtain many of the basic supplies they need to operate.

Judicial Reform in Latin America and the Caribbean

Those who currently administer the courts generally equate decentralization with a loss of power and consequently change. For example, the federal court system in the United States did not begin to delegate budget-making authority to the circuit and district courts until 1990, after years of requests for decentralization. The resultant system, however, is more cost-effective and makes better use of resources.

The central administrative bureaucracies have become cumbersome and are generally unable to provide services throughout the country. Court systems must confront this issue by creating regional offices or administrative offices within each court or by other means.

Delegation and accountability are recent concerns of all government sectors, not excepting the judicial branch. Both concepts need to be introduced to create some flexibility in management systems. In other words, professionals must be delegated authority to carry out their responsibilities, but at the same time held accountable for any excessive errors.

Informational Issues

Latin American court systems do not have institutions dedicated to providing information on the activities of other court systems. The benefit of such assistance is clear, since court systems face similar problems: how to achieve judicial independence, how to ensure more transparency in proceedings, how to reduce delays, and how to improve court administration.

In the United States the National Center for State Courts, the Institute for Court Management, the Institute for Judicial Administration, the National Judicial College, the Association of Court Management, and the Conference of Chief Justices and State Court Administrators provide and exchange information about current judicial reforms in different state and federal courts. These sources are available to any interested judge or court administrator. In Latin America the Instituto latinoamericano de naciones unidas para la prevención del delito y tratamiento del delincuente (ILANUD) has performed this role to some extent, but an ongoing structure is missing.

The systems in Latin America also lack the information to make reasoned management decisions. The caseload statistics are generally considered inaccurate, and their collection a worthless bureaucratic exercise. There are few analyses of the causes for delay in the judicial process, making it difficult to develop corrective programs. Resource allocation decisions are often made for. mulaically—ten clerks may be assigned to each judge regardless of caseload—or based on political considerations. Consequently, although the Latin American court systems are desperately underfunded, many courts must contend with significant personnel surpluses.

Finally, Latin American administrative systems require a set of norms and standards against which the administrative systems can be measured. For example, there are no standards for the design of court facilities or for the size of courtrooms and judges chambers, and no models distinguishing public areas, clerical areas, and judicial areas. Such standards are critical for responsible budgeting of public projects.

Standards are also essential to case flow management. A reasonable schedule for completing the various steps in the judicial processes must be established and then evaluated on an ongoing basis to ensure that standards are being met. In Latin America the codes identify. ing time frames are products of academic research, rather than institutional politics. Consequently, they are not always followed and no systems exist to give feedback on how well the standards are being adhered to.

Managerial Issues

The administrative systems in Latin America do not have a professional class of managers. Most of the court managers have risen through the ranks, reaching their positions through seniority. Many are highly skilled and

dedicated, but have difficulty envisioning a system that functions differently than the one that served them. Latin American court systems need an influx of professionally trained managers with backgrounds in business and public administration and experience working in nonjudicial sectors. Likewise, the introduction of automation and other tools of modern management is required. The experience has been the same in the United States. Only recently have professionals with degrees in court management or related fields started to dominate the top management positions.

Professional management is needed to introduce effective planning. The existing judicial management continue

systems, with few exceptions, are reactive in nature. They respond to crises, rather than planning for longterm growth and development. There is no procedure for establishing priorities for reform and in turn allocating resources to these initiatives.

The Role of Institutions in the Reform Process

The above reforms cannot be facilitated by simply adopting new codes or redesigning organizational charts. They call for the adoption of a new culture of governance and management in the courts of Latin America. Any institution hoping to assist in this process must be committed to all that this entails.

The court systems in the region have neither the organizational capacity nor the programmatic capability to carry out large-scale programs. This is particularly true at the trial court level. These courts are staffed with judges, legal secretaries, and clerks and do not have the programmatic capability of, for instance, a government ministry. Moreover, the central court offices, which do have some programmatic capability, are overburdened and unresponsive. If assistance is transferred directly to these offices, it risks further bogging down the system. USAID projects in this region have required intensive third-party management of project activities because of this organizational weakness. Absent intensive project management, projects have generally floundered.

Reforms have tended to be purely legalistic. New codes have been drafted and pushed through the legislature without introducing the requisite administrative adjustments. The legal history of Latin America is replete with codes that were passed but impossible to fully implement. A comprehensive and intensive approach is needed. New criminal and civil codes introducing oral hearings, separating investigative from judicial functions, and adopting alternative dispute resolution mechanisms may have a great impact on physical structures, new support organizations, and the assignment of administrative personnel. These support functions must be provided if the legislative changes are to be achieved.

In sum, any institution seeking to improve the administration of justice must understand that successful reform will probably require many years of training and analysis. As Chief Justice Arthur Vanderbilt, a founder of the court administrative movement, said: "Court reform is not for the short winded."break

9—

Court Organization and Court Reform Experiences in Latin America

Jesse Casaus

Court organizational, managerial, and administrative problems are rampant in most Latin American court systems. These deficiencies and weaknesses include:

Organizational problems

Inadequate legal representation

Inability of litigants to represent themselves

Inadequate funding

Deficiencies in the budget process

Lack of library resources

Lack of public confidence in judicial system

Rampant corruption

Excessive or inadequate judicial fees

Inefficient civil, commercial, and property registries

Improper handling of judicial deposits

Excessive control of judicial process by attorneys for litigants

Lack of proper decentralization

Inadequate physical condition of court and administrative facilities

Little or no use of alternative dispute resolution mechanisms

Managerial problems

Duplication of efforts and record-keeping

Excessive and improper use of personnel resources

Excessive staff turnover

Lack of proper training programs

Inadequate compensation

Lack of uniformity in procedures, tasks, and records

Unreliable judicial statistics

Inadequate planning

Inadequate use of statistics as planning, budgeting, and evaluation tools

Failure to make laws and procedural codes easily available

Lack of security safeguards

Lack of caseload and work standards

Administrative problems

Unacceptable increasing backlogs

Case congestion

Excessive delays in the case flow process

Lack of case flow controls and follow-up

Ineffective use of judges' times in nonjudicial tasks

Excessive numbers of prisoners awaiting trial for excessive periods of time

Inadequate use of modern technology

Case files in poor condition

Inefficient and improper storage of evidence

The above represents only a partial list of the costly problems that hamper the effective administration of prompt, fair, and equal justice. Before implementing corrective measures, however, thorough analyses must be carried out to determine the roots of these problems. In Venezuela a justice of the peace system was established and the law on judicial fees amended without proper study and input from the judiciary. After much criticism, both reforms were temporarily suspended.

Insufficient funding, lack of qualified personnel, and outdated laws and procedures are often correctly cited as the root causes of these problems. A more fundamental issue, however, is the failure to fully understand the essentials of court administration, including legal and judicial reform, the judicial process, and administrative–Judicial and purely administrative organization.

Essentials for Effective Court Administration

Court administration must be evaluated according to the different contexts in which it functions. In a legal context, it refers to the statutory culture and judicial interpretation of laws as well as to the relationship between courts in which higher courts review lower court decisions. In an continue

organizational, managerial, and administrative context, "court administration" refers to the court hierarchy for overseeing the judicial system, judicial functions, and the managerial and administrative support for the judicial process. It also refers to the relationships between and within courts and between and among the judges and nonjudicial staff.

In Latin America, and in many other parts of the world, reform of court administration is mistakenly thought to require only the introduction of computers to alleviate case backlogs and personnel problems. This notion is akin to a vehicle operator suggesting the installation of an automatic transmission in a car when the operator does not know how to properly use the steering wheel, the accelerator, and the brakes.

Court Organizational Structure and Judicial Independence

The development of efficient and effective organizational structures for courts is a pressing need of judicial systems the world over. If there is a common problem among the courts, it is that they must process an increasing number of new cases with continually shrinking resources.

Obstacles to Proper Court Administration

A significant impediment to the health of judicial systems and democracies in general is the incomplete separation of the judicial branch from the other branches of government. This situation, which has its roots in political forces, persists because the judicial branch lacks effective autonomous administrative infrastructures. As long as the judicial branch must depend on the other branches of government for support in administering justice, proper management, efficient administration, and effective operation of the courts will be impossible.

The primary goal of court administration reform must be to establish an organization that permits judges to dedicate their time to resolving cases. Judges are the most valuable resources of the court: they alone can legally exercise judicial authority. We find, however, that in nearly all Latin American courts judges are regularly required to perform routine administrative tasks while clerks, law students, and other administrative personnel, who are neither qualified nor authorized to do so, handle most of the required case actions, investigations, interviews, statements, follow-up of judicial requests, decisions, and preparation of sentences.

Judges frequently contend that they do not have time to administer justice because they are too burdened by administrative duties. In Paraguay, for example, the chief justice personally signed more than 3,000 checks monthly. Court employees, for their part, worked only three of the five morning hours officially scheduled because of inadequate compensation; they used the extra time to practice law or other occupations. In El Salvador a pilot project to alleviate this problem increased salaries and prohibited outside work. After evaluation demonstrated the program's effectiveness, it was expanded to the other courts.

In Venezuela it is nearly impossible to talk with a public registrar. Registrars handle more than 4,000 checks and documents daily, all requiring a personal signature. Signature authority is not delegated to qualified subordinates because the law does not permit it. Management and supervision of the office staff and functions take a back seat because signing more than ten documents and checks a minute is a full-time job.

In Bolivia a regional administrator is now handling the accounting of judicial funds, a job formerly held by judges. In several countries judges are compelled to pay accountants from their own inadequate salaries, often without compensation. More disturbing, however, is the practice of appointing friends to handle judicial funds—an invitation to corruption.

Efforts to Resolve Obstacles

Technical support and assistance are necessary to improve the administration of justice systems. Experts work with judges and other judicial officials in project countries to revise organizational structures and procedures, freeing judges from administrative tasks. Several Latin American countries, including Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, and Panama, have introduced on a trial basis the use of professional managers and administrators. This concept is based on the premise that it is a waste of talent to use judges to administer courts just as it is inefficient to use heart surgeons to manage hospitals or nuclear scientists to administer nuclear plants.

Yet this concept encounters universal resistance because judges mistakenly believe they will lose their authority if they relinquish administrative chores. What they fail to understand is that these professional and experienced managers are not there to supervise judges but rather to support them.

Primary responsibility for overseeing the judicial branch and courts must always rest with chief justices at the national level and with chief circuit judges and chief judges at the regional and local levels. Professional managers and administrators can effectively assist these judicial officials to fulfill their oversight responsibilities if the judges properly understand and accept the role of courtcontinue

administrators and delegate the appropriate administrative authority. Ecuador offers an excellent example. There, the chief justice appointed an outstanding, highly qualified, and capable professional manager who has put judicial operations in order not only at the Supreme Court but at the regional level.

Court Organizational Elements

The justice system is typically structured in three tiers: the supreme court, the intermediate court of appeals, and the trial court of general jurisdiction and limited jurisdiction. Central administration necessarily provides the support services for the entire judicial system. These generally include administrative support policy and guidelines and centralized services for personnel, planning, statistics, finance, budget, accounting, auditing, records, and logistical services (procurement, supplies, equipment, transportation, space and facilities, and technical support). (See box 9.1 for a summation of the administrative judicial functions in a consolidated administration structure.)

The court administrator concept has been established at the regional or circuit level to provide more effective support to the chief judges and to transfer from the central office those responsibilities that are more efficiently carried out at regional offices. Traditionally, individual courts house a judge, a clerk, and a number of administrative employees, as authorized by organic laws or by other entities such as supreme courts, judicial councils, or ministries of justice or finance. Courts are like islands, each duplicating functions performed by their twin entities next door.break

BOX 9.1	
Consolidated administration of administrative–judicial functions	
A proposal for a consolidated administrative structure to centralize operational, administrative–judicial, and administrative functions of the judiciary—and thus to both free judges of administrative duties and capture economies of scale—would include the following functional areas:	Logistics
Management of all administrative staff and their functions	Procurement
Case intake	Maintenance of physical facilities
Random case assignments	Equipment maintenance
Indexing	Voucher and invoice payments
Docketing	Travel advances
Notices	Supplies
File maintenance and control	Transportation

Judicial Reform in Latin America and the Caribbean

Case flow control	Mail and communications
Calendar management	Automation services
Case status information	Administrative and operational manuals
Judicial document preparation	Library services
Statistical recording and reports	Jury matters
Evidence security	Naturalization ceremonies
Informational bulletin for attorney, litigant, public, and press	Judicial appointment and retirement ceremonies
Personnel matters	Pro bono attorney assistance
Planning	Pro se assistance not involving legal advice
Courtroom scheduling	Collection of fees (filing, attorney, service, jury, copy, certification)
Training	Inventories
Finance	Support of judges' personal staff
Judicial deposits	Local rule input and compliance monitoring
Accounting	Disposition of court files
Processing of vouchers	Security monitoring
	Court history
	Coordination and support of court divisions
	Monitoring need for additional judges
	Liaison with related agencies, bar association, judicial council
	Secretariat for judges' executive sessions

In working to free judges of administrative duties, clerks can be given authority to manage the administrative–judicial and purely administrative functions of each court. Judges would retain a minimal staff of law clerks and a secretary and, in areas with several judges, these functions could be undertaken by a consolidated administrative staff drawn from an individual court's administrative personnel. Such an administrative structure can take advantage of economies of scale, providing services at a centralized location readily accessible to the judges and public. The administrator in this centralized structure, supervised by the chief judge or regional court administrator, would manage the essential operational, administrative–judicial, and administrative activities.

Court Model Projects

In many project countries, pilot testing of different organizational models can be an effective method not only for evaluating the court administrator concept but also for experimenting with different organizational schemes. Three different models have typically been employed.

Individual Court Model

The organization pilot model of an individual court maintains the traditional organization of a judge, a clerk, and an authorized administrative support staff. Overall court responsibility remains with the judge, but the clerk assumes control over all operational and administrative functions except those specifically legislated to the judge. Before any functions are computerized, all operational and administrative processes are streamlined and proper controls are established on case flow, files, records, and public information. Once the manual procedures have been made efficient, computerization can be introduced for functions for which it is cost-effective.

Corporate Model

In this model common administrative duties for courts in the same jurisdiction and building are performed by a combined staff supervised by a single court administrator who coordinates responsibilities with a chief judge. The consolidated office provides for all judges. Again, the emphasis is on transferring authority from the judges to the court administrator. As above, automation of case flow, records, and events is undertaken only after the manual procedures have been made efficient and computers are determined cost-effective.

Unified Model

This model is similar to the corporate model but includes courts in all categories located in a common building.

Conclusion

It is obvious to concerned officials and private individuals in project countries and abroad that much work must still be done. Careful analysis must proceed, particularly as the culture and environment become more accepting of change, despite the courts' resistance. There has certainly been an awakening to the need for modernization to improve the administration of justice. And although outside technical assistance will be required to achieve lasting benefits, countries must be encouraged to undertake for themselves the development and implementation of judicial improvements.

PART V— ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND ACCESS TO JUSTICE

10—

Alternative Dispute Resolution Mechanisms: Experience in the United States

Whitmore Gray

The objective of this portion of our conference on judicial reform is to discuss means to promote swift and fair resolution of disputes. Although much of our discussion will center on reform of basic court systems and civil procedure in various countries, my particular focus is on alternatives to traditional institutions and techniques. These alternatives include a variety of what we might call "court-annexed" procedures, that is, procedures that occur during the course of traditional litigation. I will also consider, however, other procedures that might better be characterized as purely "private" techniques for resolving disputes—those that occur before or at least without any special relation to litigation in court. The most traditional of these involve various forms of negotiation, including negotiations assisted by a third party, such as mediation. If successful, these procedures result in an agreement—a contract to be enforced by the courts if necessary like any other agreement. These private techniques also include arbitration, a procedure where the parties, either in advance, at the time of making a deal, or at the time a dispute arises, agree to resolve their dispute by giving it over for decision by a third party. Even though this is a "private" procedure, because its essence is a binding final decision, enforcement may still be required; indeed, over the years various aspects of participation in the arbitration process and interaction with the courts with regard to compelling arbitration and enforcement of the third party's "award" have become regulated extensively by law, as well as by the rules of various agencies chosen to administer the arbitration.

Court-Annexed Procedures

In the United States in recent years we have experimented with a variety of court-annexed innovations as alternatives to traditional procedures, due in large part to the creativeness of our judges. I propose to describe a number of these briefly. ¹ I have observed few other techniques outside the United States that can provide helpful models, for, in general, efforts to reconcile parties are not viewed as "alternatives," but as part of normal court procedures. (For example, see the Japanese experience referred to below.)

Court-Annexed Arbitration

Although there is some variety in the form court-annexed arbitration has taken in the state systems and federal districts where it has been adopted, this term generally refers to a proceeding held after a case has been filed with the court. An arbitrator (or in some jurisdictions, three arbitrators) is designated (not picked by the parties) from a list, usually consisting of lawyers who have certain qualifications and have agreed to serve as arbitrators for a modest fee.

In most systems, for example in California, the parties must go through this procedure before having a right to trial in almost all cases asking for money relief up to a certain amount. In other jurisdictions, for example in some of the experimental federal districts, cases involving any amount of money relief may be put into this system by the judge. In most systems, after a limited period for discovery, the parties present an abbreviated version of their case to an arbitrator (or arbitrators), who gives a decision. As to the nature of this decision, even though some of these systems have been in operation for more than ten years, it is still not clear whether arbitrators in these decisions are intending to predict what they think a jury or judge would award if this case were to be tried, or are giving their view of what would be a reasonable settlement figure. In my interviews with people who have served as court-annexed arbitrators, many have said that they give a reasonable settlement figure. Their practical insight tells them that even if they think a plaintiff would or should not recover anything if the case went to court, that decision will stand continue

in the way of settlement. If they give nothing, the plaintiff's lawyer will receive no fee, assuming he or she is retained on a contingent basis, and thus will not support the settlement. They normally, therefore, come up with a decision of a few thousand dollars for the plaintiff.

If the parties do not object, this amount is entered as a non-appealable judgment of the court. If either party objects, the case proceeds to trial in the normal way, but in many systems if the party who takes the case to trial

does not improve its position by more than 10 percent by so doing, that party must pay all the additional cost the other party sustained in going to trial. For example, a plaintiff who rejects an arbitration award of US\$80,000 must recover more than US\$88,000 in the trial de novo or pay all of the defendant's costs for the trial. A full review of the more than twenty-five jurisdictions that have court-annexed systems of this type would reveal a number of significant variations in the details of this type of proceeding, as well as an unfortunate variety in nomenclature. For example, one of the earliest and most discussed introductions of this type of proceeding was in the state of Michigan, where the proceeding was called a "mediation," even though the lawyer mediators generally simply gave an arbitration decision of the sort described above.

Mediation

In a number of state and federal jurisdictions, judges can suggest or require parties to attempt to settle a pending civil case with the help of a mediator. The goal of the procedure is to assist the parties in their negotiation of an agreed resolution. This is entered as an agreed-settlement judgment approved by the court, or is put into contract form and signed by the parties, who agree to dismiss the pending suit. (Mediation in certain types of family law disputes has been a regular part of court proceedings for some time.)

There is a wide variety in these programs. Some operate with volunteer, unpaid lawyers. Others have training programs of various lengths that lawyers (and sometimes nonlawyers) must complete before being assigned cases. Compensation is sometimes provided from public funds, or often must be paid by the parties involved. In some jurisdictions cases handled under the court-annexed arbitration procedures described above are excluded from mediation. In at least one jurisdiction, if the mediation is not successful, the mediator turns into an arbitrator and gives a court-annexed arbitration decision.²

Early Neutral Evaluation

Other techniques have been used to give an evaluation of a pending case by a neutral party. One federal district began an informal program in which parties and their attorneys came together for a conference with an attorney with expertise in the type of case involved. A court-appointed task force of lawyers proposed this confidential system as a means of early evaluation to help parties in the settlement of their cases. Its success and permanent adoption in that district led to its use elsewhere. Similar early evaluation conferences are also conducted by federal magistrates for cases pending in their courts. This type of evaluation is by persons who are by definition neutral, since their normal role is that of a judge with limited powers, and their unique contribution to the negotiation process may be to help parties see how the case might appear to a judge if it were to go to trial.

Summary Jury Trial

Another innovation, a summary jury trial, was designed to help parties see how a case might look to a jury if it were to go to trial, since the hopes of each party for a favorable verdict may be keeping the parties from settlement. A creative federal judge called a jury from the regular panel of his court to sit for an abbreviated trial of a case. The attorneys, with the parties present, argued the case, and the jury gave its verdict, without knowing that they were not actually deciding the case. Other judges have adopted variations of this technique, including splitting the jury for its deliberations into two smaller juries so that the parties get two possible decisions—sometimes in conflict with one another. Sometimes the judge also gives his or her view of the case. In many cases where this technique has been used, the parties have then proceeded to settle without going to trial. Often judges decide that a summary jury trial would be advisable, and a reluctant party is under a good deal of pressure to comply. At least two federal circuit courts have held in such a case that an unwilling party cannot be forced to participate in settlement proceedings such as summary jury trials: *Strandell v. Jackson County*, 838 E2d 884 (7th Cir. 1987); and *In re NLO, Inc. et al.*, 5 F.3d 154 (6th Cir. 1993). Although this technique is not relevant to reform proposals for legal systems without juries, it emphasizes the need to inform the parties as well and as early as possible of what they can realistically expect if the case goes to final decision. In Argentina, for example,

it may be important to evaluate how the secretary to the judge will view the case, since he or she appears to be an important part of the decisionmaking process.

Other Court–Related Procedures

The most traditional procedure for facilitating voluntary settlement of a case is a settlement conference presided

over by the judge who is hearing the case or by a magistrate or other designated "settlement judge." Depending on the judge, such a conference may be mostly a formality before proceeding to trial, or it may be a rather elaborate mediation. Some judges include in this process individual meetings with the parties and counsel, while other judges feel it would be inappropriate ever to meet alone with a party in a case pending before them. Also, in some of our appellate courts, prehearing conferences or mediation sessions have been introduced and have in fact facilitated settlement prior to the scheduled oral hearing.³

Private Dispute Resolution Procedures

On the private side, in the area of arbitration we have simply continued—perhaps somewhat behind many other countries in the world—in improving the legal framework that supports its use. Experienced lawyers would hope to find in a "modern" arbitration law the basic provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Act, as well as a number of other provisions contained in new laws that are being enacted today, (as, for example, in Spain). The United States has moved away from its former hostility to arbitration through establishment of a federal statute and state statutes, but its legislation at present is still not "state of the art."⁴

The more important area of U.S. experience, however, is in connection with more novel techniques of structured negotiation, mediation, minitrials, and so on. It is in this area of private alternative dispute resolution that the U.S. experience is unique. These are all techniques that encourage control by the parties of the procedures for dispute resolution; in fact, they also emphasize party control of the substantive result. I will describe these private techniques, even though our emphasis is on reform of the formal legal system, because they have been one of the sources on which judges and lawyers in the United States have drawn in devising court–annexed procedures. I will also comment on statutes to be considered in creating a legal framework that supports these private procedures. I will then discuss these various alternatives from the perspective of the parties, the judges, and the general public, trying in each case to raise points for law reformers to consider. Although I will include a few comments and suggestions, the attempt will be to establish an agenda, a checklist for those working with any particular system who may be looking to the United States for ideas.

Negotiation

The most common technique for settling disputes remains negotiation between the parties concerned. Our law schools and continuing legal education programs have begun to teach lawyers how to participate more effectively in this process. Dispute clauses in contracts now often provide for some kind of structured negotiation pattern, designed to walk the parties through a procedure that, it is hoped, will produce an agreed resolution. For example, a clause might provide for a written notice to the other party raising some performance problem, with a response to be given within a certain number of days. If that does not solve the problem, meetings between representatives of the parties, and eventually between representatives with authority to settle, may be provided for. We have also come to recognize the special problems that economic or cultural differences in the parties' backgrounds may present in reaching negotiated solutions, and courses and seminars on alternative dispute resolution often provide training to prepare lawyers to deal with these problems.

Minitrial

One of the new techniques created is in effect an elaborate, structured negotiation. Lawyers representing parties in a large, complicated dispute designed a procedure that focused on a formal session in which each lawyer would present his or her party's argument to the two chief officers of the parties. A neutral person was appointed to preside, but the aim of the proceeding was to give the businessmen a better understanding of each party's case and of the impressions that the lawyers' arguments would make at a trial. The businessmen then retired to negotiate a business solution to the problem. Many successful settlements have been reached using some variation of this minitrial form. Some did not use any neutral presider, while in others, the role of the neutral presider was enhanced to include giving an opinion before the negotiation phase, or even acting as a mediator during the negotiation. It should be pointed out that the name of this device is misleading. There is no "trial" and no "jury," but rather a presentation directed to the businessmen. The reporter who gave it its name when reporting the first successful case simply assumed that a "trial" was the way all disputes were normally settled.

Mediation

Mediation in various forms continues to be the principal vehicle used to help parties settle disputes. Sometimes the mediator is provided by an organization, sometimes selected independently by the parties. Usually the mediator continues

meets with both parties together to establish his or her role as a knowledgeable and caring neutral, and then meets separately with each party. In these meetings some mediators emphasize helping each party to see its own case more realistically; others, who view their role as one of shuttle diplomacy, simply convey and explain a series of offers back and forth in a move toward settlement. In all cases the voluntary nature of the proceedings is stressed—the third party does not impose any binding solution on the parties. It might be desirable, however, to put a provision in a disputes clause that would require parties to go through a mediation process, even though they would not be bound to reach a result, for experience has shown that minds are changed by this technique.

The hoped-for result of a mediation is an agreed solution to the problem, which is then reduced to a formal agreement and is enforceable like any other contract. The only special legal support desirable for encouraging mediation is protection of the confidentiality of the mediation process, so that the parties will feel free to speak frankly in joint and private sessions without fear that such statements, or the views of the mediator, will become part of any subsequent court proceeding if the mediation is not successful. Although the requirement of confidentiality has been recognized in a number of cases by courts that have analogized mediation to other settlement discussions, statutes have been enacted in some jurisdictions to reassure the parties.⁵

There has been some talk about requiring professional qualifications for mediators, but many observers point out that in commercial disputes, professional expertise seems to be the most important factor in inducing the parties to participate with confidence. Of course, in areas where mediation has become very popular and successful, such as in construction disputes, a substantial number of mediators that have backgrounds in construction disputes, as well as mediation skills gained through experience, are now available, thanks in part to the efforts of the American Arbitration Association to train mediators and promote mediation in cases where formerly parties might have gone directly to arbitration.

Arbitration and Other Third-Party Adjudication

Arbitration continues to grow in importance as a private dispute resolution technique. Many types of disputes, from consumer complaints to technology infringements, have been subjected to special arbitration regimes, many administered by the American Arbitration Association. Other third-party adjudicators are institutionalized forums of trade associations, professional organizations, and the like. They have in common the requirement that the

disputing parties surrender to a third party control over the result of the dispute resolution process. Although in a pure ad hoc arbitration, and even in some institutionalized arbitrations, parties retain a certain amount of control over the process, including selection of the decisionmaker, in most cases it is the role of the arbitrator to decide the result based on an assessment of legal issues, unless the parties expressly instruct him or her (or them) to reach what they personally would consider a "fair" result. In that event, the lawyer's role is somewhat reduced, for his or her expertise principally relates to what result the rules of law would dictate. In any case, the general U.S. law is that the arbitrator's award is not subject to review because of any substantive error of fact or law, so whether or not such an instruction is given or followed is in the last analysis often not crucial. (It might be noted that many important arbitrations, for example shipbuilding or construction arbitrations, are often conducted with a panel of three arbitrators, only one of which is a lawyer, and interviews with such arbitrators give the impression that often in such cases the technical experts are not greatly influenced by the technical legal arguments, preferring to rely instead on their understanding of the facts and knowledge of practices in the industry.)

There are other varieties of alternative dispute resolution procedures that are more or less similar to arbitration. The various private adjudication services in effect usually rely on arbitration law to enforce the decisions they provide, even though they usually do not call their process arbitration. Sometimes parties agree to be bound by facts as found by a third party, as in the event of valuation of property. Some of our states provide for the parties to agree to select a retired judge to hear the trial of their case, much as in an arbitration proceeding, but that judge's decision may be entered directly as a judgment instead of being enforced as an arbitral award. Various permutations of the normal arbitration procedure may be agreed on also, as, for example, the possibility of review by a court of the arbitrator's application of the law to the facts as found. Specialized arbitration formats have also become popular in certain fields, such as using an arbitrator for the limited purpose of choosing between two final settlement offers of the parties. This technique encourages each party to make as reasonable a final offer as possible, rather than continue to exaggerate its demands, as is commonly done right up to the end in litigation or in standard arbitration.

To some extent, all processes described that result in an enforceable award can be described as operating "in the shadow of the law." The fact that the arbitrators are often looking to substantive rules of law for guidance was mentioned above, but the law also provides the broader continue

procedural framework within which the arbitration is carried out. Courts will compel a party who has agreed to do so to arbitrate, and they may provide other assistance to promote the process, such as appointing an arbitrator for a party who declines to act in accordance with the arbitration agreement. In the last analysis, of course, enforcement of the award depends on the courts, but they are required by statute, and by international agreement in the case of foreign awards, to enforce awards without reexamining the substance of the award.

The legal framework within which arbitration occurs and arbitration awards are enforced is very complicated in U.S. law. Although we have both federal and state laws dealing with various aspects of arbitration questions, and although there have been numerous court decisions relating to these matters, many issues remain unresolved. As is often the case, our American experience provides ample illustrations of problems likely to arise, as well as a variety of imaginative solutions, but those who are drafting reform legislation will have to make difficult choices. What our experience with our very incomplete federal arbitration act does show clearly is the need for rather comprehensive legislation to support arbitration, including coverage of a number of questions that in U.S. practice are covered only by AAA rules or by provisions drafted by parties in a carefully thought out disputes clause in their contract.⁶

Discussion of Alternatives

The need for more prompt and affordable resolution of disputes has been repeatedly emphasized in recent years in the United States, not only by the consumers of legal services, but by judges at every level up to the chief justice

of the U.S. Supreme Court. Chief Justice Rehnquist recently noted that the future may require dramatic changes in the way disputes are resolved. As William W. Schwarzer, a federal district court judge from the Northern District of California who is now the director of the Federal Judicial Center in Washington, D.C., recently said in his keynote address to the federal judiciary, "We must ask: 'What is the proper balance between public and private interests, between enabling the courts to provide justice in all cases and meeting the needs of individual litigants for timely and just resolution?'" (*Alternatives* 1994, p. 6).

There is wide acceptance in the United States of the need for both utilization of innovative private dispute resolution techniques and introduction of additional dispute resolution institutions into the existing legal framework. Over the past twenty years developments have been so rapid and varied that any attempt to describe them is likely to be incomplete, but even a superficial summary will show that the creative energies of judges and lawyers have come up with an impressive variety of techniques that can serve as a stimulus for creative work by reformers in other jurisdictions. The development of new alternatives has been aided by a legal climate that has allowed strong judges a great deal of leeway in innovating, and their experiments have been valuable even in cases where they have subsequently been reined in by a higher court. (See the cases cited above in connection with the summary jury trial.) In the nonjudicial area, lawyers have sometimes led the way and sometimes been pushed by restless clients in finding imaginative ways to create better procedures and allow parties to shape results, which are often more satisfying than outcomes dictated by legal rules.

As we approach the task of reform of the dispute resolution systems in other countries—hopefully with a good deal of caution and respect for existing traditions and attitudes—it seems to me important to emphasize the intellectual climate in the United States within which these reforms and innovations have taken place. And to the extent that these attitudes differ from those in a country considering reforms, there might be a need for careful selection and adaptation of ideas, or even the need to prepare the intellectual ground very carefully before attempting to make any transplants at all. First, Americans have a healthy skepticism about authority in general, and are not particularly bound to tradition. Less government is better, and anything that secures a desired result without official acts is likely to be viewed as desirable. Formalities are not favored, and oral proceedings are preferred over documentary techniques. In addition, judges are viewed as having substantial inherent powers, not set forth in any statutory provision, to get on with the work entrusted to them, and they will be praised, not criticized, for striking out on a new path. (The judges who developed the innovative techniques described above have been kept busy in recent years as invited speakers all over the country.) We do not have any preoccupation with uniformity, but rather stress the need for the best possible substantive solution in each case, assuming that our judges are constantly participating in a process of salutary reform of the law as well as of procedures.⁷

Finally, as has been pointed out above, our fifty states all have different legal systems that have responded in radically different ways to perceived needs. Some have adopted statewide comprehensive "dispute resolution systems," creating new multidoor courthouses offering all kinds of services at public expense, while their neighbors have failed to respond at all. Perhaps even more surprising is the fact that a similar pattern of non-uniformity prevails in our federal court system. Each district has a continue

high degree of autonomy in determining its rules and procedures, and the innovators referred to above were able to introduce substantial reform and innovation without interference from any supervisory body. Even now that we have reached the stage of federal legislation authorizing the development of a comprehensive plan of alternative dispute resolution procedure in each federal district, it is still left to each district to create its own system, which may or may not include certain techniques, be mandatory for parties, and so on.

As we turn now to look at the U.S. reforms and innovations from the point of view of the various persons concerned, we might keep in mind the questions raised by Judge Schwarzer in his address to the federal judiciary (see *Alternatives* 1994, p. 6):

Does alternative dispute resolution lead to speedier, more satisfactory, and less expensive outcomes, or does it simply create another layer of litigation, increasing rather than decreasing costs?

Does alternative dispute resolution improve access to justice for those who are not well endowed and cannot afford the costs of litigation, or is it a device that provides second-class justice for cases the courts consider unimportant?

What are the tradeoffs between the advantages of alternative dispute resolution—such as privacy, speed, and reduced adversariness—and the advantages of adjudication—such as judicial resolution, vindication, comprehensive relief, and precedent?

Does alternative dispute resolution lessen the burdens on the jury system and thereby improve access, or does it obstruct access to jury trials and diminish opportunities for adjudication?

Does alternative dispute resolution lighten the burdens on the courts, or does it divert judicial and court staff resources from more useful or productive activities?

I will consider these questions from several different perspectives—that of the parties to the dispute, that of the judges to whom we have traditionally entrusted the resolution of disputes, and that of the general public interested in supporting an effective and efficient governmental institution. In a final section we will look at prospects and problems with the use of alternative dispute resolution techniques by those elaborating proposals for reform in other countries.

What Parties Want

Parties to a dispute can get from their lawyers, although often at some considerable cost, a general answer as to what result the rules of law dictate in a particular case. (There may be an initial, difficult question as to which state's law will apply, and what the chances are for change in that law.) A really precise prediction is often difficult, however, until a great deal of effort is spent determining how the facts of the case will appear if the case is brought to a court. In other words, the result of applying an existing rule of law to facts supplied by a party is not the same as predicting the eventual result in litigation—particularly in the United States! The existence in the United States of complicated rules of evidence makes this a more difficult task than in some other jurisdictions, and the possible intervention of a jury as fact finder and applier of the rules of law as given by the court also injects a considerable degree of uncertainty into the process of prediction. Perhaps this has helped to make the United States particularly fertile ground for alternatives to the normal judicial process for resolving commercial disputes. The parties would like to avoid not just the expense, but also the uncertainty, inherent in the judicial process in the United States.

Court-annexed arbitration is a way to give a rough dollar value to a claim after a partial investigation of the facts using our rather expensive techniques of discovery. As mentioned above, there is some ambiguity as to the nature of this valuation. Some arbitrators view it as merely a prediction of a trial result; others give a fair settlement figure. Perhaps either way of reaching an amount would reflect the uncertainties of the trial procedures and, in particular, the rules of evidence that may prevent complete proof of the facts. It would also reflect the uncertainties in predicting which law the trial judges will decide should be applied—or even whether a clear rule might be modified by the judge in this case—and how a jury might understand the law and apply it to the facts as proven. Obviously, the key to the success of this procedure is the quality of the professional who is giving his or her opinion. As the procedure has developed, it has had as its focus a professional, a lawyer with experience in cases of this type, who has been willing to contribute his or her time to assist the parties in getting a clearer idea of what is a reasonable settlement figure. (Although some compensation is usually given, it is typical to pay \$100 for the case to a lawyer who normally charges \$300 or more an hour. It is important, in other words, to note that we have been able to create this very highly qualified lower level of jurisdiction without any substantial increase

in court funding—and that our thinking is that any modest costs are more than offset by a reduction in the number of trials.) If the arbitrator's prediction accurately reflects the view a jury might take of the facts and which law a judge is likely to apply, then going ahead with the expensive process of preparing for trial, not to mention the trial continue

itself, seems futile, and sensible parties should be able to withdraw the case from litigation and reach a settlement.

The *summary jury trial* provides a relatively low-cost preview of what the jury might decide. The lawyers present a summary of the case to a real jury, before the real judge, using their ingenuity to make the prediction as accurate as possible—for example, using a witnesses or photographs, reading to the jury portions of a potential witness's deposition, and so on. An important incidental benefit of this proceeding might be an opportunity to get the judge's view of the law that will be applied, for he or she must instruct the jury as part of the proceeding. (Something like this might be conceived for nonjury systems.) Armed with more information than each party could obtain from its attorney initially—a clearer view of how facts might appear to a jury at the trial, some insight into which rule of law this judge will apply, and an indication of the likely result when this law is applied to the facts—settlement without going on to trial seems logical.

The summary jury trial may move parties toward settlement for another reason. It might be that a party feels strongly a need to have "a day in court," that is, a chance to tell his or her story to an impartial person and get a reaction. It is possible that this need can be met in part by the techniques referred to, and this should certainly be kept in mind as a case is reviewed. In fact, it may be the party with the worst case who finds the greatest satisfaction through the alternative process and is thereby able to move on to settlement. I spent a day observing a three-lawyer, court-annexed panel in the federal court in San Francisco hear a woman's claim of racial discrimination in an employment situation. It seemed clear to the panel very early in the woman's presentation (she had been assisted by pro bono counsel in filing the claim, but appeared without counsel at the hearing) that the claim was without much foundation, but she was given a thoughtful hearing by the panel, and expressed her satisfaction with the procedure. I wonder whether the federal judge would have been willing to spend the same amount of time, or whether the more formal court procedures would have produced the same satisfaction. The case illustrates the beneficial effect of spending time to produce satisfaction, but it also shows the costs involved. Perhaps \$4,000 of billable time was contributed here—half a day of the time of three successful lawyers—to make the plaintiff feel good about the resolution of what was technically a groundless claim, and of course the expense to the corporate employer defendant was very large, for its lawyer appeared together with its president and two other witnesses ready to testify!

In our analysis of alternative versus traditional dispute resolution techniques we should probably note particularly the significance of the substantive result that may be negotiated as the result of the alternative processes. To the extent alternative dispute resolution techniques accurately predict what might happen in court, they may show both parties that the legal result is not the best outcome for either of them. To the extent that they emphasize the uncertainty inherent in our system, they may provide an incentive for the parties to craft their own solution. For example, in one summary jury trial in a pollution case, the jury was split in two to give individual verdicts after hearing a very creative presentation of the facts regarding causation and possible effects on the health of a group of plaintiffs. One jury allowed each plaintiff a substantial recovery, resulting in a total recovery of about \$20 million, while the other jury, having just heard the same presentation, allowed no recovery at all! For the first time each side had to confront a realistic possibility that it might lose entirely on the money claim, and settlement was in fact arrived at immediately following the summary jury trial (with the help of additional pressure from the judge who was handling the case). In such a case a negotiated result might include apologies, setting up a program to assist others similarly situated, taking measures to avoid such problems in the future, and the like, all satisfying to the plaintiffs, but unobtainable as part of a litigated result of their original suit for damages.

The whole idea of *mediation* should be to empower the parties in their efforts to find a solution they will be satisfied with, in part because they will "own" it psychologically. Some mediators lead the parties through their own arguments to help them discover weak points they have glossed over. Some help in communicating information the other side had been unable to get a party to consider previously, though it takes considerable skill on the part of the mediator to do this without being viewed as an advocate for the other party. A mediator may help the parties see the disadvantages—and not just financial—of pursuing a case to a final judgment in court. Perhaps the most important function of a mediator is what we often call "enlarging the pie"—that is, looking for a creative range of alternative solutions that do more than simply divide a limited good between the parties. In an ideal mediation the mediator reinforces for the parties the idea that they have been able to find a solution for the dispute, without appearing to have imposed his or her will on them. In fact, the satisfaction level, and therefore the likelihood of voluntary compliance, should be very high with all negotiated results—including those reached following a minitrial or negotiated with the assistance of a mediator.

Instead of satisfaction, parties may simply feel resignation when accepting the results of alternative dispute resolution techniques that employ decisionmaking by a third party. For example, the decision of a court-annexed arbitrator or the verdict of a summary jury may be accepted as a basis for settlement, but not really accepted psychologically as fair. Probably the least satisfactory technique from this point of view is traditional arbitration. Although some parties may feel that the same or as satisfactory a result has been reached as would have been reached in court—but reached more quickly and at lower cost in the arbitration—my in-depth interviews with parties and attorneys over many years concerning their arbitration experiences lead me to think that even in those cases they have complaints about the arbitral process. The formal atmosphere created by some litigator lawyers who conduct arbitrations, and the delays in arbitrations caused by recourse to the courts, often as a delaying tactic, tend to leave a negative impression about the process, perhaps because its advantages were oversold at the time of signing the arbitration agreement. This dissatisfaction is often heightened for the losing party by the absence of the possibility of appeal—and, in the case of ordinary arbitrations under AAA auspices, the absence of any opinion of the arbitrator(s) explaining the result reached.

In fact, in both court-annexed procedures and traditional arbitration, there can be meaningful participation by the parties. Instead of casting them in the role of mere observers of the lawyers in action, as is commonly the case in regular court proceedings, it is standard practice to order attendance of the parties at court-annexed alternative dispute resolution sessions. Judges often observe that it is helpful to be able to speak directly to the parties whenever possible, and in the private minitrial or in the summary jury trial a party sometimes for the first time gets a true picture of the weaknesses of his or her case. Arbitration can be conducted in a more informal way than a court proceeding, so that a party can have the satisfaction of giving a coherent, spontaneous account of his or her side of the dispute. Both my observation and parties' comments, however, attest to the fact that litigator lawyers often opt for rather formal procedures, and that the lawyers tend to be the main participants. (Even the training videotapes of the AAA do not stress the possibilities for informality, perhaps because they are aimed in part at promoting to lawyers the use of arbitration.)

The Judge's Perspective

From the judge's perspective what are the advantages and disadvantages of the various dispute resolution alternatives? Certainly the traditional attitude of U.S. courts has been a degree of jealousy about their jurisdiction and power. U.S. judges today, however, unlike the early English judges, are not out looking for business—their problem is rather being overwhelmed with more cases than they can handle in the way they would like. My observations in Buenos Aires suggest the same is true there. One judge may have thousands of open files to deal with—in one judge's chambers they were constructing an upper level of shelving to hold the ever-increasing bulk of files. The contrast with the United States was striking, for we are rapidly computerizing

records, and in some courts even allowing filings with the court to be done by fax.

Perhaps there is even some awareness in the United States that party–negotiated, business–driven solutions are in many cases fairer than the all–or–nothing approach dictated by many of our rules of contract law, and this helps create a positive climate for alternative dispute resolution. In fact, the process of reform of those rules through the greater use of principles of good faith and reliance may be a manifestation of this malaise with regard to traditional contract doctrine. In a well–known case in the 1980s the court chided the parties for failure to negotiate a business solution, and then made an unsuccessful attempt to introduce into our contract law a major change based on good faith (*Aluminum Company of America v. Essex Group, Inc.*, 499 F. Supp. 33, [W.D. Penn. 1980]). (In fact, that case was settled by the parties after an alternative dispute resolution proceeding held under the auspices of the circuit court during the appeal process. A structured dispute resolution clause that could have been included in the original contract—designed to facilitate settlement by the parties of disputes without litigation—is attached as appendix A.)

Looking first at the court–related alternative dispute resolution procedures that do not involve a judge, one might guess that court–annexed arbitration would be viewed favorably by the judges. It is, in effect, adding a lower level of highly qualified professional decisionmakers, from whom the judge only gets a kind of appellate case load; furthermore, the cases he or she gets when a dissatisfied party asks for trial de novo have had the benefit of extensive pretrial attention. Other court–annexed procedures look more like variations on techniques that might traditionally have happened with the involvement of the judge. For example, some of the mediation and early neutral evaluation looks like what many judges did in differing amounts and with differing levels of skill in traditional pretrial conferences or in cases he or she heard involving the use of magistrates.

Perhaps here is the place to note that some judges are reluctant to turn over functions to trained mediators, feeling that they have developed the skill to do this effectively themselves. It does seem, however, that one of the

advantages of mediation is lost when it is the judge who performs this function. The possibility that the judge will use confidential information parties have communicated if the mediation proves unsuccessful and the case goes to court may inhibit the parties at the mediation stage. Still, we should note that this successive function of mediator then adjudicator has been institutionalized on the fully private side, where so–called med–arb has been introduced. In both public and private dispute mediation, the advantage of being in early, direct, informal communication with the eventual decisionmaker is probably viewed as outweighing the disadvantage mentioned.

It would be unfair to our judges, however, to view their principal reason for supporting alternative dispute resolution procedures as relief from work, for many judges have been actively and creatively involved in developing supplementary techniques in which they play a considerable role. The summary jury trial is an obvious example, but the case management systems mandated by some judges, their involvement in committees planning other techniques and rules, and so on, all indicate that they are willing to take on new and different duties if they feel the result justifies the effort. It is clearly essential to keep the judges involved in any reform and supplementation of the traditional systems. I spent a day in the state courts in San Francisco with the judge who supervised the docket of court–annexed arbitrations, and it seemed clear that his thoughtful input to the process through talking with the parties and choosing particular arbitrators suited to the cases contributed greatly to the substantial degree of success the system was enjoying. (At that time almost 80 percent of the arbitration decisions in his district were accepted by the parties, whereas I was told that in a district in Southern California, where the scheduling of cases for arbitration and the assignments to arbitrators were made with less individual input, the success rate was only about 50 percent.)

The Public's Point of View

From the public's point of view, that is, the perspective of the taxpayer and citizen interested in living in a society where friction from disputes is reduced, the development of various alternatives is generally considered a good thing. Some people might question whether there should be public funding of what might be called private procedures. If the parties to a commercial dispute want the assistance of a mediator, or if they eventually go to arbitration, why should the public pay for those procedures? One answer to this question lies in the financial costs of the alternatives. If it is possible to settle early a matter that would otherwise come before a judge, it makes sense to spend a small amount of public money to facilitate settlement in order to avoid whenever possible the cost to the public of a full trial. It also seems unfair to have good alternatives available only to those with funds to pay for them—as though they were some kind of luxury.

These considerations have led to proposals for a new way of looking at public justice systems. Reformers see a multidoor courthouse as the ideal, a place where professionals (and perhaps qualified volunteers as well) are busy not just dispensing justice but actively helping parties to resolve their disputes—that is, to reach results that are truly satisfying to them—all at public expense or at a fee schedule proportionately lower than the amount for litigation. (In the United States court costs are nominal, and the basic cost of judge, courtroom, court staff, and the like is borne by the public and not paid for by user fees.)

Lawyers may be somewhat apprehensive about the long-term effects of alternative dispute resolution reforms, but it would seem that for the foreseeable future there would even be increased work for lawyers who got into the new spirit and developed their skills as participants in these dispute resolution techniques. In fact, the availability of dispute resolution procedures that are relatively lower in cost than traditional legal processes and that involve lawyer participation should ultimately bring more disputes into lawyers' hands and, incidentally, improve the image of those lawyers who get involved. There is much we could say on this point, but we should at least note that many of the important innovations in this field have been the work of lawyers, and that we have a generation of young lawyers who are looking for professional roles in which they can see themselves as making a positive contribution to society in general.

Summary

What can we conclude from this analysis? U.S. experiences with reform or supplementation of traditional civil procedure through the development of alternative dispute resolution techniques, as well as the extensive development of private alternative dispute resolution techniques and their support by the courts, give us some insights into how to begin the same process in other legal systems.

First, we should not try to introduce strange birds into any environment. Except for the ombudsman, our alternative dispute resolution innovations were invented from native material by those caught up in the day-to-day problems of our legal and commercial society. A country continue

should build on existing strengths and deal with those who are skeptical by publicizing successful local experiments. Identifying foreign imports as such may make them easy targets for those whose resistance is really to the substance of the ideas. If some members of a skilled, professional judiciary can be enlisted in the cause, they should know best how to win over others who are in their own way frustrated with the existing system. If there is skepticism about the use of mediators in court, perhaps we should let private mediation lead the way and, at the same time, introduce controlled experimental programs in the courts whose successes can be publicized to create a demand for more.

We should educate the new generation of law students and reeducate lawyers to see a positive role for themselves in dispute resolution, whether it is in the new improved pattern of litigation—court-annexed alternative dispute

resolution—or in dispute resolution that keeps cases away from the courts and makes their clients happier. Our discussions concerning "access to justice" bring to our attention the additional problem of past cases of conflict in which we have not provided adequate assistance or an adequate forum. Low-level, justice-of-the-peace jurisdictions or small-claims courts may be viewed as alternative dispute resolution or an extension of existing institutions. Either way, deciding what should be the character of the rules applied and the role of counsel in such institutions presents additional challenging questions that should be resolved in accordance with local conditions, and certainly with the input of legal professionals of all kinds.

On the basis of this overview of the institutional possibilities, we might tentatively respond to Judge Schwarzer's questions set out above as follows:

Does alternative dispute resolution lead to speedier, more satisfactory, and less expensive outcomes, or does it simply create another layer of litigation, increasing rather than decreasing costs? If this "other layer" is in fact a lower layer, as in court-annexed arbitration, and a substantial number of parties accept the result, this is good. Even for the parties who go on to trial, it seems that in most cases going through this procedure is likely to reduce the time and cost, and probably improve the result. At the very least, in the United States it has been a way of getting a very capable segment of our bar to contribute their time to solving the problems of people who are not their clients. In view of the reluctance in all countries to devote substantial additional resources to the processing of disputes, this is perhaps our most important innovation. In other countries it may mean that reformers who find this idea attractive will have to find a way to get their lawyers to make this kind of contribution.

Does alternative dispute resolution improve access to justice for those who are not well endowed and cannot afford the costs of litigation, or is it a device that provides second-class justice for cases the courts consider unimportant? What is second-class justice? Having an experienced attorney contribute to the parties' basis for settlement by providing at low cost an informed opinion as to the value of the case seems better described as first-class treatment. Should we ever characterize as second-class a negotiated solution—that is, an alternative that informed parties have chosen in preference to continuing with the normal civil procedure? It is probably important not to contrast alternative dispute resolution with some idealized view of what civil procedure might be, but rather with the prospects for a litigated result. A party who has settled in any given case has declined to litigate, no doubt after taking into account possible delay, higher transaction costs, and a possibly less satisfactory substantive result dictated by the strict legal rule—and above all, the difficulty of trying to predict all three of these variables with any certainty.

What are the tradeoffs between the advantages of alternative dispute resolution—such as privacy, speed, and reduced adversariness—and the advantages of adjudication—such as judicial resolution, vindication, comprehensive relief, and precedent? Comprehensive relief may in fact be more available through alternative means. For example, judges have enforced some specific measures ordered by an arbitrator even though they would not give that relief themselves in ordinary legal proceedings. Precedential effect of alternative dispute resolution decisions is simply a matter of providing for publicity while preserving the confidentiality of the parties, a possible combination since it is the method used for reporting ordinary court decisions in many other legal systems. In fact, alternative dispute resolution results are already well documented in such publications as *Alternatives*, a house organ of the Center for Public Resources in New York.

Does alternative dispute resolution lessen the burdens on the jury system and thereby improve access, or does it obstruct access to jury trials and diminish opportunities for adjudication? In fact, the summary jury trial permits a popular input into the negotiation process at a fraction of the cost of a regular jury trial. One is reminded of the advisory juries sometimes utilized by equity courts to provide the judge with a popular perspective even though they were not part of the required procedures.

Does alternative dispute resolution lighten the burdens on the courts, or does it divert judicial and court staff resources from more useful or productive activities? Our best evidence comes from busy judges and magistrates

who have thought that their successes to date have justified a continual expansion of the court-annexed programs.^{break}

Although some judges seem opposed to certain alternative dispute resolution procedures on philosophical grounds, even many of those judges would not deny that alternative dispute resolution procedures to date have resulted in substantial savings of judges' time that they have been able to devote to other work.

As a closing note, I raise one lesson from our U.S. experience that I know is difficult for dedicated reformers to accept. We in the United States feel that we are still in the early stages of our own reforms. We feel we lack final, uniform answers as to what are the best forms of alternative dispute resolution procedures and which procedures work best for particular disputes. Our overall answer to date appears to be that keeping the system in a constant state of experimentation—remaining open to new ideas and refining existing ideas—is the best way for us to proceed for the present. Our world of alternative dispute resolution mechanisms remains a moving target, not ready for systematization. For example, when I read recent attempts of American writers to describe our alternative dispute resolution institutions, I am constantly struck by the inadequacy—in effect, the inaccuracy—of what they say. They emphasize common characteristics instead of creative differences and suggest that certain named devices have fixed characteristics. For example, some say the minitrial uses a third-party neutral, even though some practitioners have had success without one.

In a recent article, an in-house lawyer for a company that has been extremely active in alternative dispute resolution commented on the practice of developing standard forms and models for dispute resolution procedures. He feels that if parties are too influenced by set criteria, "the ad hoc spontaneity and creativity that has produced such splendid alternative dispute resolution success in the past might be lost," and that "if parties rely too heavily on off-the-shelf or canned procedures, they lose a valuable opportunity to tailor a process most suitable to the dispute at hand" (Madoorian 1994).

Perhaps in part because of this constantly evolving nature of the alternative dispute resolution devices, we have had trouble developing uniform terminology for them. For example, lawyers and sometimes legislators use the term "nonbinding arbitration," trying to use existing terms to describe a new idea, namely, a device where a third party gives a decision but the parties are free to reject it. It seems unfortunate to use the term "arbitration" in this context, however, for it has been used for years to refer to a *binding* dispute resolution process—and we have a large, uniform body of statute and case law using the term in that sense. Perhaps this disorderly terminology is a price we pay in the United States for a system that is slow to arrive at final forms and create uniform legal theory.

So, are we likely to have comprehensive statutes soon in the United States? I don't think so. For example, some people think that med-arb is a bad idea unless the mediator asks the parties for a new agreement to accept him or her as arbitrator if the proceeding passes to that stage. Should that be made a "rule" in a statute drafted to introduce alternative dispute resolution techniques into a jurisdiction? Are there nuances in the role a third party plays when helping parties reach an agreement that are best conveyed using two terms, mediation and conciliation? In a system built of careful definitions in tightly drafted statutes, such distinctions may be made; but in the United States I think we will struggle along without these refinements. We will no doubt be learning from you in the field of codification of these techniques.

Appendix A— Suggested Clause for Alcoa–Essex (Section 5)

Adjustment in Processing Charge Due to Unforeseen Circumstances

5(a). It is the intention of the parties that the charge made by Alcoa for processing shall be sufficient to provide a reasonable profit for Alcoa over the life of this Agreement, and to that end they have agreed on the formula for

annual adjustment of the processing charge contained in Par. III of the Agreement. If, due to circumstances which the parties did not take into account in arriving at the agreed adjustment formula, Alcoa feels that it is no longer able to make a fair profit at the price arrived at by application of the formula, or Essex feels that the formula price is producing an excessive profit for Alcoa, then the complaining party shall give written notice of that fact to the other, setting forth the basis for its complaint, and naming a representative authorized to negotiate in regard to this matter on its behalf. Within thirty days from the receipt of that notice, the recipient shall send a reply responding to the matters given as the basis for the complaint, and naming a representative authorized to negotiate on its behalf.

5 (b). The two named persons shall make themselves available to meet at convenient times, and a meeting shall be held within thirty days to attempt to resolve any differences. If no agreement is reached at that meeting, each of the parties shall designate an economist, who shall within sixty days prepare and submit a written argument on behalf of that party regarding the points in dispute. The two representatives shall meet again within thirty days from the exchange of these arguments, and if they are unable to reach agreement, shall set a date with-in sixty days for a further hearing of the matter in the continue

presence of the two chief executive officers of the two companies. Before setting that date, they shall also agree on a neutral advisor to preside at that meeting, and if they are unable to agree on any person who will accept such appointment, such a person shall be appointed by the Center for Public Resources in New York City. The parties agree that any outside costs, including any fees of CPR and the fee and all expenses of the neutral advisor, shall be borne equally by them.

5(c). At the hearing each party may be represented by an attorney if it so chooses, and may have three hours or such time as may be agreed to present its case in any manner it chooses. The neutral advisor shall establish any other rules he thinks appropriate for the conduct of the proceedings. At the conclusion of that hearing, the executive officers of each company shall attempt in good faith to resolve the disagreement over whether Alcoa is making a reasonable profit at the current price arrived at by application of the formula.

[The following are two alternatives which might be used to round out the clause:]

Alternative A: 5(d) Substantial compliance, or an attempt in good faith to comply, with each step in the procedure described above shall be an express condition to the right of any party to assert any right under this contract based on a contention that Alcoa's profit under the formula price is either excessive or insufficient, including any claims based on changed circumstances, failure or presupposed conditions, impracticability, impossibility, mistake or unconscionability.

Alternative B: 5 (d) In the event the parties are unable to reach agreement on the complaint within fifteen days after the end of the hearing described above, then the two economists named by the parties as part of the procedure described above shall agree on an economist who shall finally resolve the controversy as an arbitrator. If the two economists are unable to reach an agreement, the economist to act as arbitrator shall be appointed by the American Arbitration Association. The arbitration shall be held under the rules of the American Arbitration Association at a place to be agreed on by the partners, or if they fail to agree, a place designated by the American Arbitration Association. The parties agree to compensate each of the economists for selecting the arbitrator and the economist who serves as arbitrator at their regular rates for consultation, and to bear these and all other costs of the arbitration equally. The parties agree that the arbitrator shall decide whether the current price arrived at under the formula is unreasonable as asserted by the complaining party, and if he finds that it is, he shall set the current price so as to approximate as closely as possible the level of profitability the parties intended to establish under the original agreement. In making this determination, he shall take into account the following factors that the parties used in arriving at the original formula: . . . The parties agree that the price set by the arbitrator shall be substituted for all purposes in the contract as of a date ninety days following the original notice of complaint.

Notes

1. For a more detailed description, a very helpful publication is *Judge's Deskbook on Court ADR* (New York: Center for Public Resources, 1993). For a broad, insightful look at the general subject of procedural reform in the United States from a continental point of view, see E. Stiefel and J. Maxeiner, "Civil Justice Reform in the United States," *Festschrift for Karl Bensch*, (Berlin: De Gruyter, 1993, pp. 85369).

2. A particularly helpful guide evaluating and describing the details of the court–annexed mediation programs in the various states is *National Standards for Court–Connected Mediation Programs* (Washington, D.C.: State Justice Institute/Institute of Judicial Administration). For a comparative perspective on court–annexed programs, see K. Iwasaki, "ADR: Japanese Experience with Conciliation," *Arbitration International*, vol. 10, no. 1, 1994, pp. 9197. In Japan mediation is conducted by a committee appointed by the judge, and its purpose, according to Article 1 of the 1951 Civil Conciliation Act, is, Iwasaki writes, "to settle amicably a civil or commercial dispute not by strictly applying law but by applying the general principles of justice and fairness as befitting the actual circumstances of the dispute."

3. A summary of a recent symposium dealing with the full range of court–annexed procedures is available from the National Center for State Courts, Box 8798, Williamsburg, VA 23187, USA.

4. See the thorough comparative study by A. Garro, cited in greater detail in note 6 below, which discusses the UNCITRAL Model Act and the legislation of Spain and several Latin American countries.

5. See, for example, California Civil Procedure Code § 1297.432. Statutes also often provide immunity for mediators for acts within the scope of their duties. (These and other statutes are discussed and cited in detail in *National Standards for Court–Connected Mediation Programs*, cited in note 2.)

6. An article analyzing foreign arbitration law gives some perspective on the range of problems to be considered: J. Meyer, "Recent Mexican Arbitration Reform," *University of Miami Law Review*, vol. 47, no. 913, 1993. In "Changing Attitudes toward Dispute Resolution in Latin America" (*Journal of International Arbitration*, vol. 10, 1993, pp. 123131, Robert Layton describes how to use arbitration in Latin America during the transition to a better statutory framework.

7. Generally this is viewed as desirable, but judges are sometimes criticized for failing to take the doctrine of *stare decisi* –soft

sis seriously enough. For example, a local bar group recently evaluated the U.S. Seventh Circuit Court of Appeals and said about one of its leading figures, "Although Chief Judge Posner is unquestionably one of the most influential legal thinkers in the country, he refuses to accept existing circuit and Supreme Court precedent as controlling" (*National Law Journal*, February 28, 1994, p. 3).

References

Alternatives (Center for Public Resources, New York). 1994. "Open Questions about ADR." 12(1):6.

Madoorian, H. N. 1994. "Some Guidelines for System Design." *Alternatives* (Center for Public Resources, New York) 12(4):45.break

11—

Alternative Dispute Resolution Mechanisms: Lessons of the Argentine Experience

Gladys Stella Alvarez

Conceptual Framework

The term "alternative dispute resolution" (ADR) encompasses a range of procedures for solving conflicts without recourse to force and without a resolution by a judge. It can also be seen as a movement aimed at institutionalizing ways of resolving juridical disputes other than through traditional judicial procedures. The most basic techniques of this type include negotiation, conciliation, mediation, and traditional forms of arbitration. To these we might add new forms of arbitration (both the unilaterally binding or "last offer" type and nonbinding arbitration), prior independent evaluation, independent experts, minitrials, and so on. For conceptual clarity, a few distinctions need to be made.

Negotiation is a voluntary, usually informal and unstructured process, used by parties to reach an acceptable agreement. No independent third party is involved, the parties may or may not appoint lawyers to represent them, and the process can take place without the parties having to be present, either by telephone or correspondence. There are various styles of negotiation. One new approach, which underlies the Harvard University negotiation project, is known as *cooperative negotiation*. The innovation lies in the goal that both parties find the negotiating process enriching and achieve a high level of satisfaction from it.

Conciliation is usually incorporated into codes of procedure—as has been done in numerous Latin American countries—as a power of the judge, who may, at any point in the proceedings or before they begin, convoke the parties and try to get them to agree. Some other administrative authority or independent third party may also perform the same function. The process need follow no set pattern and the person attempting to reconcile the parties may propose any settlement he or she thinks would reasonably satisfy the parties' expectations. The third party in conciliation is often called a "facilitator." In certain institutions the term can imply emotional or neighborhood ties between the parties.

Mediation is a nonantagonistic procedure in which an objective third party with no powers over the parties involved helps them through a cooperative approach to find a point of harmony in the midst of the conflict. The mediator induces both parties to identify the matters in dispute, to recognize their interests over and above the position adopted, to explore ways of reaching agreement that transcend the level of the dispute, and to turn the conflict into something beneficial for both parties. Confidentiality is a key feature of this technique.

Traditional arbitration, a process to which parties resort of their own free will, is antagonistic. One, or more than one, independent party decide(s) the issue, pronouncing an award that is binding on the parties. This technique generally operates in parallel with jurisdictions resorted to on other occasions (appeals, foreclosure). The parties have some say in the arbitration procedure, which is less formal than judicial proceedings.

If we analyze these mechanisms from the point of view of the decisionmaking powers of the parties, it is clear that they are in no way restricted in the case of negotiation. When a neutral third party intervenes, there may or may not be a loss of decisionmaking autonomy. In the case of legal jurisdiction, the powers of decision rest entirely with the judge, and the same applies to arbitration. A conciliator does not decide an issue, but he can advise or offer an opinion, and propose solutions that he considers just or reasonable. By contrast, in mediation the parties retain full powers to decide the issue and the mediator is not allowed to issue a ruling or advise, to propose solutions, to pass judgment, or to continue

Translated from Spanish.

evaluate proposals. In this case, the parties alone preside over the conflict and its solutions.

The ADR movement with these basic mechanisms and a few additional novel techniques has existed for more than two decades in the United States, and for a considerable time in China. It has also developed to varying degrees in Canada, England, France, New Zealand, and Norway, as well as in other countries. Colombia was one of the first Latin American countries to explore this field, beginning in 1983, and today it is one of the more advanced, at least as regards the private sector and commercial arbitration and conciliation, which is similar to mediation. (I was able to ascertain this during the highly successful International Seminar on Justice and Development: Agenda for the Twenty-first Century, held in Santa Fe de Bogotá, Colombia, April 22, 1994, under the auspices of the Inter-American Development Bank [IADB] program for Modernization of Justice in Colombia. My address to the seminar, "Alternative Dispute Resolution from a Judge's Perspective," was based in part on this paper.) Although types of alternative dispute resolution are practiced in most countries, especially among the indigenous communities, and although conciliation and arbitration are generally regulated in existing legal systems, until a few years ago there was no over-all vision of the movement and of its significance for society; of its essentially democratic nature; and above all, of the possibility of it inducing a paradigmatic social change from a culture encouraging litigation to one of pacification and cooperation. ADR is on the way to becoming institutionalized. Bolivia is a case in point: there the Executive Branch has on its agenda a draft Law on Arbitration, Conciliation, and Mediation.

Alternative Dispute Resolution in Argentina

Numerous conflicts in Argentina are settled by negotiation between the parties involved, especially in the public sphere—in political squabbling or in disputes between the government and trade unions, for example. However, until recently there was no sense of negotiation as an ADR method, and even less was known about the *cooperative negotiation* model—in a sense the opposite of competitive negotiation—which emphasizes solving a conflict through discovery of an element of harmony and in which both parties stand to gain. This model envisages disputes as opportunities for change and for the creation of positive solutions catering to the interests of the parties involved. Cooperative negotiation is an uncommon practice, however: it is by no means usual for the parties to a conflict to agree to a negotiation stage prior to a trial. Only in the past two to three years did this emerge as a subject in a few official curricula, and only in April 1993 did the Faculty of Law and Social Science at the University of Buenos Aires authorize, in response to a proposal I made, the creation of a postgraduate refresher course in "Negotiation and Conflict Resolution."

As regards *conciliation*, the National Code of Civil and Commercial Procedures treats it as a power that a presiding judge can invoke at any stage in an attempt to get the parties to reach a settlement. However, the proportion of cases in which conciliation occurs is low. A survey of judicial delays—designed at the National Center for State Courts—focused on labor tribunals, which historically deal with more cases than any other kind of court. Only 12 out of 100 sample proceedings under way at the end of 1992 resulted in conciliation prior to the examination of evidence, and only 16 ended in conciliation during that stage. In the civil courts the figures are minimal. Some of the blame for the failure of this conflict resolution option can be attributed to the lack of

training in negotiation and mediation techniques; the obvious reluctance of the parties to state their real interests in front of the person who is to decide who wins the dispute; and above all, the lack of time at the judge's disposal to preside over the hearings personally. As is often noted, time is a judge's most precious possession and he or she has to use it to substantiate judgments.

As regards *arbitration*, the Code of Procedures includes the traditional form as an extrajudicial procedure. The award is binding upon the parties and can be legally enforced: it is also subject to judicial review if impugned on the grounds of legal invalidity. Given that it is the arbiter who decides the dispute after certain proceedings and after following basic legal norms, this kind of conflict resolution is similar to a judicial sentence in that it too is "adversarial." When the arbiters can rule on the basis of their own convictions using a broad notion of justice and equity, the Code refers to them as "friendly arbitrators." The parties can sign an "arbitration commitment" and agree on the procedure to be followed. If nothing is established, it is governed by the Code of Procedures.

In the private sector, the Buenos Aires Commodity Exchange (Bolsa de comercio) has a General Arbitration Tribunal with its own special features and rules. Although it achieved some renown around 1970, it never really dealt with many cases (its record was forty cases in 1980, each of which took between eight months and two years to settle). Today, its activities are minimal. Over the past two years, in response to the crisis of the judiciary, newcontinue

arbitration tribunals have been established such as the tribunal for the Economists' Association (Colegio profesional de ciencias económicas), the Condominium Chamber (Cámara de la propiedad horizontal), or the Industrial Union (Unión industrial). The Law and Social Science Faculty of the University of Buenos Aires and the Association of Notaries of the Federal Capital have set up a General Tribunal for Arbitration and Mediation governed by very precise rules and endowed with the installations it needs to operate. All the full-time professors in that faculty were appointed arbitrators and, in recognition of the training and dissemination we have carried out on behalf of this project, the first two honorary arbitrators named were Elena Highton and myself. Recently, mediation was introduced into the Industrial Union and Commodities Exchange regulations. Nonetheless, little has been done.

So far arbitration has not gotten off the ground. It needs a good shake-up and new approaches. Néstor Martínez, the IADB delegate, reached the same conclusion in a speech he gave to the "First Inter-American Meeting on Alternative Dispute Resolution," held in Buenos Aires November 7-10, 1994, and organized, under the auspices of USAID, by the National Center for State Courts and the Libra Foundation. Referring to arbitration, as it had evolved at both the national and international levels, Dr. Martínez said on that occasion:

Arbitration has become a mere ritual; and the concept of public order has become sublimated. As a result, the system has turned into a rather complex mechanism, vulnerable to attacks at any time on formal grounds through appeals for nullity of the arbitration awards. This renders arbitration ineffective and deprives it of the very purpose that gave rise to the arbitration agreement . . . [that is,] costs, which have not always been lower. . . . In short, ad hoc arbitration has been a failure and it will only have a future to the extent that arbitration is institutionalized, meaning that there are organs behind it, administering it, training arbitrators, and producing professionally qualified secretaries for the arbitration tribunals, with proper rooms designed for oral proceedings.

To that end, the Ministry of Justice submitted to the executive branch in 1992 a draft arbitration law inspired primarily by Sergio Lepera, but it has not yet been dealt with by Congress. As discussed in some detail later in this chapter, the Ministry of Justice in 1994 presented the executive branch with a draft Reform of the Code of Civil and Commercial Procedures introducing major changes in the whole set of legal procedures, including arbitration, and incorporating mediation and other alternative forms of dispute resolution.

Mediation is used in national public disputes where mediators have been appointed to deal with political conflicts or disputes involving trade unions or other professional associations. However, the role carried out by neutral third parties of this type is not always mediation in the academic sense. There are also a few private sector antecedents, especially in circles or institutions concerned with applying system theory to personal or family disputes.

At the international level, the Beagle Channel conflict in which Argentina and Chile disputed sovereignty over three Southern Cone islands was submitted to mediation by Pope John Paul II. The Pope guided the parties and assisted them in their negotiations. However, he did not ultimately act as a mediator because he produced a ruling that settled the conflict on the basis of agreement by both parties. The procedure appeared to be similar to a nonbinding arbitration. In the end it was indeed accepted by both countries on October 29, 1984, and the conflict ended.

Whatever the forum of a dispute, the mediator's function is to help the parties solve their conflict by mutual accord. He or she is trained to spot and note down the facts and issues in dispute; to help the parties discover the real interests and concerns at stake; to explore grounds for a possible agreement and spell out the consequences of not reaching one; and to foster a cooperative spirit that could pave the way toward a solution of the conflict.

Mediation is confidential, which means that neither the mediator nor those present during mediation may reveal to third parties what was said during those sessions; nor can they be forced to make statements about the proceedings. In fact, it is customary for all parties to sign a confidentiality agreement, which establishes an individual obligation to keep what is said secret, quite apart from general provisions that already impose such secrecy. A few exceptions do, however, exist, such as when facts are discovered indicating that the physical or mental health of a minor is endangered, or that there is an intention to commit a crime.

The purpose of mediation is not the investigation of guilt. Mediation has its sights set on the future, paying special heed to establishing a relationship between the parties. The fact that it attempts to settle a conflict out of court makes it democratic, because it is the parties themselves who make the rules they agree to be governed by. That is why, according to statistics on programs carried out in the United States, there is a high rate of continue

compliance with agreements reached through mediation, in contrast to judicial judgments, which often must be enforced.

Alternative Dispute Resolution and the Judicial Crisis in Argentina

The Gallup Institute, with USAID support, recently carried out a public opinion survey of administration of justice in Argentina. Some of the findings were published in March 1994 and indicate that, in terms of image:

Public opinion is generally negative (40 percent consider administration of justice in Argentina to be only fair, while 49 percent consider it to be bad or very bad).

The vast majority of the population (80 percent) cannot find anything positive to say about administration of justice in Argentina.

Thirty-five percent of those surveyed list the main defects of the system as slowness and bureaucracy; 65 percent consider it unjust, partial, biased in favor of the rich, corrupt, above the law, politicized, prone to personal favors. Some (between 4 percent and 9 percent) also think that the laws are not strict enough and are out of date.

Sixty-five percent consider the major problems to be corruption and excessive delays in reaching verdicts.

Forty percent are unaware of the existence of other means to solve conflicts, apart from the law courts. (Thirty-four percent state that no other means exist. Twenty-five percent believe that there are other means.)

The Gallup Institute drew several conclusions from the survey. First, "administration of justice in Argentina is currently undergoing a major credibility crisis, which also affects other institutions and fundamental social groups (such as political parties, trade unions, or Congress). This mistrust leads to criticism among the population, mainly directed against excessive slowness and delays in reaching verdicts and against growing political bias. For the general public, this means that administration of justice fails to fulfill its basic function, which is to be 'just and equitable,' either because it fails to settle cases quickly or because it is too heavily dependent upon the powers that be." This, in turn, engenders a pervasive "sense of insecurity: the vast majority of people feel they have little or no protection from the judiciary and maintain that it does little or nothing to safeguard their rights, and rather favors those who are either rich or powerful. . . . "

Second, "with regard to judicial reform, the idea is that after explaining to the population the main changes brought about or about to be implemented, there should be a general consensus in favor of them and highly positive expectations with respect to future developments in administration of justice once the reform has been completed. Oral proceedings, neighborhood tribunals, and mediation were generally accepted by the population, because most people think they should help decongest the courts and accelerate the judicial process, speeding up the solution of conflicts taken to court." Although most of those surveyed mentioned attorneys as the best people to consult if they were confronted with some kind of conflict, it also emerged that a quarter of the population tries or would try to solve its conflicts on its own. This was interesting because, when asked to specify, those respondents mentioned means such as letters to the editor, writing a note to the company that overcharged them, consumer defense organizations, the ombudsman, go-slows, strikes. . . . "

Against this background, alternative dispute resolution is—along with reforms in judicial procedures, education, and culture, in administration of justice, in the level of productivity expected of judges, and in the technological backup for judicial proceedings and rulings—one of the mechanisms that could help the judiciary emerge from its current crisis.

Administration of Justice in the Broad Sense

Alternative dispute resolution is not just a way to take some of the load off the system. It also addresses social uneasiness at the difficulty in obtaining a just solution to conflicts.

The distinction here is the same as that made by Bill Davis in the "First Inter-American Meeting on Alternative Dispute Resolution": access to the judicial system as distinct from access to justice, in the sense of a just solution. As Kelsen (1966) wrote in his extraordinary book *What Is Justice?*, ". . . it is one of those questions where one can only resign oneself to the fact that there will never be a satisfactory answer and that all one can do is learn to pose the question better."

What do people mean when they say, "There is no justice to be had here?" A lot of doubts are explained by unreliability, slowness, and corruption in the legal system, as emerged in the Gallup survey. But underlying the complaint is a major element of justice that John Rawls (1979) calls "the efficacy principle." This principle coincides with Pareto's optimum theory and states, in simple terms, that

. . . in a given distribution of goods between two parties, there is a point of equilibrium at which continue

the degree of satisfaction of both parties is at a maximum; at that point an improvement in the satisfaction of either one could only occur at the cost of the other. The value underlying this approach is "satisfaction." The approach itself forms part of negotiation theory and, generally speaking, it does indeed reflect the way individuals

or collective entities seek to solve their conflicts, in the most satisfactory manner possible, without doing more damage: in other words, at the least possible cost.

According to Ury, Brett, and Goldberg (1988), various kinds of cost must be borne in mind: the economic cost of the transaction; acceptance of the outcome by both parties, in other words, the degree to which interests are satisfied and the outcome is believed to be fair; the impact that the solution arrived at has on relations between the parties; and finally, recurrence of the conflict, that is, how long the outcome will hold and the chances of the conflict recurring in the future.

From this point of view, the least costly settlement of a conflict would be negotiation between the parties, possibly with the help of a neutral third party—a mediator, for instance—based on the interests at stake. Sometimes negotiation only becomes feasible when a third party clarifies the rights of the parties to the conflict. So-called nonbinding arbitration may help to establish the limits to the rights of the parties and thereby assist in the resolution of the dispute. However, alternative dispute resolution is not always possible from the viewpoint of the parties, of society, or of the state, and in those cases conflicts can only be settled by those who have public authority to solve conflicts according to law: judges.

If we truly believe that alternative dispute resolution will reduce the litigation rate in society as well as raise the level and quality of administration of justice, we should implement ADR programs connected with the courts and offer society new ways with which to solve its disputes, in the conviction that in that manner, too, we are administering justice.

In a conference for federal judges at the Harvard Law School (Cambridge, Massachusetts, USA), Judge Wayne Brazil of the Northern District of California, who is a director of ADR programs, addressed the following question: "When Do Court ADR Programs Make Sense?" According to Brazil, the answer depends on a series of prior questions: First, "Will it increase the level and quality of service provided to parties by the courts?" Second, "Will it raise the general public's level of satisfaction and trust in the judiciary and in the government?" And finally, "Will it make people more grateful to judges and to the State for fulfilling their duty of helping people to solve their problems and get on with their lives? If the answer to all these questions is 'yes' and if we can provide such services without in any way compromising the fulfillment of our traditional judicial function, then we are inclined to set up an ADR program." Brazil reminds us that Judge Robert F. Peckham was given to saying that courts are "an institution whose purpose is to find the best ways in which to satisfy the needs of its clients: the general public" (Brazil 1994).

From that point of view and also in accordance with the teachings of Frank Sander, an ADR professor at Harvard Law School, the ADR movement pursues the following objectives:

To ease the burden on the courts and to cut both the costs and delays involved in conflict resolution.

To increase community participation in dispute resolution processes.

To facilitate access to justice.

To provide society with a more effective form of conflict resolution.

To the extent that these objectives are gradually attained in the social system, we will be moving from an ineffective system of dispute resolution to one that might be called efficient: it can call upon numerous institutions and procedures for preventing and resolving most controversies, at the lowest possible cost and based on the needs and interests of the parties, and it respects the principle of subsidiarity, according to which "conflicts should first be handled at the lowest and if possible most decentralized level, and then, when absolutely necessary, at a higher level" (Goldberg, Green, and Sander 1985). If the system is society as a whole, that highest level is the

judiciary. Unless some higher interest dictates otherwise, the judiciary should only handle conflicts after other methods of resolution have been tried.

Implementing an Alternative Dispute Resolution Program Connected with the Courts

A vision of justice for the year 2000 should include a judicial system offering citizens numerous alternative ways in which to solve their disputes before and during a trial.

Alternative dispute resolution can be linked to the judicial system in various ways that are not mutually exclusive. Cases can be handled outside the system but by judges, in public or private centers; ADR can be just another service provided by the judicial system; or the two approaches can be combined. This comprehensive approach is usually referred to as the "multidoorcontinue

tribunal." Several states in the United States have adopted it since 1983 on an experimental basis. One of the latest to do so was Massachusetts, which in 1990, at the initiative and under the supervision of the presidency of the Supreme Court of Justice, established a Commission on the Future of the Courts, whose main objective was to create a vision of what administration of justice could and should be by the turn of the century. The Commission's report, funded by various public and private institutions, was preceded by an in-depth field study, with censuses and surveys addressing different sectors in society. It was presented in mid-1992 under the title, "Reinventing Justice for the Year 2022."

Working alternative dispute resolution techniques into the court system is not a new idea. As a publication of the Center for Public Resources (1992) in New York points out, back in 1952 Pennsylvania courts were already authorized to establish compulsory arbitration programs. Since then they have proliferated. According to National Center for State Courts figures, there are 1,200 ADR programs in the United States, which receive disputes or cases referred to them by judges. Thomas Moyer, President of the Supreme Court of Justice in Ohio, has cited some revealing statistics. Of all the cases handled under the Multidoor Program, only 10 percent ended in a sentence, with the rest solved by alternative methods. Of those cases referred to "neutral evaluation," between 55 and 60 percent were settled following the independent assessment of the dispute; between a quarter and a half of those sent to "summary jury trial"—a mock jury trial to help parties see how a jury might decide the case—were able to reach a settlement. The highest settlement rate came with mediation, which was also the method preferred by most users. A survey showed 80 percent of them in favor of this procedure. Of the lawyers, 77 percent favored introducing mediation even at the appeal stage. In addition, statistics show that between 65 and 75 percent of the agreements reached with the help of mediators are kept to.

The Center for Public Resources Legal Program recommends asking the following questions when implementing an ADR program connected with a court:

What kind of ADR is to be offered? And for what kinds of cases?

Will it be voluntary, compulsory, or a combination of the two?

How will cases be selected and by whom?

Will parties in a dispute be able to withdraw from the ADR procedure whenever they like?

How will the program be financed?

Who will be eligible to serve as a neutral third party? And how will they be chosen for each case?

Will the neutral third parties receive special training?

Are the neutral third parties to be financed, and, if so, by whom?

Will confidentiality be respected and, if so, what will that imply?

How will the program be administered, monitored, and evaluated?

What roles will the judges, lawyers, and parties play in these programs?

No doubt the decisions taken regarding alternative procedures will depend in part on the idiosyncrasies, special circumstances, and laws of each country, although some will be based on value judgments and others on the experience acquired through evaluation of other programs. From a technical standpoint, a field study might be advisable, or a diagnosis of the existing system, or a pilot program that is then evaluated and applied more broadly. In Colombia we favor a pilot program, which has the advantage of providing real data. This presumption of a pilot program seems to underlie Decree 2651, which was promulgated by the president of the Republic of Colombia on November 25, 1991, and stipulates ways in which to ease the burden on the courts. In particular, two sets of provisions concern conciliation (Articles 210 and 53), which allow judges to delegate stages to a judicial conciliator, and arbitration (Articles 1120). As this Decree is temporary—its provisions are valid for forty-two months—presumably the experience gained will be assessed, and, depending on results, those provisions and institutions that have best served the objective of taking some of the load off the courts will be recommended for inclusion in a permanent law.

Standards for Mediation Programs Connected with the Courts

Some courts in the United States have developed certain principles, known as standards, to serve as guidelines in implementing mediation programs. The following section deals with some standards that are applied in family courts in Los Angeles, California.

The administration of U.S. courts is separate from jurisdiction. Mediation programs attached to or connected with the courts thus come under administration.

The degree of responsibility for implementation of mediation programs or the activities of mediators working with the courts depends on whether the cases were remitted by judges or whether the mediators were chosen by the parties.

The court is wholly responsible for the mediators it selects to work with programs administered by the judiciary.

The court must likewise supervise and evaluate the quality of the mediators or programs operating outside the judicial system to which cases are referred.

The court is not responsible for quality or performance under programs chosen by the parties without advice from a judge.

The court must specify its objectives in starting a mediation program or in referring cases to mediation programs or other outside services.

Where possible, all stated goals should be measurable.

The circumstances that have given rise to the mediation also determine responsibility in the provision of information, both to the mediator and to the court.

When the parties decide to use outside mediation services, the court is not under any obligation to provide information to the mediator.

When the judge obliges the parties to have recourse to mediation, whether inside or outside the judicial system, he or she is obliged to provide information to the mediator or the mediation program that will handle the case.

If the program is directed by the court, or if a case is referred by the court to programs outside the judicial system, the person responsible for the program or the mediator is responsible for submitting to the court such information as it needs to monitor and evaluate the program.

If the mediator or program is chosen by the parties with the court's advice, information need not be submitted.

Argentina's Experience in Implementing Mediation

In early 1991, after a trip to the United States during which I was able to observe various kinds of alternative dispute resolution at work in courts in Florida and their effectiveness in reducing delays in the judicial system, I proposed to Carlos Arslanian that we set up a mediation program. As a result of that initiative, a Mediation Commission was formed in the Ministry of Justice and was charged with carrying out the studies and drawing up the drafts needed to implement mediation as an alternative form of dispute resolution.

A National Mediation Plan

In September 1991 we submitted our final report along with a draft National Mediation Plan. The plan envisages setting up mediation programs in different spheres of society—local communities, schools, professional associations, the judiciary—and incorporating them into university courses. The studies, the draft mediation plan, and other recommendations of the Mediation Commission bore fruit when Executive Decree 1480/92 declared mediation to be in the national interest, instructed the Ministry of Justice to draw up a National Mediation Plan, and gave orders for the creation of a mediator corps, a school for mediators, and a pilot scheme in civil law administration. It also empowered the Ministry of Justice to call upon the Supreme Court of Justice to assist with this scheme.

In November 1991, with USAID and American embassy backing, Sharon Press, the director of the Tallahassee Dispute Resolution Center created under a joint program of the Florida Supreme Court and the law faculty of Florida State University, was invited to deliver an introductory course in mediation. Invited to participate in this mainly informative course were judges from different types of courts, members of the bar association (Colegio de abogados), the Lawyers' Association (Asociación de abogados), professors from the law faculty at the University of Buenos Aires, psychologists, social workers, and other professionals from different walks of life. During her stay, Sharon Press interviewed the presidents of the institutions invited to take part, members of the Supreme Court, the dean of the law faculty, and so on, in an attempt to involve all sectors associated with judicial affairs in the new ADR movement. At the same time, every effort was made to obtain as much publicity as possible in the media, radio, and television at the start of a campaign to make the public aware of this new approach to dispute resolution.

The same routine was followed with two North American trainers, who conducted two successive courses. On the advice of the Mediation Commission, one of the trainers, David Jenkins, was recruited from the private sector and was particularly qualified to teach about multiparty property disputes. The other trainer, Patricia Roback, is a mediator for family cases who works with a public mediation center attached to a Los Angeles court. By this time,

in 1992, the Ministry of Justice could count sixty certified mediators. In 1993 an invitation was extended to the director of the Dispute Resolution Service in Richmond, Virginia, to give talks to such strategic bodies as the Lawyers' Association, the National Civil Law Appeals Chamber, and law faculties in state and private universities.

After attending these training courses, lawyers from the four local district legal aid centers established in the federal capital some years ago by the Ministry of Justice with USAID assistance started using negotiation and mediation techniques to reconcile parties in dispute.

Pilot Scheme in National Civil Law Courts of First Instance in the Federal Capital

The Ministry of Justice issued Resolution 983/93, which initiated a civil law pilot scheme and appointed a committee to advise and evaluate the experience acquired.continue

This committee was made up of two civil law first–instance judges, the director of the Juridical Extension Services Department in the Ministry of Justice, and myself. Ten mediators were selected from those trained and officially certified by that department as qualified to serve in a mediation center. Although mediators can be drawn from any profession and do not, moreover, have to have a university degree (it is enough to have taken the training course, which includes observation and comediation), on this occasion the advisory committee selected and contracted as mediators eight lawyers with at least four years' practical experience and two psychologists with four years' clinical experience, to act as comediators in judicial cases. Both mediators and comediators have to respect certain ethical norms. They may not act as mediators in cases in which they have advised the parties and may not counsel them afterward. In general they are subject to the same rules as those regarding objection to and disqualification of judges. Anyone who has been a mediator in a case cannot then be an arbitrator, especially when the parties are bound by some clause that obliges them to proceed from mediation to binding arbitration.

As the pilot scheme is operating subject to the norms of the old Code of Procedures, cases are only referred to the Mediation Center at the request of the parties or when a judge invites such mediation in cases where he considers it appropriate. If there is no agreement, no mediation takes place. If the parties agree to ask for mediation, legal proceedings are suspended for the period agreed upon by the parties, and a form is filled out asking the Mediation Center to intervene. That form is all that the center receives, because the file on the case stays with the court.

The first thing that the Mediation Center does, after receiving the request, is to hand the parties and their lawyers instructions regarding the mediation procedure, in order to ensure that they are properly informed about the nature of mediation, the role of the mediator, the possibility of holding either joint or separate sessions with the parties, the nature of such sessions, the obligation to keep what is said secret, and the consequences of reaching either total or partial agreement. The parties are also advised of their rights, such as the right to withdraw from mediation whenever they like.

When the mediation comes to an end, the Mediation Center informs the judge about the result and, if an agreement has been reached, sends it to him. The judge then acts according to law (ratifies, informs the adviser for minors, and so on). The center keeps only the mediation file consisting of the form requesting the mediation, the court order receipt, the confidentiality agreement, proof of notification of all persons invited to testify, proof of meetings held and those present, and records of any other act carried out and of the completion of the mediation.

The idea is to monitor and assess the behavior of the parties and their lawyers vis–à–vis mediation, during and after the hearings. We will also evaluate the mediation procedure and the performance and main characteristics of the mediators.

Judicial Reform in Latin America and the Caribbean

It was against this backdrop that the Ministry of Justice invited the Supreme Court to participate in the pilot scheme and asked the Civil Law Appeals Chamber to name seven property case courts and three family courts in which to conduct the experiment. The chamber voted, by a narrow majority, against carrying out the pilot scheme. It was the first obstacle the project had come across and one that, as a member of the chamber, I witnessed personally. Of the 39 members of the chamber, only 28 were present at the session that dealt with this topic, and of those present, 13 voted in favor and 15 against. The following factors seem to have played a part in this first setback:

Lack of a prior statement on the issue by the Supreme Court.

Lack of adequate information about mediation and its impact in improving administration of justice.

Ignorance of what it means to conduct a pilot scheme experiment prior to the passing of legal norms.

Fear of executive interference in the judiciary, because the mediators had been trained and contracted by the Ministry of Justice.

Resistance to change and fear of losing power and control.

The Supreme Court had been invited to participate in the pilot scheme prior to the Civil Law Appeals Chamber decision, but it had not yet replied to the Ministry of Justice (despite the fact that one of its members sat on the Mediation Commission). In the end, after the chamber's refusal to go along with the project, the Supreme Court voted, with only one dissident vote, in favor of carrying out the pilot scheme (Resolution 62, February 14, 1994).

In accepting the opinion emitted by the highest court in the country, the chamber first asked the judges whether they were interested in taking part in the experiment. Because of the high percentage (over 85 percent) of judges in favor, it was necessary to draw lots before naming the courts that would take part in the pilot scheme.

Role of the judges, court personnel, and users in mediation . According to the "Recommended Standards Governing Mediation Programs Attached to the Courts," drawn up by the Dispute Resolution Center based in Washington, D.C., and subsidized by the State Justicecontinue

Institute, "The courts, together with lawyers and professional organizations, are responsible for informing the public, lawyers, judges, and court personnel about the mediation process, the judicial process, and other programs; about the differences between them as methods of solving disputes; about the possibility of saving on costs and time; and about the consequences of participation." The judges are responsible for deciding which cases are referred to mediation. The instructions given to judges and court personnel must emphasize the participatory nature of mediation and the possibility of reaching creative agreements governing future relationships. Judges must also advise parties to a suit of their rights and tell them how the referral process works.

In keeping with these standards, short courses were held for the staff of the ten courts, including ordinance staff: 120 people in all. Judges, court secretaries, and juvenile court advisers were also given instruction.

Role of lawyers in mediation . According to the standards cited above, courts should urge attorneys to inform their clients of the advantages, disadvantages, and strategies associated with the use of mediation. Before their clients decide to resort to mediation, attorneys may offer advice as to whether it suits their interests and which rights would prevail if the case went to court.

Attorneys may attend mediation sessions and participate directly in the mediation. Alternatively, they may participate indirectly by counseling their clients before, during, or after the mediation sessions.

Information on the mediation pilot scheme is being circulated to legal practitioners through various channels. Some judges have opted for posting an announcement of the experimental program at the entrance to the courts; others have called special hearings to invite parties to a dispute to make use of this procedure when, in their opinion, the type of conflict involved is susceptible to mediation. Some judges make the recommendation in writing, in the file of a case. In short, this aspect is left to the judge's discretion.

Role Played by the Libra Foundation

Founded on September 30, 1991, the Libra Foundation is a nonprofit institution that, according to its statutes, aims to help modernize and improve the administration of justice in Argentina. It comprises judges, attorneys, businessmen, psychologists, notaries, researchers, university professors, teachers, mediators, and experts in negotiation. From the start, it has focused on introducing and disseminating alternative methods of dispute resolution in Argentina and neighboring countries.

The Libra Foundation collaborates with and supports the National Mediation Plan by working in coordination with the Ministry of Justice and with the judiciary in the provinces. It publishes a journal three times a year, as well as producing teaching materials, manuals, videotapes, and guides for official use and for the foundation's own internal uses. This activity is sponsored by USAID programs administered by the La Ley Foundation.

The Libra Foundation has signed scientific and academic cooperation agreements with various public institutions. Under an agreement with the College of Notaries of the Federal Capital, for example, the foundation has brought over international mediation and negotiation experts to train Libra's own teaching staff and to provide first-class training courses.

The Libra Foundation has worked with the United Nations Development Program (UNDP); with the Inter-American Bar Foundation based in Washington, D.C., in developing ADR programs in Bolivia; and with the National Center for State Courts, the institution with which it organized the "First Inter-American Meeting on Alternative Dispute Resolution" (November 1994), which was attended by seventeen countries. There were ninety-two guest delegates at that meeting, including ministers of supreme courts, ministers of justice, and representatives from the private and public sectors, intermediate institutions, foundations, and chambers of commerce. The meeting was declared in the national interest and was sponsored by USAID with the backing of the Ministry of Justice. The three-day meeting was dedicated to discussing alternative dispute resolution as it relates to the judiciary, to the community, and to the private sector. The conference offered a useful mixture of speeches, panels of experts, and workshops, allowing an invaluable exchange of experiences among participants. A publication of the proceedings of the congress will be published.

The benefits accruing from this "First Inter-American Meeting on Alternative Dispute Resolution" were immediately apparent. Libra is acting as a consultant for the establishment of mediation centers and is following up on requests for training from Bolivia, Chile, Paraguay, and Uruguay. It has been asked by the Latin American Integration Association to organize specific and general training courses. The Chamber of Commerce of Mercosur has also solicited Libra's services.

Without the backing of the Libra Foundation, alternative dispute resolution and the National Mediation Plan would not have been publicized or have developed as quickly and effectively as has been the case. In this regard it is worth recalling that the foundation was designed to continue

ensure that the conception and effort expended on behalf of alternative dispute resolution and judicial reform would be protected from the ups and downs of political life.

Current Status and Future Prospects for Mediation

At the time of writing, May 1994, the National Mediation Plan is under way. The Ministry of Justice has signed cooperation agreements with various provinces, and mediators travel inland periodically to teach training courses. Agreements are also being signed with law faculties, as envisaged in the plan, offering mediation internships in urban district centers. The judges participating in the pilot scheme have been referring cases to the Mediation Center, which also receives requests for mediation services directly from interested parties who have not yet taken their cases to court. To give an idea of the amount of interest there is in mediation: the day the center opened it received 100 telephone calls and 53 appointments were made to exchange further information. Twenty-seven mediations resulted from those appointments.

It is obvious that the ten mediators contracted with USAID support will be insufficient to cope with the demand originating with both the general public and the judges. Likewise, the space available for mediation is insufficient. Also needed is technical support to follow up, monitor, and evaluate the program. Although the necessary instruments for these functions have been drawn up, the management software is not yet in place.

High public sector demand and slim resources notwithstanding, I am unaware of any special budget appropriations for either the mediation plan or the mediation program connected with the courts.

On the private sector side it will be important over the next two years to provide support to the Libra Foundation's activities to enable it to carry out projects involving individuals, companies, and intermediate institutions.

Conclusion

Experiences with alternative dispute resolution mechanisms in some North and South American countries, and particularly the experience with mediation in Argentina, suggest the following:

The establishment of court-related ADR programs may help overcome the crisis in administration of justice. However, it should be stressed that alternative dispute resolution is not the only path to modernizing and improving judicial administration.

A properly monitored and evaluated pilot scheme makes it possible to design norms governing the establishment of mediation and other forms of alternative dispute resolution connected with the judicial system.

Alternative dispute resolution programs need to be designed for the private sector. In addition to training courses, mediation centers are needed to make diagnoses and design ADR systems, as well as to provide mediators, arbitrators, neutral evaluators, and the like.

References

- Brazil, Wayne. 1994. "When Do Court ADR Programs Make Sense?" *Alternatives* (Center for Public Resources, New York) 12(2).
- Center for Public Resources, Legal Program, Judicial Project. 1992. "Court ADR Elements of Program Design." New York.
- Goldberg, Green, and Sander. 1985. *Dispute Resolution*. Boston, Mass.: Little, Brown and Company.
- Kelsen, Harris. 1966. *Qué es la justicia?* Argentina: Universidad Nacional de Córdoba.
- Rawls, John. 1979. *Teoría de la justicia*. Mexico: Fondo de Cultura Económica.

Ury, Brett, and Goldberg. 1988. *Getting Disputes Resolved*. San Francisco, Calif: Jossey-Bass.

12— Access to Justice

Bryant G. Garth

As the context for the access-to-justice movement has changed dramatically over the past twenty years, the importance of law as a system of governance—both nationally and transnationally—has grown throughout the world. Under the legal regime established by NAFTA and the revised GATT, for example, law has become much more important in the regulation of trade and of the environment.

The legitimacy of law and legal regulation depends to a great extent on perceptions of access to justice. Where authority depends on bases other than law, such as military authority, access to justice seems almost beside the point. Once the rule of law is asserted as the basis of legitimate authority, however, claims for access to justice gain prominence.

The reason is simple. If the tools and institutions of law are unavailable to large sectors of the population supposed to be governed by the rule of law, law loses its claim to be a legitimate form of authority. In short, the legitimacy of requiring ordinary people to obey the law presumes that legal institutions operate at a level that is accessible to them. Not surprisingly, therefore, the renewed importance of law (in conjunction with the globalization of the economy) brings new attention to the problem of access to justice.

It is difficult, however, to be precise about the meaning of "access to justice." "Access" can be defined in many ways: formal access to a particular institution, subsidized accessibility, strategies to promote access for individuals and groups who would not otherwise act to enforce their rights. "Justice," too, is a slippery concept, changing with time and place. It would be more precise, for example, to refer to access to lawyers, to courts, or to dispute resolution. I will continue to refer to "access to justice," however, because this phrase is used in current debates, and because it is important to see how the changing interpretations of "access to justice" relate to changes in law and the economy.

Although this chapter outlines three basic approaches to access to justice, there is a core to all three that goes beyond the proliferation of techniques. I will, therefore, examine the access-to-justice movement of the 1960s and 1970s in the United States and Western Europe. I will also explore access to justice during the Reagan era, when many institutions remained but the context changed dramatically. I suggest that the best approach, today, requires rethinking access to justice in relation to the globalization and deregulation of economies. This will mean, above all, reexamining what lessons from the northern countries, which are more or less used to thinking in terms of access to justice, are usable in countries of the South, where the role of law is changing quickly and dramatically. Although there is neither time nor space here to develop these ideas at length, some basic lines of approach can be set out and a few suggestions made regarding the Latin American and the Caribbean experience.

Access to Justice in the Welfare State

In some respects the access-to-justice movement reached its high-water mark in the 1970s, exemplified by the Florence Access-to-Justice Project (Cappelletti and Garth 1978). The era was characterized by a growth in legal sociology, a new awareness of people's legal needs, acknowledgement of the barriers to access ordinary people confront when their rights are violated, and considerable energy in the designing of institutions to break down those barriers. The movement's theme was one of making rights effective, consistent with the theme of delivering services characteristic of the welfare state. In the 1970s, reform was seen as a way to improve mechanisms for

delivering legality.

That theme, however, fits less well in the liberal state. The achievement of the 1960s and 1970s move—soft

ment was to transform thinking about legal reform and the legal profession. The access—to—justice movement covered at least three waves of reform. The first began with legal aid (growing out of the war on poverty) and the public defender (growing out of the Warren Court's "rights revolution"). In the 1960s in the United States and Western Europe, both neighborhood law firms and programs for civil legal aid proliferated in the world of common law. There was considerable writing about legal aid—if not much reform—in Latin America as well. But this research made it clear that in criminal or civil cases, the existing charitable system of legal aid was inadequate to legitimize the legal system.

The second wave, in the United States, Europe and, to some extent, Latin America, opened up access to groups seeking to enforce the rights of such diverse interest groups as environmentalists and consumers. The 1966 reform of class action in U.S. federal courts—coupled with liberalized standing to sue—was obviously important for common law. In civil law the starting point was probably the French *loi Royer*, which, in 1973, granted standing to sue to consumer groups. Another important example was the 1985 Brazilian law that enlarged standing in consumer and environmental matters to include groups. Again, a principle that had emerged out of scholarship and reform efforts moved on to affect consumer and environmental rights. Interest groups, which have increasingly mobilized public support, can claim a role in the eventual legal enforcement of regulations that protect consumers and the environment.

The third wave of the access—to—justice movement was characterized by an emphasis on alternatives to the courts—including mediation and arbitration. Initially, the focus was on small claims. France, for example, experimented with *conciliateurs* to handle minor disputes that once were the province of the *juges du paix*. In the United States the principal focus in the late 1970s was on neighborhood justice centers and court—annexed arbitration, both designed for minor matters (or at least relatively small claims) in the federal and state courts.

It soon became apparent, however, that these alternatives could be just as important in handling larger claims as smaller ones. In some settings there has, indeed, been a boom in private justice. The principal legacy of this movement, however, is more general. The focus on alternatives, both for civil and criminal cases, forced a rethinking of how disputes ought to be processed. In particular, the perception of what is a "normal" case has shifted. In the United States, for example, we now think of a settlement, or even a plea bargain, as the norm, whereas before, anything other than a trial was an alter. native. This change in focus—provoked by a generation of law and social science research—undoubtedly shapes how we now think of access to justice and legal reform.

Rationing Justice

The 1980s were a transition period for the movement to enhance access to justice. Privatization and the shift away from the welfare state affected the law no less profoundly than they affected other state—delivered services. And inevitably, the growing international market for trade and services and the internationalization of regulation also affected the problem of access to justice.

Governmental austerity led to a relative decline in the amount of resources available for legal aid as a public program of the state. Since legal aid had been considered part of the programmatic content of the welfare state, it was natural for it to decline along with other welfare state programs. Such a decline, however, puts justice on the level of other commodities to be rationed according to the marketplace.

Similarly, there seems to have been a conscious effort to cut back on cases in the courts on the grounds that they reflected an excessive litigiousness or rights consciousness that cost too much in public resources. The alternative

dispute resolution movement in the United States in the 1980s, for instance, can be seen as an effort to dispose of "waste" cases proliferating in the state and federal court systems. Numerous programs of court-annexed arbitration and mediation were formed with the express purpose of easing the caseload of the courts and saving public funding. The focus was not on access but rather on diverting potential court cases to other mechanisms.

At the same time, the proliferation of alternatives built new competition for the "desirable" disputes among law firms and other dispute resolution providers. At the national level—beginning in the United States but then expanding widely outside U.S. borders—there emerged a new generation of entrepreneurs offering alternative services. Notable in the United States were JAMS and ENDISPUTE, each of which used retired judges to resolve disputes.

Finally, new emphasis in the 1980s on the international market brought with it new international trends. With respect to private justice, multinational enterprises wished to avoid dealing with the courts of the opposing party—and thereby giving up any perceived "home court advantage." They therefore helped to build a strong system of international commercial arbitration that began with the International Chamber of Commerce in Paris and spread widely. This system provides an elite level of private justice that is, to a great extent, distinct from state systems of dispute resolution and regulation.^{break}

The growing involvement of nongovernmental organizations at national and international levels in such areas as environmental protection and human rights is further evidence of how the processes of dispute resolution have changed in response to internationalism. The trend toward liberalized standing has not diminished in the past decade. It has, rather, become important both nationally and internationally. As a political scientist recently observed, the "international human rights regime . . . serves as an arena of adjudication" (Brysk 1993) in such formal institutions of adjudication as the Court in Strasbourg and in informal negotiations, or mediations, that increasingly invoke the rule of law.

These emerging trends, characterized by increasing competition and internationalization, set the stage for the 1990s. Reaction to the welfare state led to the privatization of justice and a decline in commitment to the value of universal access to justice. Yet while the welfare state, with its goal of delivering legal and social services, was retreating in the United States, the importance of law to both economics and human rights was expanding around the world.

Although the new emphasis on law often stemmed from a simplistic reaction to the welfare-state model, it nonetheless learned as much from the expansive reforms of that model as from more market-oriented initiatives.

Access to Justice, the Liberal State, and the New Global Era

Although it is dangerous to generalize, it is possible to distill some general principles shaping current discussions about access to justice.

Rejection of legal utopia . As a starting point, we recognize that law is not the solution to every social and economic problem. Similarly, delivering legality, and the law, is not always worth a major social investment. At the very least, we now see that some form of rationing is necessary, and probably desirable.

Competition as a positive value . Some form of competition in the delivery of public services—including the services available for settling disputes—is acceptable and desirable. Competition can result in better and cheaper dispute resolution products. Through competition, more, over, it is possible to recognize that litigation is not the normal way of resolving disputes.

Entrepreneurial successes . Entrepreneurial efforts have promoted alternative methods of dispute resolution. Some of the products offered (such as court–annexed arbitration in the United States) have not led to substantial savings in time or money as their initial sponsors claimed they would. Yet these programs, which allow litigants to tell their stories to a neutral decisionmaker, are very popular with litigants. The mediation movement has also created a new field of lawyer and nonlawyer mediators who offer their services in competition with one another. It has been shown that legal reform is more successful when it makes use of dispute resolution entrepreneurs.

Reconsideration of access problems . New views on access to justice seek to improve access to courts, to other forms of (private and public) dispute resolution, and to (private and public) legal advice and representation. Legal reform is no longer seen as the key to social change, with the result that there is now the possibility of "depoliticizing" legal aid. Instead of seeing legal aid as the cutting edge of a political movement, it can now be considered a fundamental right of citizenship under the rule of law.

Importance of fundamentals in representing groups . As legal rights and remedies become more important in regulating the economy and the state, we return to the importance of group representation. There are numerous ways to proceed, including class actions (which have gained importance in many areas of the world), liberalized standing to private attorneys general, and the granting of the right to sue to formal groups (Garth 1990, pp. 20531).

Constitutionalism and internationalism . One reason for a more neutral stand on the question of gaining access to justice through legal aid is the trend toward the constitutionalization of procedural rights, which has gained force internationally through, among others, the International Court of Human Rights in Strasbourg and the Inter–American Court of Human Rights.

Access to Justice in Latin America

The principles of access to justice discussed above are applicable to Latin American reform efforts aimed at creating a justice system that is worthy of access, promotes access, and can cope with increased access.

Court reform and access to justice . In most of Latin America (and indeed, in many of the urban court systems in the United States) the initial focus should be on court reform. For access to justice to be meaningful, the court system has to function efficiently and judges must be independent. (Equal access to slow and questionable justice is not likely to bolster the legitimacy of the rule of law.) It is therefore important to note the strict connection between court reform and access to justice. Furthermore, to challenge the legal culture of delay and delegation requires careful analysis of the incentives that promote inefficiency. That kind of analysis is therefore also important to the question of access.break

Legal aid and advice . A basic attribute of access to justice is meaningful legal aid. What model is chosen to provide aid matters less than the commitment to provide adequate funding for it. For both civil and criminal legal aid, some combination of staff systems and compensated private counsel is necessary. Competition between the two can be useful as well.

One judge or three in first–instance procedure? The problem of resources within the judicial system leads to the question of whether one judge or three should be used in the first instance, and also to the question of the proper use of mediation in the first instance by the judge or judges. There are different views about these questions, and the answers may differ in different contexts. For what it is worth, my opinion is that one judge has many advantages—including accountability, speed, and the assignment of responsibility.

Judges and settlement negotiations . I also think that it is better for the judge to stay out of settlement negotiations to avoid any potential conflict of interest if the judge is then asked to decide the case. It may be less

costly to have judges serve as mediators, but my experience is that lawyers and nonlawyers can be trained quickly for mediation and can serve at almost no cost when called upon by the court.

Private justice: taking it slow . Given the necessity to reform the courts and to strengthen their independence—and the difficulty of publicly monitoring private judges without a strong consumer movement—it is difficult to see the immediate need to promote private justice as practiced in the United States. And while it makes sense to build institutions for international commercial arbitration, these constitute a specialized machinery that is specific to international trade.

Out-of-court dispute settlement . It will be important to find ways to handle any increase in cases brought about by improving access. Since court congestion is already an enormous problem, it will be important to ensure that the courts work more efficiently and that mechanisms are developed to encourage the settlement of disputes out of court. Recognizing the key role of public courts, it is probably wise to develop many of these programs under the auspices of the courts.

Group and collective interests . Finally, the more public dimension of internationalization must be addressed. It is clear that the role of nongovernmental organizations is increasing, and it is also clear that the role of law in trade regulation is increasing (through such arrangements as NAFTA). Some of the major debates around NAFTA, for example, have concerned the question of whether Mexico's legal system provides adequate possibilities for the private enforcement of environmental regulations, and this will inevitably lead to pressures for court reform in Mexico and enhanced standing to sue.

I believe that there will be similar pressures elsewhere in Latin America, both internally—from the proliferation of organizations for human rights, the environment, women's rights, and other issues—and externally, as part of internationalization. The need to broaden standing to sue is evident. If groups achieve greater influence in society, and the rule of law becomes more important, then groups must be given a greater role in law. Whether that means experimenting with class actions, however, is an open question. As with respect to private justice, it may be that the best approach is to go slow on the more wide-open aspects of the entrepreneurial U.S. model.

Conclusion

The rule of law is becoming increasingly important in Latin America and the Caribbean, because of both national and international pressures. Those pressures are putting access to justice on the agenda of legal policymakers. If law is to be the basic mechanism for legitimizing the authority of the state, it is essential that there be access to the legal system. Citizens cannot be expected to respect the authority of law if they are cut off from legal remedies.

The essentials of access to justice are:

The legal system must be made worthy of access, which will require confronting the questions of delay, cost, and judicial independence.

There should be a new focus on nonpolitical legal aid and assistance as part of a functioning judicial system.

Entrepreneurial energies in promoting conflict resolution alternatives, especially mediation, should be used to multiply the opportunities for cases to be settled out of court. Lawyers who provide legal advice and assistance also play a role in promoting such alternatives.

Ways must be found to enhance the legal standing of organizations to represent their own interests and those of their members in courts and courtlike agencies.

References

Brysk, Alison. 1993. "From Above and Below: Social Movements, the International System, and Human Rights in Argentina." *Comparative Political Studies* 26:25985.

Cappelletti, Mauro, and Bryant Garth. 1978. *Access to Justice: A World Survey*. Milan.

Garth, Bryant. 1990. "Group Actions in Civil Procedure: Class Actions, Public Actions, *Parens Patriae* and Organization Actions." In International Academy of Comparative Law, ed., *XIIIth International Congress: General Report*. Montréal: International Academy of Comparative Law.

13—

The Justice of the Peace As an Alternative: Experiences with Conciliation in Peru

Hans-Jürgen Brandt

In many countries the judicial branch of government is experiencing a structural crisis. Such is the case in Peru where for the majority of the population—litigants, lawyers, judges, intellectuals, politicians, and the citizenry—the formal mechanisms for justice do not offer satisfactory means for resolving conflicts.

The nonlawyer justice of the peace represents an alternative to the formal system. This medium for conflict resolution, administered by citizens who are not legal professionals, is very popular. Litigants hope for a forum in which they can speak their own language and for a judge who will understand their cultural values and the social problems of the local population. At its best, the justice-of-the-peace system avoids formal processes and procedural traps, resolves conflicts within a short time, is low-cost, and benefits from judges who are honest and just. In the course of this chapter, we will see whether these expectations and goals are met.

This paper grew out of my experiences as coordinator of the Training of Justices of the Peace Program conducted by the Judicial Studies Center of the Supreme Court of Peru, sponsored by the Friedrich Naumann Foundation of the Federal Republic of Germany, which I represented during 1983-88. As part of the program, a study was conducted involving interviews with more than 299 justices of the peace, a review of 6,000 resolved case files, and a survey of 1,000 users of the nonlawyer justice-of-the-peace system (Brandt 1987, 1990). This paper incorporates results of this study, complemented by information on developments stemming from judicial reform efforts in Peru and the promulgation of the new Political Constitution during President Fujimori's administration. Perhaps Peru's experience can shed light on whether use of the justice of the peace can be effectively adapted in other countries contemplating alternatives to the formal justice system.

Justice and the People

Criticism of the judicial branch of government seems to be universal across countries. A series of studies in industrialized countries have found that judicial systems, diverse though they are, share many similar problems: difficult access, complex judicial language, unintelligible pleadings, restricted interpretations of conflicts, inconsistent rulings by judges, prolonged processes, and high costs.¹ These problems are also found in the judicial branch of Peru, but are more serious because the legal system and the formal judicial structures are both in crisis.

An avalanche of laws and decrees, disorganized and often incoherent legislation, and the lack of systematic, up-to-date information about current legal procedures have produced chaos in the legal system. Moreover, the common perception that the law is negotiable, that it can be manipulated or easily circumvented, has contributed

to this crisis in the legal order. Our survey reveals that only a minority of the public has much confidence in the legal system.² The opinions expressed—that "laws are unjust," that "laws are not for the poor," that "laws favor the rich"—are due to social fragmentation and the fact that a considerable part of the citizenry feels that it is dominated by one sector of society and excluded from the legal system.

The widespread lack of confidence in the legal order reflects not only citizens' sense of being dominated but also their perception that they are losing their culture. Governmental law has lost social its sensitivity—or perhaps it never had it—to issues pertaining to the cultures of Peru's indigenous populations. Indeed, the country's heterogeneity, manifest in its diverse ethnic groups and varied cultural and social practices, means that different norms and justice systems operate in parallel—for example, the practices of peasant com—soft

Translated from Spanish.

munities and of native communities. The legal order has not been able to eradicate them. Yet the different systems of customary law, which reflect the commonly held beliefs and practices of the people, rarely have been the source of Peruvian law.³

In accordance with the Political Constitution, the authority for administering justice emanates from the people. Nonetheless, the Peruvian people have little confidence in professional justice.⁴ The Peruvian judicial branch is perceived as a system that does not recognize the realities of the peasant's life or of the urban population sectors, that does not take into account the values and customs of the different regions and zones of the country, and that usually requires litigants to express themselves in Spanish, a language that is foreign to many Peruvians. Extreme delays in legal processes and institutionalized corruption contribute to the negative perception. It is estimated that as of 1993 in the Supreme Court alone, there was a backlog of 28,000 cases pending. In the judicial branch overall, there was a congestion of from 250,000 to 500,000 civil and criminal cases.

Thus, it is not surprising that the representatives of the judicial system have such a bad reputation. Our survey indicated that one—half of those interviewed had a terrible perception of professional judges, viewing them as "unjust," "immoral," grafters." Justice, as rendered in Peru, is met with a lack of confidence and elicits fear and a sense of rejection. It seems that there is national consensus in this feeling of discontent (Chrinós Segura 1990). And although there have been many efforts at reform of the judicial branch since the early 1970s, they have had poor results.⁵

The Nonlawyer Justice of the Peace

The nonlawyer justice of the peace figures prominently in the Peruvian judicial system. About 70 percent of the justices of the peace are laymen, and the rest are attorneys.

The justice—of—the—peace system is an organic part of the judicial branch. It is at the first level of the judicial hierarchy. According to demographic criteria set by the executive council of the judicial branch, almost every population center in Peru should have at least one justice of the peace (Art. 61, Judicial Organic Law). In the larger cities, attorney justices of the peace—that is, professionals schooled in the law—assume the functions and responsibilities of the justice of the peace. In the smaller communities and urban areas outside large cities, justices of the peace who are neither attorneys nor legal professionals are employed.

Previously, the justices of the peace were appointed by the district executive councils for a period of two years (Art. 69, Judicial Organic Law).⁶ However, in accordance with the new Constitution of 1993 (Art. 152), the justices of the peace are now to be elected by popular vote. It remains to be seen whether through popular vote there will be a strengthening of the ties between the justices of the peace and the community and an increase in the social control exercised by the citizenry.⁷

Serving as a justice of the peace is considered an honor in Peru and the position does not carry with it any compensation. In the past the government did not even take care of the administrative costs of the courts operating in the smaller villages, and often the courts were housed in the homes of the justices of the peace. Now the Organic Law requires that the judicial branch provide these courts, on a priority basis, with essential support to carry out their responsibilities. The Law further requires that the municipal councils provide the necessary facilities to house the courts.

An important recommendation that has been incorporated into the new Organic Law is the legalization of the practice of *conciliation* as an efficient methodology of the justice of the peace (Brandt 1990, p. 402). Article 64 of the new Organic Law established that "the justice of the peace is essentially a conciliator. . . ." Consequently, he is authorized to propose alternative methods of conflict resolution to the parties in order to facilitate conciliation, but is prohibited from imposing settlements. Only when conciliation proves unsuccessful does the justice of the peace have jurisdiction (established by the executive council of the judicial branch) to rule in the following cases (Art. 65, Judicial Organic Law):

Monies due and owing.

Support and alimony matters.

Urgent, temporary intervention with juveniles who have committed antisocial acts.

Evictions.

Injunctions governing personal property.

Although the old Organic Law treated the nonlawyer justice of the peace in the same manner as the professional judge, according him the same duties and responsibilities without taking into consideration the differences in education and training, the new Organic Law acknowledges that the justice of the peace has limited knowledge of the law, both statutory and procedural. In accordance with Article 66 of the new Organic Law, it is not required that a sentence have a juridical basis, only that the justice of the peace render the sentence in the light of his honest appraisal of the facts of the case, in accordance with the values preserved in the Constitution and with respect for the culture and customs of the locality.
break

Characteristics of the Justice-of-the-Peace System

Within the Peruvian judicial branch we find two worlds diametrically opposed and profoundly uneven, characterized by two different sets of concepts, procedures, objectives, values, and standards: the world of the professional judge, that is, the university-trained legal technician; and the world of the empirical judge, or the justice of the peace. The one applies the official law, the other acts on the principle of "the known truth and maintenance of good faith."

The differences between the two worlds can be illustrated using five theses:

Different standards apply in the justice-of-the-peace system than in the formal justice system.

Conflicts that are valid areas for mediation are more broadly conceived.

The goals of conflict resolution are different.

The procedures and methods of conflict resolution differ in the justice-of-the-peace system, where conciliation is key.

The justice of the peace is the preferred mediator of first resort.

Different norms and standards . The justice-of-the-peace system relies on the popular principles of law—principles based on custom and common law.⁸ The justice of the peace, who lives in the same location and generally belongs to the same social class as the parties to a conflict, has a moral obligation, and is under social pressure, to come up with a solution. The local people want their conflicts to be resolved in a manner that takes into consideration their cultural values, idiosyncracies, and overall views—that is, that a resolution be reached based on the reality and specifics of the case at hand, with an awareness of cultural context, and not based on laws that are foreign and based on a modern, urban reality.

Often, the conflict at issue in a dispute has no parallel in governmental law. For example, in the Andean culture it is customary for parties to go before a justice of the peace to resolve conflicts that in "modern" sectors of society are considered completely private and are not disclosed before a judicial authority. This practice is evident in cases of conflict between couples or among family members, in which parties litigate before a justice of the peace on such matters as jealousy or nonfulfillment of domestic obligations. Other examples might include the public declaration of a joint action, the conciliation of couples, or the separation of live-in couples. Such conflicts cannot be classified as matters involving legal rights; still, the parties present their cases before a justice of the peace—not to obtain legal review of the conflict, but rather to arrive at an overall solution and, thus, the reestablishment of harmonious relations among the parties.

A justice of the peace who restricts himself to his legal capabilities, referring litigants to a higher judicial level, will not be viewed favorably. So the justice of the peace finds himself in a quandary. On the one hand, the government requires that the law be complied with and that the justice of the peace rule only in those cases where norms and standards of customary or common law apply; on the other hand, the parties to a conflict have a different expectation. Faced with these diverging demands, the justice of the peace is inclined to fulfill the demands of the sector of the society to which he belongs. Whereas for the judicial branch the law is the ultimate authority, evidence shows that for justices of the peace and adversarial parties, the law acts only as a frame of reference the justice of the peace can use to reach solutions to concrete problems, when and as he finds it applicable.⁹ Nonetheless, the justices of the peace trained by the judicial branch know their limits: they apply the standards and norms of customs or common law only when they do not violate the fundamental rights of the parties.¹⁰ There have been few instances when abuses occurred on the part of the justices of the peace.

Broader perception of conflicts . Another characteristic of the justice-of-the-peace system is that it allows for a broader interpretation of the kinds of conflict that may appropriately be dealt with by this means. Sometimes the visible part of a conflict is an act that is covered by the civil and criminal codes. But motivating that act are hidden conflicts, which are the true cause of the discord between the parties. For example, a case of bodily injury may have its roots in jealousy between the parties, problems over land boundaries, and the like. Failure to address the underlying problems means that the conflict will recur, perhaps with serious consequences. In such cases the parties may turn to the justice of the peace in search of mediation. As the underlying problems causing the conflict come to light, the justice of the peace gains a fuller picture of the dispute. He is not limited to looking only at the legal aspects. After determining the underlying causes that have led to the litigation, the justice of the peace tries not only to resolve the conflict, but also to get at the source of the conflict in order to promote a lasting social peace.

Different goals in conflict resolution . The goals of the formal justice system are to sanction, correct, and prevent illegal behavior, and in theory, to rehabilitate. In the justice-of-the-peace system, the goal is to educate and rehabilitate offenders and to reintegrate them into continue

the community. In formal civil trials, where the focus is on the individual rights of the litigants, application of the law is a zero-sum game: there is a clear winner and loser. The goals of the justice-of-the-peace system are different: maintenance of social order and a common peace holds sway over individual rights.

Heavier stress on conciliation . The new Organic Law establishes the justice of the peace as the judge of conciliation. Empirical evidence demonstrates that, nationwide, 64 percent of the conflicts that enter the judicial system at this level are resolved through a settlement or through conciliation. The justice of the peace does not "dictate justice"; rather, his objective is to arrive at solutions acceptable to the parties in conflict and not to impose unilaterally a judgment that merely puts an end to the litigation. A typical proceeding begins with receipt of a complaint or demand, whereupon the judge notifies the parties of a hearing. The parties appear on the date indicated, generally with witnesses. If the conflict involves a family matter, the parties will also appear with parents or godparents. Generally, in both civil and criminal cases the judge will try to establish an atmosphere of confidence to facilitate communication between the parties. He reminds them that he is the authority, that they must treat each other with respect, that everyone must tell the truth, and that they must try to reach an agreement.

This reasonable beginning notwithstanding, the trial atmosphere can become agitated. Frequently, the plaintiff will be interrupted by the defendant. At this point, the judge may intervene by quieting the parties and insisting that they maintain proper order. The judge's goal is both to advance the debate toward a settlement and to reestablish the disturbed or broken relations between the parties of the conflict. If the judge's efforts to reach a harmonious agreement seem imperiled, he can threaten to send the case to a higher judicial level, which will mean different standards, another language, and higher costs for the parties—in short, a legal setting in which a settlement cannot be negotiated according to the values of the community.

Nonetheless, if the parties do not wish to conciliate, there are the following possible outcomes:

The plaintiff or complainant desists from judicial action.

The case remains pending.

The judge dictates a sentence.

The justice of the peace submits the case to a higher-level judge.

About 25 percent of such cases remain pending. This "no solution" is in many cases, especially in rural areas, a way of seeking conciliation. Rather than impose a solution in a case in which the parties are not disposed to reach a settlement, the justice of the peace frequently postpones a judgment so that the parties can reflect about a possible solution and reach an agreement in the future. On a practical basis, this delay represents a "remission" of the conflict in social terms, especially in small communities where the closeness of the parties and the immediacy of the social control of community members push the litigants to find a common meeting ground. In this manner, the justice of the peace avoids a forced intervention, and the parties are obliged to find a good-faith arrangement.

Solutions arrived at can sometimes have homespun features that depart significantly from the codes, but that often are more efficient. Such was the case, for example, in a conflict between two peasants over ownership of a chicken. The judge in the case decided to release the chicken, which went directly to the corral of one of the litigants. The judge decided in his favor. There are many precedents for resolutions of this type.

Greater reliance on the justice of the peace . Of all the legal forums, formal and informal, the justice of the peace is preferred by the population for resolution of their conflicts. For matters involving a conflict with neighbors, family members, or other persons over a debt or some other dispute, 51 percent of almost 1,000 persons surveyed chose the justice of the peace, with the rest preferring other forums (for instance, community leaders, the police, a lawyer or trial court judge, the lieutenant governor).

Our study results demonstrate unequivocally the importance of the nonlawyer–justice–of–the–peace system in Peru. Almost one in four of those surveyed said they had at least one case before the justice of the peace. The study suggests further that in each extended family at least one member has had direct experience with the justice of the peace. Justices of the peace handle roughly 47 percent of the cases that enter into the courts of first instance on a national level, excluding Lima. A majority of the litigants (63 percent) were satisfied with the actions taken by the justice of the peace in their cases. This high approval rate is due to the positive factors already discussed, including: accessibility; common idiom (for example, Quechua); the use of simple, clear language; the simplicity and rapidity of the procedures; the low cost; the membership of the justice of the peace in the community where he presides (thus affording the community some social control over him); and the perception of the justice of the peace as honest and just. Another plus is that the justice of the peace can provide an important link between the parties to a conflict and the judge, should the case go to the formal court system.^{break}

A Changing Role for the Justice of the Peace

Quantitative analyses indicate that modern societies, with their relatively high degree of socioeconomic development and longer life expectancies, also show a relatively lower rate of case settlement. More traditional societies, on the other hand, with their relatively low socioeconomic development—characterized by low urban population and low levels of education and income—tend to exhibit a higher rate of conflict settlement. It seems that when the parties to a conflict are connected through family, neighborhood, and community, there is a strong tendency to use conciliation to reestablish equilibrium in social relations. But when the relations between the litigants, and between the litigants and the justice of the peace, are distant and weak, the likelihood of reaching a solution is reduced. Thus, the justice–of–the–peace system tends to be effective in more "traditional" sectors but loses much of its conciliation function in more "modern" sectors.¹¹

Conclusion

What are the prospects for the justice–of–the–peace system? Will it diminish in importance, becoming irrelevant in the course of socioeconomic development? Or, on the contrary, is it an important legal alternative that is worth reevaluating, reforming, and strengthening? What are the lessons of experience that could be useful for other countries?

These questions are at the heart of a debate between two opposing juridical–political orientations. On the one side are those who hold that in complex, "modern" societies justice can be attained only through perfecting the formal juridical system, especially the procedural apparatus. Informal forms of conflict resolution are, in this view, poor processes for poor people. Thus, those who lean in this direction would replace the nonlawyer justice of the peace with the lawyer justice of the peace or, at least, law students who would act in this capacity.¹²

On the other side of the debate are those who see a need for alternatives to the formal justice system. It would seem that the justice–of–the–peace system in Peru exemplifies one form of social control that can be considered alongside other countries' experiences with such alternatives as mediation and conciliation. The debate, which has been going on for more than twenty years worldwide, continues (see Galanter 1980; Abel 1980).

In industrialized nations the debate has been fueled by frustrating experience with more formal justice systems: an avalanche of cases, high costs, stigmatization rather than rehabilitation of the defendant, the secondary role of the victim, treatment that is limited to the juridical aspects of conflicts, and so on.

In some countries (the Philippines, for example) there is another motive for seeking alternatives: the desire to elevate popular culture and to recognize popular customs and traditions in the solution of interpersonal problems (Tadier 1988).

The common theme in the debate has been the need to find a way to deprofessionalize the system for administration of justice in interpersonal conflicts and to create neighborhood and popular processes for mediation. This trend can be seen in the United States in the Neighborhood Justice Centers and Citizen Dispute Resolution Programs created in the 1970s (Felstiner and Williams 1980); the Community Justice Centres (created in 1979) and Neighborhood Mediation Centres (1987) in Australia (Faulkes 1988); the Arbitration Commissions in Norway (Stangeland 1987), for cases involving juvenile delinquency; and, in a nonindustrialized country, the Barangay Justice (1978) in the Philippines.¹³

Conditions for Development of Conciliatory Justice

The efficacy of the justice-of-the-peace system depends on the disposition of the parties to a conflict to find mutual ground and to come to an agreement. A series of factors can contribute to this.

Common values and interests . Common values and interests can prompt litigants to seek conflict resolution through conciliation, above all if both parties live within the same social group. The intimacy of a small village, tavern, or agrarian community obliges the parties to modify their behavior in response to the expectations of the community. In collective living areas nonconformist attitudes and behavior carry the risk of community sanctions and ostracism. In a successful mediation, however, each of the parties recovers his or her social group standing, the violator is reintegrated into the community, and equilibrium is restored. Interest in settlement diminishes gradually if, in the process of modernization, the sense of solidarity and mutual responsibility within families, neighborhoods, and communities is lost.¹⁴ Modern societies usually tend to employ modes of conflict resolution that are more formal, stricter in their procedures, and more anonymous.

Homogenous social level of the parties . It is easier to obtain an agreement if the parties to a conflict are at the same social level and have equivalent power (information, influence, wealth). The likelihood of arriving at a peace-soft

fully agreed solution is less when one party has superior knowledge or more influence to bring to bear in the case.

Litigation without attorneys . The chances for successful mediation increase if the parties litigate directly. In most neighborhood or popular forums, with the exception of the Peruvian justice-of-the-peace system, parties may not be represented by lawyers and must litigate directly, face to face. This is the case in the Philippines, where the practice is based on the following considerations (Tadier 1988, p. 304):

Lawyers make litigation more technical and complex.

Lawyers create a combative, confrontational environment.

Lawyers assume the responsibilities of the litigants.

This reasoning applies to other types of mediation. A saying in the United States is apt: You can settle any dispute if you keep the lawyers and accountants out of it.

Parties' acceptance of a conciliatory justice . The willingness to employ and accept mediation depends on the knowledge and sensibilities of the parties. If the experience of one of the parties is dominated by models of the formal justice system, the litigant may perceive the mediator or justice of the peace as an impotent judge, believe that it will be impossible to satisfy his own expectations, and persist in seeking litigation before the formal justice system.

Social authority of the judge . The justice of the peace must not have less education than, or have a social rank inferior to, that of the parties, because in such cases he would not be acceptable as a mediator.

Conflicts appropriate for conciliation . There are cases that, by their nature, cannot be resolved through mediation or conciliation. Mediation is appropriate for controversies, minor offenses, and misdemeanors. Mediation is not appropriate for felonies or in any case that requires a sanctioning of the offender; such cases must be brought before the courts of the formal justice system.

Prospects for the Justice of the Peace

Socioeconomic development does not mean the justice-of-the-peace system will inevitably disappear or be diminished. The system continues to provide an efficient alternative for the following types of litigation:

Interpersonal conflicts, if the parties belong to the same social group and have a common interest in the reestablishment of social relations.

Civil conflicts in general and criminal conflicts if the offense is minor.

Cases that do not require complicated examination of evidence.

Direct litigation without lawyers.

Experience in Australia, Norway, the Philippines, and the United States has demonstrated that modern societies need alternative forums for mediation.¹⁵ In other countries similar projects are being developed. In the Asia-Pacific region the Asia-Pacific Organization for Mediation was created in 1985 (with headquarters in Manila), with the objective of promoting mediation as an instrument of conflict resolution worldwide, from Bangladesh to the United States.

The high level of satisfaction of parties, not only in Peru but also in other countries (for the North American experience, see Felstiner and Williams 1990, p. 197), points to the important peacemaking function of mediation. This is essential in evolving societies, which suffer high social tension and increasing violence. In such instances, the justice of the peace can help recover and maintain social peace, at least at the communal level. Another advantage is that in pluralistic societies, with disparate levels of development, conciliation forums permit each group to litigate within its own system of values. The mediation forums can thus reinforce cultural values. This function is of utmost importance in a society whose system of values is in crisis. Finally, the justice of the peace relieves the formal justice system by handling a large proportion of cases—in Peru the justice of the peace handles one-half of the country's legal processes.

But the system of the nonlawyer justice of the peace has its detractors. Some European authors point out that it may not be desirable to strengthen neighborhood social control. To involve neighbors (justices of the peace) in matters that have nothing to do with the usual role of the neighbor—for example, mediating such interpersonal conflicts as problems between a couple—invites a high level of repression, they say.¹⁶ Nonetheless, conciliation systems of justice are dependent on the free and active participation of the parties in conflict. Consequently, one should not overestimate the danger of creating communal courts and forums that manipulate or marginalize citizens who are unaware of community rules. The conciliation justice is only a complement to the formal justice system: if the parties do not agree to go to mediation, or do not reach agreement in mediation, the conflict may pass to the more formal justice system. Both options should be available.

Historically, informal and formal methods of conflict resolution have coexisted. It is not a given that in modernizing, societies must pass through a "perfecting process" wherein a formal legal system supersedes continue

extralegal forums for conflict resolution. There will always be a dialectic between modern forms of justice in tribal societies and forms of tribal justice in modern societies (see Abel 1974).

Notes

1. Among the problems mentioned in the studies, those with cultural aspects are not considered. Judicial logic and procedures ignore the specifics of social conflict, converting disputes into exclusively "judicial cases." This approach reduces the complexity of litigation, permitting its juridical comparison with similar cases, the application of dogma, and a decision based on juridical science. But it distances parties to the conflict from the process, for the following reasons:

The process is reductive, treating only those aspects of the conflict that have juridical relevance.

Communication between the judge and parties is formal and distorted, with the judge dictating the rules; the parties may not participate in the process or express their feelings.

A decision is made unilaterally by the judge, with a judgment or sentence meted out that can be executed and enforced against the will of the parties.

2. In answer to a question on "confidence in the laws," 36.6 percent of respondents said they had "much" confidence, 46.2 percent had "little" confidence, and 17.5 percent had "no" confidence.

3. An exception is Article 149 of the new Constitution, which for the first time recognizes the existence of a customary right in native and peasant communities and its application in jurisdictional forums in such communities and in the justice-of-the-peace system.

4. When questioned about their "confidence in professional judges," 29.8 percent of respondents said they had "much" confidence, 44.4 percent had "little" confidence, and 25.8 percent had "no" confidence.

5. The last reform was initiated under the administration of President Fujimori, who promulgated the new Organic Law of the Judicial Branch of Peru. In violation of the principle of constitutional division of powers, one-half of the Supreme Court justices were dismissed, as were two-thirds of the country's 1,250 judges. It can be conceded to the Fujimori government that the judicial branch can be reformed only with trained and honest judges. But it is doubtful that these ends can be attained with methods that violate law and order.

6. The proposals of the district municipal councils, minor municipal councils, and peasant and native communities would be taken into consideration in the making of appointments.

7. The constitutional article that establishes popular election has not yet been regulated, thus it is not in force. Many judges and lawyers fear that in establishing elections, the office will become politicized. But this argument is not persuasive. In fact, the experience of the Philippine communal justice system (the "Barangay justice")

argues to the contrary. In the elections for the Barangay captain, who presides over this communal forum, political parties cannot carry out propaganda efforts in favor of candidates. Although in the Philippines many of the candidates for the communal forums are members of political parties, generally the electorate does not know it. Likewise, the law on election of the justice of the peace in Peru also prohibits political propaganda.

8. "Popular principles of law" refers to the uses, customs, principles, beliefs, and practices—collectively, the norms—that regulate social life in rural and urban areas. As an example, customary right is understood to prevail in the rural, backwoods areas, to be based on traditional customs of the Andean world, and to differ from the customs of the dominant society. Nonetheless, the existence and observance of systems of customary rights in Peru is not uniform.

9. The bases for authority in the justice-of-the-peace system differ radically from those of the judicial branch: the customs and prevailing values of ethnic and cultural groups and the precedents set in common law constitute primary sources of authority that are more important than governmental law. A judge, to give impetus to conciliation, can threaten application of the law, in which parties have no confidence.

10. See Article 145, Constitution of 1993.

11. In the largest cities the role of the nonlawyer justice of the peace is minimal; and it can even be completely nullified if within the jurisdiction there is an appointed lawyer justice of the peace who by legal injunction can prevent him from handling those cases that are properly his jurisdiction.

12. In line with this thinking, the new Organic Law of the Judicial Branch of Peru provides for the designation of justices of the peace, with a preference for licensed lawyers, law school graduates, and law students (Art. 68, Judicial Organic Law).

13. *Katarungang pambarangay* : a communal court that is preliminary and mandatory in civil litigation, has limited jurisdiction, and is used for noncriminal cases. In this forum a mediator selected by the village or a commission tries to resolve the matter through conciliation.

14. This is seen not only among Peruvian peasants and villagers but also in other cultures, for example, in African villages. In modern societies parties turn to formal legal procedures when there is a threat of a rupture in social relations. Indeed, putting a case before the formal justice system often signals the rupture of relations. The *maintenance* of social relations, on the other hand, is predicated on the existence of informal procedures and the possibility of resolving conflicts in an informal manner.

15. Nonetheless, there is little agreement in Europe on the feasibility of using these models in European industrialized countries. As to the local court systems in the United States, it is said that their success can be explained by the homogeneity and norms that prevail in North American suburbs and that exert a rigid social control over the behavior of citizens. European observers argue that such a system is unlikely to work in industrialized, heterogenous societies where extreme privacy prevails (in Germany, for example), because in these societies the sense of community has broken down.

16. Without a doubt, it is a great achievement of democratic societies to have restricted the power of the state through continue

the rule of law, the transparency of judicial decisions, and the suppression of arbitrariness. It must be admitted that in strengthening popular forums there is a danger that the protective powers of the law will be weakened and that the possibility of repression will be increased.

References

- Abel, Richard L. 1974. "A Comparative Theory of Dispute Institutions in Society." *Law and Society Review* 8:217-347.
- . 1980. "Delegalizing: A Critical Review of Its Ideology, Manifestations and Social Consequences." In Erhard Blankenburg and others, eds., *Rechtsformen und Alternativen zum Recht: Jahrbuch für Rechtssoziologie und Rechtstheorie* . Vol. 6. Oplanden/RFA.
- Brandt, Hans-Jürgen. 1987. *Popular Justice: Natives, Peasants* . 2d ed. Lima: Friedrich Naumann Foundation/Center for Judicial Studies of the Supreme Court of the Republic.
- . 1990. *In the Name of Communal Peace: An Analysis of the Justice of the Peace in Peru* . Lima: Friedrich Naumann Foundation/Center for Judicial Studies of the Supreme Court of the Republic.
- Chrinos Segura, Luis A. 1990. "Prologue." In Hans-Jürgen Brandt, *In the Name of Communal Peace: An Analysis of the Justice of the Peace in Peru* . Lima: Friedrich Naumann Foundation/Center for Judicial Studies of the Supreme Court of the Republic.
- Faulkes, Wendy. 1988. "Mediation in Australia: State of the Art." In Asia-Pacific Organization for Mediation (APOM), ed., *Transcultural Mediation in the Asia-Pacific* . Manila.
- Felstiner, William L. S., and Lynne A. Williams. 1980. "Mediation As an Alternative to Criminal Prosecution: Ideology and Limitations." In Erhard Blankenburg and others, eds., *Rechtsformen und Alternativen zum Recht: Jahrbuch für Rechtssoziologie und Rechtstheorie* . Vol. 6. Oplanden/RFA.
- Galanter, Marc. 1980. "Legality and Its Discontents: A Preliminary Assessment of Current Theories of Legalization and Delegalization." In Erhard Blankenburg and others, eds., *Rechtsformen und Alternativen zum Recht: Jahrbuch für Rechtssoziologie und Rechtstheorie* . Vol. 6. Oplanden/RFA.
- Stangeland, Per. 1987. "Wege autonomer Konfliktregelung: Strafrecht und Nahgemeinde." *Kriminologisches Journal* 19:285.
- Tadier, Fred. 1988. "Institutionalizing Dispute Resolution: The Philippine Experience." In Asia-Pacific Organization for Mediation (APOM), ed. *Transcultural Mediation in the Asia-Pacific* . Manila.

PART VI— THE LEGAL PROFESSION, JUDICIAL TRAINING, AND LEGAL EDUCATION

14—

The Role of Bar Associations in Judicial Reform

Pedro J. Mantellini González

The strength and resilience of a democracy can be assessed by examining the health of its system for administration of justice. For when administration of justice is weak or discredited, the legal insecurity that ensues can threaten not only the execution of justice but the very existence of states with democratic governments, such as those that prevail today in Latin America and the Caribbean.

Key to the administration of justice is a strong, effective judiciary. Bar associations, as representative groupings of professional attorneys, have the obligation to fight for an honest, competent, efficient, and autonomous judiciary, with sufficient resources and influence to confront and offset, through appropriate countervailing activities, any abuses committed by the other two powers of state, the executive and legislative branches.

Evaluation of the Legal Profession: From Litigation to Consultation to Prevention

The traditional image of an attorney is that of the barrister, trained in university law schools to litigate. This traditional view has been altered by changes, not just in judicial proceedings, but throughout the entire legal sphere. A counterpart to the barrister working in the court environment has emerged: the attorney who feels more at home negotiating, participating to a greater or lesser degree in negotiations between parties to acquire a better sense of the points of view of both his client and the opposing party. We are witnessing the evolution of a new breed of attorney who tries to dissuade parties from going to court; who encourages clients to desist from the obvious—bringing suit—and to search for approaches that transcend the conflict at hand, including national and international arbitration.

We are moving away from using the courtroom "battleground" to solve our disputes and toward employing techniques in which contentiousness is less in evidence—consultation, negotiation, arbitration—or in which emphasis is on the *prevention* of conflict. Thus, the role of the attorney today is not so much to embody the interests of one party in a dispute as to counsel clients in ways that will sidestep potential conflicts, for example, by avoiding faulty or unintelligible contracts.

Lawyers' Associations

Although lawyers' activities tend to be solitary pursuits, lawyers have chosen to band together in groups to create an identity for themselves, to protect the exercise of their profession, and to raise the technical expertise and moral level of practitioners. Such associations, though originally intended expressly to benefit lawyers, have yielded more widespread benefits. In raising the moral caliber of individual members, lawyers' associations have ensured a higher level of appreciation and respect for the profession as a whole and a higher quality of service for the society in which lawyers operate.

Membership: Voluntary or Compulsory?

For many years there have been two schools of thought on lawyers' membership in bar associations. One school supports voluntary affiliation, while the other calls for legally compulsory membership. In the two international bodies that comprise most of the bar associations in Ibero–America (that is, Latin America, Spain, and Portugal)—the Inter–American Federation of Lawyers, which dates back to 1940, and the Ibero–Americancontinue

Translated from Spanish.

Union of Associations and Groups of Attorneys, established in 1977—the trend is toward compulsory membership: attorneys must register to practice and registration brings with it obligatory membership in an officially established bar association. The two umbrella organizations maintain that there are clear advantages associated with compulsory membership. One is the influence that comes with sheer numbers when all the attorneys in a country belong to the bar. Both these bodies have spent years passing resolutions urging countries to produce laws officially recognizing the existence of bar associations and making membership in them a prerequisite for practicing law. Some countries even make membership in a bar association a prerequisite for performing legal, and even judicial, functions in a public post.

Dangers of Politicization

A danger with the potentially influential bar associations is that they can become politicized. Experience has shown, for example, that if certain obligations or conditions are established as prerequisites for the right to vote, especially in elections of bar association officers, political or economic power groups can dominate the outcome of the elections. Venezuela, for example, required for many years that lawyers be up to date with their payments of association dues in order to vote. So political parties took it upon themselves to bring lawyers who supported their party "up to date" with their payments. They thus managed to engineer key posts for people who hadn't the slightest interest in the association and its problems, but were suitably biased in favor of the political interest groups that had brought them to power within it. This situation prompted a group of lawyers to found a group of attorneys known as the Civil Association for a Return to the Bar Association (Asociación civil para una retorno al Colegio de abogados, or ARCA), whose objective is to be able to field attorney candidates, politically independent and paid-up with their bar association dues, who on election day can run as nonparty candidates. Financed by contributions from member attorneys and their law firms, ARCA was the dominant force in the past three elections held in the bar association of the Federal District of Caracas. Although the group failed to win all the posts up for election, it did manage to win a majority both in the bar's board of directors and in its disciplinary tribunal.

Although this movement has not had much success in bar associations in other parts of the country, where key jobs continue to reflect the main parties' political interests, there has been a nationwide reaction in favor of making bar associations less dependent on the government (or on the executive branch) and its political line. That is why there is some hope that there will emerge within the profession a reform group that will make clear and enforce the distinction between an attorney and his political views; and that the professional will acquire more say over how electors participate in appointing and supervising senior positions in bar associations.

Code of Ethics and Discipline in Bar Associations

For many years there has been debate about who should discipline attorneys and sanction failures to live up to standards of ethical conduct. In Venezuela the Law of Attorneys has long held that the disciplinary tribunals in each bar association are responsible for reviewing the professional conduct of members and for sanctioning ethical misdemeanors. Venezuela's current Code of Professional Ethics for Venezuelan Attorneys goes back to the code of ethics adopted as a model by the Inter-American Federation of Lawyers at its second Biannual Conference in Dallas, Texas, in 1956. That code was later amended and adapted to Venezuelan circumstances.

The Code of Professional Ethics calls for a disciplinary tribunal in each bar association, composed of five people elected by association members. Also elected is an attorney who is to function alongside the tribunal and enforce disciplinary action against colleagues violating the Code. The results have been mixed. Because the general public is barely aware that these tribunals exist, few ethics cases are brought, even though any injured person or any lawyer, injured or not, can bring a case for action by the disciplinary tribunal. The disciplinary institution has come up against both the unwillingness of attorneys who know about infractions of the code to initiate disciplinary action against their colleagues and the reluctance of the tribunals, which are tainted by political partisanship, to take effective action. Thus, many complaints brought before the disciplinary tribunals fail to

yield disciplinary action, either because they are inadequately substantiated or because they do not reach completion.

The Federal District (Caracas) Bar Association has had greater success with its disciplinary tribunal, the majority of whose members do not cater to political-party cliques; rather, they are dedicated to the professional interests of the association, as is the senior attorney attached to this tribunal. The tribunal is currently handling an increasing number of cases brought against colleagues who have violated disciplinary norms.

The sanctions envisaged in the Law of Attorneys for infractions against its provisions and those in the Code of continue

Professional Ethics for Venezuelan Attorneys range from simple, private reprimand to temporary suspension of the right to practice. If an attorney is sentenced to prison, suspension of the right to practice is immediate upon sentencing and lasts for the duration of the prison term. Because life sentences are banned under Venezuela's Constitution, no one can be permanently expelled from the profession.

The rosy picture we have painted of the Federal District Bar Association is not typical of other, provincial associations. There are some in which the movement toward independent, nonpolitical self-policing has only recently gotten under way. We trust that as the senior officers in these bar associations free themselves of their political-party ties, and as the public becomes more familiar with the existence and powers of the disciplinary tribunals, the number of cases of professionally unethical behavior that are heard, resolved, and punished by these tribunals will increase.

It is important to note the education function the bar associations fulfill in relation to ethical professional conduct. Lawyers who violate the professional code of conduct do so for the most part out of ignorance of the moral restrictions binding on the profession. In the Federal District Bar Association it is customary to hand those being admitted and sworn into the bar a copy of the Code of Professional Ethics. For many new attorneys it is their first contact with the Code and the first time they have been made aware of the existence of norms regulating the professional conduct of lawyers. It is essential to correct this by informing law students, especially those about to graduate as attorneys, of the existence of these norms and codes and the moral values they enshrine. Familiarity with ethical norms and codes and their moral implications is precisely what will bring about true professional awareness of the role of an attorney and the principles that should govern the profession. There is little doubt that the mass education of law students, with its failure to address issues of professional ethics, has had a destructive effect and must be changed.

Bar Associations As Regulators

Bar associations have a broad role to play, not only in monitoring professional ethics, but in overseeing professional education and continuing education and the maintenance of standards. The XI Congress of the Ibero-American Union of Associations and Groups of Attorneys, held in Punta del Este, Montevideo, April 21-23, 1994, analyzed, discussed, and passed resolutions on how to regulate the legal profession, from entrance into universities to pursue a theoretical and practical legal education, to controls over entry into the profession, to the dissemination of codes of professional ethics and their application, to constant updating of the knowledge and practical know-how attorneys need to guarantee clients appropriate service.

I have been commissioned to prepare a report and recommendations on laws and regulations governing the legal profession, with attention also to university entrance requirements and curriculum. The law education curriculum is expected to lay the foundations needed to ensure that licensed attorneys from all over the Ibero-American region have the credentials and skills that will permit them, if they also comply with local requirements, to practice law in any country in the region (naturally in conjunction with an attorney from the country concerned).

My task will involve analyzing the standards for entry into the profession, which, according to the line taken at the above-mentioned congress, should not be automatic upon mere presentation of a university degree. The profession should have the authority to admit or refuse a candidate's entry to the bar on the basis of formal requirements.

The study is also to include requirements to ensure that law professionals keep their professional qualifications up to date. Continuing practice will be made contingent on continuing education, including an ongoing consideration of professional ethics. Moreover, continuing technical education should not overlook essential skills, including a command of what Argentinean professor Augusto Mario Morelli calls the three languages indispensable to a good attorney: Spanish, English, and computer skills.

I plan to pursue these objectives in two stages. The first year will see the collection and analysis of information to form an idea of the status of the legal profession and legal education in each of the member countries of the Ibero-American Union. In the second year I will prepare this material for presentation at the XII Congress of the Ibero-American Union of Associations and Groups of Attorneys, to be held in Madrid in 1966. My hope is that, with the help of colleagues in all the Ibero-American countries, and especially of senior officers in the bar associations, I will be able to make precise recommendations about how we can achieve the objective we have set ourselves, namely, harmonization of the rules and regulations governing the legal profession. The European model is clear: the European Community and the attorneys in it have made enormous strides toward standardizing and regulating professional activities, including their approval of a Common Professional Ethics Code. The challenge before us is enormous, but with the help of attorneys who believe in our profession, the results will be worthwhile.
break

Bar Associations As Providers of Social Services

Many attorneys, for lack of proper training in certain professional and ethical issues, think that the legal profession is just a way to make money, that their main concern with regard to clients is to collect fees, and that their only obligation toward society is to acquire professional prestige. This weakness in training, along with a mistaken idea of the role lawyers should play in society, has led many attorneys to transgress ethical norms in acts directly related to their practice or in economic activities they have become involved in through their legal profession. Moreover, an ignorance of moral principles has fostered an egocentric attitude that ignores the professional obligation, under certain circumstances, to provide professional services either free of charge or with fees pared down in line with clients' means.

Pro bono service, provided by attorneys through organizations run by bar associations—a well-understood practice in Anglo-Saxon countries, especially in the United States—has not caught on in Latin American countries. But in Caracas there is a scheme under way in the Federal District Bar Association that has managed to achieve two objectives: providing legal advice for those who otherwise could not afford it; and hooking up young lawyers with clients who cannot afford the higher fees of more experienced and prestigious lawyers. In addition, the scheme helps create funds for this social service.

It works like this. For more than twelve years now, the Federal District Bar Association has had a legal advice service known as the "Dr. Antonio Reyes Andrade Service," in honor of Dr. Andrade, a great defender of the profession, a university professor of professional ethics, and father of one of the participants in this conference, Dr. Pedro Miguel Reyes Sánchez. The legal basis and regulations governing the service are found in the Association's internal rules and regulations, the Law of Attorneys, and the Venezuelan Constitution. The Service's goal is to ennoble the profession of attorney; improve doctrine, legislation, and jurisprudence; and above all, ensure that attorney's professional services reach those without the means to pay for them, thereby granting the legally disadvantaged access to justice. The Service's activities allow young lawyers to engage in ethical-legal social practice and instill in them their responsibility to act as guides in the community they serve during their

internship in the Service. These services are generally provided by recently graduated attorneys who see their service as an opportunity to apply the theoretical knowledge they have acquired, under the supervision of a coordinator and with the help of more experienced colleagues. There is a possibility that the Service will be extended to offer internships to students in their final years of law school. This idea is a precursor to a possible later development, which would make such an internship a requirement for obtaining a law degree.

Participants in the Service must devote at least two hours a week in a prearranged place. At present, the legal services are provided through the Federal District Bar Association itself, but there are plans to extend the program to the offices of local authorities in each parish or municipality of the Federal District. The attendance and quality of service of the attorneys providing the social services are constantly supervised by the Service's coordinator. The professional fees charged are the "minimum fees" established by the Federation of Bar Associations of Venezuela, plus expenses incurred on behalf of the person requesting assistance. When there is no chance that the person requesting legal assistance through the Service will be able to pay his fees, they are defrayed by the Social Defense Fund created by the Federal District Bar Association expressly to assist clients with little or no money.

Half the minimum fees collected is for the legal adviser and the other half goes to replenish the Social Defense Fund; the bar association, as such, does not receive a penny from social services revenue. Everything is channeled back to the users of the Service, in the form of services. Payment for drafting documents is done through banks, in accordance with the provisions of the National Regulations Concerning Minimum Fees. Payment for other services is agreed upon by the legal adviser and the client, with the approval of the Service's coordinator, and is made in two installments: 20 percent of the estimated fees and costs is paid up front; the remaining 80 percent is paid according to the particular agreement reached with the legal adviser, with the approval of the service coordinator. The coordinator is appointed by the governing board of the Federal District Bar Association, based on a comparison of the credentials of various applicants; the post is filled for two years, with the possibility of reelection.

As can be seen, the Service's goals go beyond affording the economically disadvantaged access to justice. It also aims to increase awareness of the active role of attorneys in community affairs and to heighten their profile as servants to the community, not just in professional matters, but also as model citizens who are both law-abiding and concerned that justice be served.

Conclusion

The following conclusions can be drawn from this paper:

Bar associations are indispensable institutions for improving the services that attorneys provide.^{break}

The main trend in Ibero-America is toward obligatory membership in bar associations and recognition of these bar associations as the authentic representatives of the legal profession.

The laws regulating bar associations should in no way enable political parties and groups with special political interests to exercise control over the selection of officers, to the detriment of the interests of the community the attorneys are supposed to serve.

Bar associations should improve their contact with universities in order to inform them of the needs constantly arising in the practice of law. Currently such needs tend to be better communicated to the professional associations than to the universities in which the attorneys studied.

University law curricula must be made to include courses on professional ethics, not only by instituting a separate chair for this discipline but also by having all lecturers insist that professional ethics are fundamental if attorneys

are to provide first-class service capable of contributing to a better and more just society.

Bar associations should be able to control entry into the legal profession by university graduates, so as to ensure that the profession is practiced by qualified professionals. Laws regulating entrance examinations, however, should contain safeguards to prevent their being used to create an elite and to exclude persons well suited to practice.

There must be recourse to appeal within the profession, with all due judicial and administrative remedies, to review the results of entrance examinations or to review the credentials the bar associations establish as prerequisites for entrance of newly graduated law students.

Attorneys must be obliged to keep up to date professionally, to avoid a situation in which attorneys' qualifications lag behind while all around them society is changing and posing new challenges every day.

Bar associations should provide professional refresher training facilities to help attorneys keep up to date. To that end, attention should be paid to bar members' proposals of where curricula should be altered to reflect societal changes or new norms or legislation.

A near-term objective should be to achieve throughout Latin America a code of professional ethics for attorneys. Standards should be backed by provisions allowing the bar associations to impose sanctions, with the right of appeal. The professions' self-policing must have administrative recourse within the formal court system.

Bar associations should make it the norm to provide social services to economically disadvantaged classes in Latin American society, in recognition of the widespread poverty in the region. If we want social peace in our region we must grant those who are genuinely poor access to justice through regular channels. Otherwise, they will look for ways to take justice into their own hands.

15— Training Programs for Judges

Rogelio Pérez Perdomo

This chapter summarizes current knowledge about the training of judges and other court officials and the part training can play in judicial reform.

A couple of general points are in order. First, although the word "training" (*adiestramiento* in Spanish) brings to mind the creation or maintenance of skills, I will use the term in the broader sense of education to instill knowledge and develop habits of mind (*formación*). The second point I want to stress is my background. I am an academic researcher in the sociology of law, a field sometimes known as "law and society," which deals with legal systems in the context of social systems. So my remarks are based on my research, particularly comparative research, in that discipline and on the experience I have acquired as an occasional professor or instructor in training courses for judges.

Training for Judges: Different Philosophies

The tailoring of a system of training for judges and other court officials has much to do with the broader framework of how a particular legal system operates. As judicial systems tend to change slowly, judicial education is necessarily conservative. Judicial training cannot be the lever to transform a judicial system—but it can be an important instrument for improving it.

The design of training programs for judges and other court officials must take into account the recruitment system, the prior education of those selected, the activities they will have to perform, their career outlook, changes taking place in the judicial system, and society's expectations with regard to judges and the performance of their duties. Questions like What kind of training should a judge receive at the start of his career? or What institutional arrangements have to be made? will elicit different answers, depending on each case and context.

The training of judges is intimately linked to the way judges are chosen. There are two basic types of recruitment systems, with numerous variations. In one, highly experienced lawyers are selected, with a view to turning them into judges; in the other, young graduates are recruited to begin a career in the judiciary. The first system corresponds to the Anglo-Saxon tradition, and the second to the Roman common law tradition, better known by its simpler English name, civil law. Each country attempts a mix of the two, to avoid the perverse effects of applying either one in its pure form. In Spain, for instance, judges enter at the lowest level, when they are still quite young, after passing an exam called the *concurso de oposición*, which resembles the ordinary civil service entrance examination. To avoid the creation of a corps of judges that is too uniform or too conservative, a number of positions are left to be filled by more mature lawyers, who enter at different levels. And, in the appointment of judges to the Constitutional Court and the designation of members of the General Council of the Judiciary (Consejo general del poder judicial), it is expected that some appointees will be drawn from academic life or the civil service.

Across countries the same practice of seeking diversity in the selection of judges is found. In France's *Ecole nationale de la magistrature*, some positions are left to be filled by persons from nonlegal professions. In Venezuela, the justice of the peace, a new institution in that country, is elected by the people and does not have to have a law degree. All these reforms are attempts to let some fresh air into administration of justice, which can run the risk of seeming too cut off from daily life and from the values most of the population shares.

Various kinds of social pressure have also brought about important changes in the courts, with major implications for judicial functions and for the training needed

Translated from Spanish.

to fulfill them. For instance, a higher litigation rate, whether because of an increase in the number of lawsuits or the emergence of new types of cases, may bring pressure to bear on a judicial system, forcing judges to assume new roles or courts to be organized differently, in order to operate more efficiently. Thus, in a relatively unburdened judicial system there is no need for a big administrative apparatus; judges can perform necessary administrative functions. But in a system with a heavier workload, judges might have to concentrate only on judging, making it necessary for much of the administrative work, including supervision of the pace at which trials proceed, to pass into the hands of specialized administrative personnel. I observed the modernization of both the *greffe* in France and the judicial secretariats in Colombia, and I found that the reforms implied both major changes in the functions performed by judges and the emergence of new jobs within the judiciary.

So judicial systems and workloads and the societies in which they operate vary, and the design of a training program for judges requires a careful analysis of the numerous variables involved. For instance, if asked what kind of training would suit the judges in my country, Venezuela, I would first ask whether the question refers to justices of the peace, who have mediation functions in civil cases and powers to indict (*funciones instructoras*) in criminal cases, are elected by the people, and probably lack previous legal training; or to first-instance judges, who have mainly adjudicative functions and should be chosen by exam from among law school graduates. If the latter, I would ask further what kind of people are being attracted to the profession and whether there is serious reform under way of what in Spain is known as the judicial office (*oficina judicial*). These issues determine the kind of training needed for people making a career in the judiciary insofar as they affect the functions judges will have to perform and the relationship and interplay judges will have with other officials in the judicial system.

Does this mean that one can only discuss judicial training on a case-by-case basis? Or are there general criteria that can serve as guidelines in designing programs and institutions for the training of judges? The answer is, yes, such criteria do exist.

Program Design

Nowadays training programs for judges are a necessity. Traditionally, judges did not receive training for two reasons. First, their task was considered to be mechanical, a matter of applying norms. And second, the workload was so light and lawsuits of so little social importance that judges could be expected to learn on the job, seeking the advice of more seasoned judges or of court officials who would show them the ropes. This system no longer works: judges' functions today are so complex and their workload so enormous that they cannot be expected to learn everything as they go along, although on-the-job training continues to be important and perhaps needs to be formalized. In any event, the training of judges is now considered indispensable for teaching specific skills and, in a broader sense, for instilling an ethos, making judges conscious of the responsibility vested in their position and of society's expectations of them.

Another point to bear in mind in designing training is that programs are costly, both for the organization running them and for society. Designing programs, building or renting premises and attending to other logistical aspects, and paying instructors require a large outlay of resources. Other costs include the time devoted by participants, whether judges on paid leave or others not yet practicing as judges, the social costs of leisure time or other activities forgone, and the like. With their high cost, the training programs must be looked on as an investment, not an expenditure, and as with any investment, their effectiveness and the "return" must be evaluated.

Training programs thus present a dual constraint: they are costly but necessary. But the solution to high costs is not *cheap* programs. The most likely outcome of a cheap program—one that has, say, reduced costs by locating classes in unsuitable or ill-equipped premises, skimping on teaching materials, slighting design elements, or underpaying instructors—is that it fails to provide the required training, and the little invested is wasted. Moreover, a cheap program does not reduce the more intangible costs, such as the time spent by participants. And finally, a cheap program carries another steep, if not readily discernible, cost. If a program is poorly designed and defective, if the teachers' educational qualifications are substandard or their motivation and performance inadequate, the message sent is that a judge's job is not important and can be done with minimal effort. In education extraordinary attention must be paid to the silent curriculum: the nonverbal transmission of values and attitudes. Often enough what the head of an organization or an instructor says may be forgotten, but the message imparted by his behavior and attitude sticks. If the messages are contradictory—for instance, on the one hand, it is held that a judge's function is highly important, but, on the other, those who practice the profession are treated shoddily—what is being transmitted is cynicism.

Recognizing the importance of transmitting the message that judges play a key role in society, judges' training programs must be carefully designed; they must be run by

a first-class team of dedicated instructors, with good teaching materials and in well-suited facilities; and they must treat participants well and professionally, with respect for their investment of time and effort. The answer to the necessary-but-costly constraint lies not in cheap programs but in programs that cater to key needs, without wasting resources. How can this be achieved?

Identifying Specific Needs

I suggest two ideas for ensuring that programs address important needs. The first is that training programs should not be remedial, that is, designed to fill gaps in participants' education. If such gaps exist it is because the selection system is not working properly, and the cheapest and most effective remedy is to improve the selection

system.

This raises the question of curriculum. Generally, if the curriculum is designed for law school graduates, there is no need to discuss law, except in special cases—for instance, in the case of new, especially complex legislation. If it cannot be assumed that judges will interpret the new law correctly, it might be useful to schedule a briefing by those who designed the bills or other qualified experts who can point out problematic issues. By and large, though, too elementary a program, or a confusing, poorly designed program with mediocre teachers, will send a negative message.

The second point in program design is that programs must be based on studies of real needs. Typically, programs are designed as follows: four or five, usually very experienced, people meet. One says that judges should be familiar with procedural law and that they are not. Someone else tells of a verdict issued with a certain piece of nonsense in it, which proves that judges indeed lack familiarity with procedural law. Another person perceives the problem as largely ethical—judges have lost all sense of the dignity of their office and corruption is becoming alarmingly widespread. And so a curriculum gets pieced together based on these rather vague ideas of need. The conversation turns to who should teach in the program: one person's name is offered because he has been a judge for many years and has taught procedural law at university, while another person is mentioned because he is known for his honesty and has written excellent essays on corruption. Thus, "teachers" are contracted, asked to prepare courses, and expected to begin teaching in a matter of months or even weeks. Devising a curriculum and planning educational experience in this way is totally inadequate. The most likely outcome is a program on procedural law very similar to that taught in law schools and an ethics course full of hot air.

How, then, to identify real needs? The first thing I envisage is a small group of highly qualified people specifically mandated to study what is happening in the judiciary, to detect weaknesses and needs, and even to anticipate future needs. The group would work with judges belonging to different groups and generations, noting their impressions. It would talk to lawyers and to the public. (This approach is not new. In Spain, for example, studies like these are carried out every year by the well-known legal authority Toharia, at the request of the General Council of the Judiciary, under the leadership of Luis Alberto Belloch, current minister of justice.)

For curriculum, the study group would try to pinpoint specific gaps in knowledge of procedural law and key ethical issues that must be confronted. The study group presents its findings to those responsible for program design, who draw up a curriculum tailored to revealed needs. The study group's findings also inform the selection of instructors and the development of teaching materials and program activities.

This kind of study and planning is not a onetime task. It must be an ongoing effort because needs change over time. Moreover, in contemporary society it is unthinkable that a segment of the state as important as the judiciary should not be the subject of studies conducted by independent, properly qualified experts. That such studies are too expensive is just a pretext: I suspect they cost less than a one-judge court. And the cost is insignificant compared with the benefits of the program.

Experts in human resources management recognize three training mechanisms: direct experience, observation of others, and formal instruction. The first is the most important: the best training for judges is being a judge, doing the job. The second way is to observe other judges at work. The third form of training is formal instruction. A program should mix these forms. It runs counter to everything we know about human resources training to imagine that everything can be accomplished through formal courses alone. Their value is in simulating direct experience and creating frameworks for discussion in preparation for what will be learned through experience and observation ("apprenticeship," to use an old term). Moreover, direct experience and observation can be an effective way of learning not only good practice, but practices to be avoided.

Targeting the Program Audience

The training program must be tailored to meet the needs of the target audience and will depend on how far along participants are in the judiciary career. The task at hand, for instance, might be to design an initiation program for continue

those just starting their career. Or a program might need to be designed for practicing judges. The target audience will shape curriculum and teaching methods, with initiation programs leaning toward formal course work and apprenticeship-like experiences under highly qualified "masters," while training for seasoned judges takes the shape of seminar-type forums with lively discussion centering on, for example, analysis of major new legislation or aspects of the administrative reform of the courts. Judges should be encouraged to discuss their specific environments and the social demands made on them. One question to be clarified is the relationship between such training programs and a judge's career. It should be made clear that participants' active and responsible participation has a positive impact on their career.

The Ethical Dimension

Paradoxical as it may sound, ethics has a bad reputation. Nobody goes so far as to say that ethics are unnecessary. But when it comes to deciding what we should teach, or what course of action we should take, the question of ethics strikes us as irrelevant, as something of an intruder. This may explain why some people prefer the term "training," which refers to practical skills, to the term "education," or *formación*, which carries the broader connotations of shaping and strengthening character. A curriculum should concern itself, they say, with practical, useful know-how.

Nor is it clear that ethics can be taught. A Venezuelan term sometimes applied to ethics is *paja*, meaning "straw," with the inference that it is just so much pretty but vacuous verbiage.

One version of what ethics is about seems to justify such *sotto voce* criticism—*sotto voce* because anyone voicing it risks being labeled unethical. I propose discussing it openly. In this narrow and even damaging conception, ethics is a set of obvious rules—for instance, that judges should not misuse their office or be corrupt. People speak eloquently on such subjects, the public goes along, and everyone is indignant at bad judges. All agree with the utmost enthusiasm, and nothing happens. The effect of such discourse is nil; it is all, in effect, just *paja*.

There is another, broader idea of what it means to teach ethics. In this view ethics education should be directed toward analysis of the expected role of judges (or the normative image of the position) and the difficulties judges face. Inquiry should include analysis of pathologies or deviations, with their prevalence quantified if possible, and an attempt should be made to explain why they occur.

I was for a brief time an instructor of criminal law courses sponsored by the Instituto latinoamericano de naciones unidas para la prevención del delito y tratamiento del delincuente (ILANUD). One of the texts for discussion was a sociojuridical study describing the different types of corruption in a judicial system and, especially, judges' links with politics. One participant said that the very choice of text was an affront to the dignity of magistrates, a statement that quickly sparked debate. Another text dealt with the duration of criminal proceedings and the consequences. Another was a comparative study of unconvicted prisoners, in other words, prisoners awaiting sentencing. I remember heated reactions to these texts dealing with sensitive, ethical issues: refusals to admit the facts, assertions that the statistics must be wrong, and complaints of discrimination on the grounds that a study did not include figures for a specific country. The discussions were lively and not at all easy to direct. It was surprising that the judges were not familiar with the studies academics had carried out of their activities: none of the judges had read the papers before they were sent to them. And only one of them had afterward taken the trouble to update the data used in the study to find out what had happened since in his country.

As far as I know, ILANUD did not do a follow-up study on the impact of these programs. However, I also relate a little anecdotal evidence that might suggest they had a positive effect. One story involves a judge from El Salvador who had complained about criticism of his country; I later learned he was doing a study on the duration of trials and the number of prisoners awaiting sentencing in El Salvador. In another case I encountered a former participant of the ILANUD course, a judge on the Judicial Council (*Consejo de judicatura*) in Venezuela, who had decided to study the files of all the prisoners in a prison to see what was going on there and to find out why the figures of the Ministry of Justice, which is responsible for prisons, and those of the Judicial Council did not agree. (The preliminary findings she reached were horrific and it is a pity that she never published the results of her research, which appears never to have had any impact or any kind of follow-up.) This is the kind of research that may grow out of, and in turn contribute to, workshops with judges.

Recent developments militate in favor of a greater emphasis on ethics in judicial training. In the past few years the perceived role of judges in society has changed drastically. From being marginal, usually handling insignificant routine matters, judges have become a center of attention. This has much to do with recent corruption scandals, public interest in white collar crime, and a heady mix of drug smuggling, financial fraud, and corruption in the upper echelons of the police and politics. In several countries judges have not yet adapted to these continue

changes and remain trapped in their formal, passive roles. In other countries, by contrast, judges have discovered the pleasure of making it into the headlines, leading to the emergence of media-oriented judges, or *les juges médiatiques* as they call them in France, meaning judges with close ties to the media. "Judicial protagonism" is another coinage for this phenomenon. This raises the question, What is the legitimate role of the judge! This is an issue that needs to be included in training courses for judges. It is probably something that judges ought to discuss with academics, journalists, and media experts. As society changes and presents new challenges, judicial functions also change, along with society's expectations of what judges should achieve and what demands may be put on them. Thus, ethics education for judges must evolve if it is to contribute to building up the normative image or ideal of what a judge should be.

How should the ethical dimension be introduced into an educational program? First, the teacher does not preach. Nor does he dictate. Rather, he supplies participants with serious studies and encourages debate about the normative image of the judge and the difficulties of living up to that image. He helps create an environment in which questions about the role of the judge—What should a judge be like? What should be the judge's role in society?—can be analyzed frankly from an ethical standpoint. If conducted honestly and in depth, the study of ethics is not flimsy, like *paja*. It is central to any training program for judges.

Program Evaluation

How can we tell whether a training program is good, or better than another one? Human resource experts distinguish between four levels of training program evaluation. The first method gauges participants' immediate reaction. This method is used most often because it is easy to apply, but it is the least reliable because it has a high emotional content and reveals nothing about the impact of the course. The second method evaluates to what extent goals or objectives have been attained. This requires a before-and-after evaluation, to check whether the desired goals were achieved. The third level of evaluation involves checking whether what was learned is being applied. The fourth and deepest level is an assessment of impact: what has changed in the organization for which the program was intended? It appears that there has been little assessment as yet of training programs in the judicial sphere; or if there has been any significant appraisal, I am not familiar with it.

Final Remarks

I would like to summarize briefly the French mode of training judges. All judges start off in law school, where they combine the brass-tack elements of a legal education with studies of the social environment and an

apprenticeship (observation and guided activities) in the courtroom. The training does not stop there. Periodically, judges serve internships in government or in private business, or they take part in seminars at the Institut des hautes études sur la justice. Seminars at the institute are organized and led by such authorities as Blankenburg, Garapon, Guamieri, Lenoble, Ost, and Toharia, and other sociologists and specialists in the philosophy of law. The caliber of the judges is impressive, the quality of inquiry and debate excellent. All of this speaks well of the selection and training of judges in France. And these were not ivory-tower sociologists or philosopher-judges. I saw them at work as judges in the correctional court at Creteil, which I visited because of my interest in the organization and administration of courts, and was greatly impressed by their efficiency.

The element I would like to underscore here is the fluid lines of communication maintained between academics studying the judiciary, and judicial authorities and judges. *Droit et société*, the French journal of the sociology of law, has an agreement with the Ministry of Justice whereby it regularly publishes articles on the judiciary at the ministry's request; and although in France the ministry continues to be the final judicial authority, the independence of judges is not threatened thereby. *Documentation française* publishes excellent, promptly updated judicial statistics and studies of considerable interest. The Institut des hautes études is a place where judges, judicial authorities, and academics studying the judiciary meet to discuss issues of common interest. This open and even cooperative attitude is admirable and, I think, helps bring about significant reforms and good training programs for judges.

My dream, which I invite you to share, is that those of us who conduct sociological research into the administration of justice will produce work that may contribute to improving it. I yearn for a world in which judicial authorities and judges no longer mistrust us, but accept us as the collaborators we would like to be, even though the results of our investigations may displease them. In short, I dream of a world in which we all acknowledge that by working together we can build something better.

16— Legal Education in Changing Societies

Neil Gold

In this chapter I outline a planning framework that I hope will be of assistance to persons developing broad schemes for legal education in changing societies. In particular, I sketch out processes that are useful in preparing a program for public legal education, professional development, and judicial education.

I discuss the intimate relationship between judicial reform and legal education, for just as all the elements of legal system reform are interdependent, so are educational reform and development the lifeblood of judicial reform. I outline the characteristics of education and learning generally and then link these characteristics with judicial reform through ten criteria by which to measure a legal education system in a changing society. The ability to define the values of the reformed legal system and to reflect them in the educational process will ultimately be evidenced in the conduct of the operators and users of the legal system. Their particular roles, therefore, must be carefully described.

Learning is demonstrated by changed knowledge, skills, and attitudes. I investigate each of these areas briefly and suggest a process for determining the appropriate content of educational programs. In particular, I summarize how educational projects must be strategic, systematic, universal, and concerned with quality.

I propose the adaptation of systematic instructional design methods to the creation of curriculums for the education and training of lawyers, judges, officials, and members of the public. I suggest the analysis of jobs, tasks, skills, knowledge, and attitudes to clarify curriculum contents. (I also recommend analysis of complaints

about lawyers, judges, and officials to identify recurring problems in need of remediation.) Having determined what needs to be taught, I suggest ways to organize learning and teaching activities to meet these requirements.

I then turn to the important question of access to higher study and the legal professions. I argue that regulations for the admission of students to legal study should incorporate the principles of access to justice.

Finally, I offer a few brief words on the responsibility of the professions to develop the professional education agenda. Included within this mandate is the creation of a rich, living, practical legal literature to ensure access to law and to provide a basis for continued learning.

Judicial Reform and the Importance of Education

Law provides the constitutional basis for a nation. It embodies its deeply held values and reflects its social aspirations. Through law, nations establish their systems of governance. Constitutions describe and limit the powers of governments. The allocation of responsibilities among the arms of government identifies country priorities and sets out the checks and balances that regulate dealings among its constituent elements—including the executive branch, the legislature, the administration, and the courts. In many countries, constitutions also proclaim the goals of governance and the nature of the society that governments—and hence courts—are charged to promote. Changing legal systems changes the arms of government.

Judicial reform, therefore, although limited, is a significant kind of governmental reform. The matters allocated to courts for disposition indicate the rights and interests a nation deems worthy of protection. How courts manage their business is central to their achieving justice. One main reason for strengthening judiciaries is to facilitate nations' economic and political development, for courts play a major role in advancing commerce.

It is frequently said that the role of courts is to promote the just, speedy, and economic resolution of disputes on their merits. Judicial systems that are bogged down by procedural delay, that are not readily accessible to those continue

who require their services, or that take on cases that could be better resolved through other means fail to meet the central dictates of this mandate. To be reliable and trustworthy, courts must also be independent of executive, as well as private, influences. Judicial reform, therefore, should seek to alter the legal system and its operations to minimize barriers to economic and social development.

Because international trade cannot prosper where local legal conditions do not promote economic security, it is appropriate that this conference on judicial reform has as its central themes the full range of issues that affect the performance of judiciaries in their role as stabilizers of nations and facilitators of domestic and international relations: independence of the judiciary, economic costs of a judicial system, legal reform, administration of justice, alternative dispute resolution mechanisms, access to justice, the legal profession, and legal education and training.

Because all elements of a judicial system are interconnected, reform of one will influence most, if not all, other elements. Changes in court administration, for instance, require judges, lawyers, and officials to change their behavior. New systems for the delivery of legal services to enhance access to justice will affect, among others, the financing of courts, the role of individual lawyers and their professional bodies, and the use of alternative dispute resolution mechanisms. This interdependence requires not only new laws, procedures, and administrative functions but also a system of education and training to support change and provide new knowledge, skills, and attitudes to the people playing the various roles affected by reform.

The task of outlining a framework for systemwide educational and training initiatives is daunting, particularly where change is pervasive and will cut deeply into established patterns of action. The establishment of appropriate educational and training initiatives is further complicated by the fact that training and education must precede the implementation of legal, procedural, and administrative reforms if those reforms are to be carried out successfully. In other words, these initiatives will not, at the outset, have experience as a basis for planning. While the teaching of new material will be unencumbered by current conventions that may be out of keeping with statutory requirements, therefore, the absence of experience makes it difficult to ensure that new systems will work in practice. In addition, if the shifts in law, procedure, practice, and administration are great, there may be reluctance by some participants to change their attitudes and behavior to conform with them. Persons may refuse to change, clogging up the new system, or they may work to sabotage the changes.

Education can go only so far in shifting attitudes and performance. To be most effective, educational programs must respond dynamically to learner orientations and predilections. Because programs need to be able to be flexible, the educational system will seek to help its participants manage and accommodate change. A management system must also be in place, however, to oversee performance at the point of service delivery. Education by itself is insufficient to ensure adequate performance. In particular, it is important for planners to gauge both support for and resistance to judicial reform and to plan to deal with them at both the managerial and educational levels.

Education and Training: Complementary Processes

A distinction is frequently drawn between education and training. Education is often described as a process of transmitting knowledge, skills, and values that enable a person to live life in an enhanced way. Education, thus, fosters development of the mind, body, and spirit. Training is usually described as a process of preparing a person for a specific occupation. Such a division, however, tends to artificiality and makes technical distinctions that are of little merit. I will use the term "education" to connote the promotion of teaming generally, or—when used with the word training"—to connote the processes through which the acquisition of knowledge and attitudes is promoted. I will use the term "training" to connote the processes through which the acquisition of skills is promoted.

Education is the intentional, strategic intervention into the experience of another to produce change. Learning is the change that results, either from intentional interventions into the experiences of the learner, or from experiences interpreted by the learner on his or her own. Learning is described as change because it is reflected in new behavior by the learner, who can, for example, do new things, discuss new subjects or express commitment to new ideals. The role of education and training is to facilitate the acquisition of predetermined teaming.

Learning opportunities arise all the time and are not limited to classrooms and assignments in preparation for class meetings. In discussing the creation of teaming opportunities below, I will suggest ways effective supervision can promote learning on the job.

A Legal Education System in a Changing Society

The following criteria might be used to measure the appropriateness and likely success of an educational system created to help the process of judicial reform. Such an educational system:

Must reflect the values of the reformed judicial system.

Must be based on a clear conception of the kind of lawyer, judge, or official needed to work in the reformed system.

Judicial Reform in Latin America and the Caribbean

Must aim to change not only the knowledge base of its learners but also their intellectual and operational skills, attitudes, values, and beliefs.

Must be organized to achieve clearly stated strategic goals through effective, efficient, and varied means.

Must be suited in all of its elements to a specific purpose and governed by clearly described standards.

Must be aimed at all users and operators of the legal system.

Must be truly a system, with all parts connected to the whole.

Must recognize its interconnectedness to other elements of the judicial reform process.

Must build on and maintain the strengths of the existing educational system.

Must be supported by the professions and governments.

Importance of a Reformed Judicial System

The major goal of judicial reform in Latin America and the Caribbean is to promote economic development. Economic development prospers with improved governance, which virtually always leads to social development. As nations move toward a more stable economic and political environment, their judicial systems will also need to change.

Central to a stable economic and political environment is the rule of law. Under it, only lawful authorities may make new laws, every person is subject to the laws equally, and everyone is entitled to equal treatment by the operators of the legal system. Everyone, furthermore, is entitled to fair treatment and able representation. All citizens should have access to the law: they should be able to understand it, resort to it without fear of retaliation, and be properly represented according to the exigencies of the particular case.

A reliable judicial system provides both procedural fairness and substantive justice. Included among the attributes of a stabilizing legal system are an independent and competent judiciary, consistency of treatment for all, predictable results, and timely, effective judicial operations.

To incorporate these values and characteristics, an educational system must be open, accessible, fair in its treatment of learners, and designed to promote learning. Testing (wherever applicable) must be fairly conducted and relate directly to declared expectations for student achievement. There must be no bias on the part of examiners and no unearned benefits conferred on students.

In a creditable educational system, admissions must be based on clear criteria applied even-handedly to all applicants. Access to a legal education is an aspect of access to justice. Members of groups within the general population not adequately represented within the legal system, therefore, should be encouraged to apply, and admissions requirements should be written with this public interest in mind. The curriculum itself should promote ideals (such as judicial independence, access to justice, procedural fairness, substantive justice, effective representation, and ethical behavior). Additionally, the educational system must be constantly monitored for effectiveness. In short, the educational system should mirror the goals and values of the legal system itself.

Educational planning should also include mechanisms to handle the learning needs of lay people, officials, lawyers, and judges, because a stable and reliable legal system must be understood by all its users, not only by its professionals. Citizens must have adequate information on what they can reasonably expect of the system. Because legal systems teach through actual practice, the rule of law must be evident in both theory and reality.

Similarly, professionals need to be prepared to make access to justice a fact. Their education and training must be accessible, ongoing, and deliberately planned and executed. Senior members of the judiciary and legal profession should conduct themselves so that juniors can learn from their teachings and emulate their behavior.

Considerable attention must be paid to make sure that the educational system reflects the values of the reformed legal system if both the educational and judicial systems are to become integrated into the social reality.

Educating for Different Roles in a Reformed Justice System

In carrying out their duties, lawyers, judges, and officials play many parts. In different jurisdictions their roles vary according to public expectations. For example, in the British common law tradition judges interpret and apply law, but do not make it. They have a limited role in filling *lacunae* in the law and are always subject to the supreme authority of the Parliament. They have no supervening, constitutional power to nullify legally enacted laws that they find to be unsatisfactory for any reason. The role of the British judge is thus viewed conservatively.

In the United States judges not only determine the legality of procedures leading to the enactment of a law

and the authority of the legislature to make a law, they also test whether that law meets the standards set by the Constitution. This power has tended to create a more activist judiciary. In the United States, though many caution that the judiciary should not make law, few doubt that judges often do.

There is a link between the particular constitutional arrangements in a country and the extent of judicial activism deemed appropriate, but activism often also arises from culturally determined views of the judicial role and public expectations about who should be responsible for reform. In common law, especially, one finds a wide range of adaptations of the conservative or reformist approaches influenced by local values, traditions, and practices.

Judicial activism is not, however, limited to lawmaking. It is also intimately connected to the arrangement of the legal process itself. In the common law tradition, one finds a wide variation in the procedural role accorded to judges under rules of court and local tradition. The traditional common law adversarial system requires judges to serve as referees. The disputes brought before them are framed by the parties, who have sole responsibility for placing the case within an argued legal framework and adducing the facts they believe are relevant. This is called party prosecution and party presentation. The judge as referee simply makes certain that the parties conduct their case according to the prevailing rules of practice.

The specific characteristics of judicial intervention, however, are not the same in all common law jurisdictions. In some places, judges are accorded interventionist authority at various stages of the proceedings, frequently based on discretion allocated to the judge by court rule. The more interventionist the rules for judicial behavior, the more probable it is that judges will intervene to control the processes and persons who come before them. The boundaries of permissible intervention may also depend on local custom about the conduct of judges. Individual American states with substantially the same procedural codes, for instance, may implement them differently. Similarly, the relative combativeness of lawyers appearing before courts will depend on local definitions of effective representation.

Much current judicial system reform in common law countries has included express new substantive and procedural authority for judges. Through pretrial hearings, settlement conferences, and mandated mediation, judges now play a major role in facilitating settlement before trial. Judges may be given authority to compel settlement efforts and may themselves conduct these processes or refer parties to officials with the power to mediate disputes. The form of judicial intervention has thus been transformed from rigid refereeing to active intervention. Whatever their role, judges in common law systems are charged with ensuring that due process is

observed.

How a system views its judges directly affects the education and training that should be provided to them. The conception of the judicial role can never be fully articulated in constitutional statutes or court rules. It is constantly evolving and, as a result, somewhat indeterminate. Still, the conventional role is generally defined, and judicial obligations can be specified for particular contexts. As judicial systems are reformed and judicial roles shift, the new roles must be clarified and transmitted to students.

Central to the definition of the judicial role is the principle of legality and the responsibility of judges to seek justice in cases that come before them. This raises complex questions that are not readily treated here. In educating judges in the context of reform, however, it will be crucial to identify judicial responsibilities related to the observance of law and the achievement of justice. Even where judicial independence is a given, approaches to legality and justice are central. We thus return to the theme of a predictable, reliable, consistent, trustworthy, and just judicial system as fundamental to a stable social and economic environment. It is also fundamental to designing educational programs calculated to prepare officials and lawyers for their responsibilities in a reformed legal environment.

What kind of lawyers do we want? Should they be vigilant, rights-conscious, interests-oriented practitioners? Should they see the law as a source of creative action to remedy wrongs and redress harms through partisan representation? Or are they essentially technical specialists, who apply law and its procedures to the case at hand? (In some places lawyers are seen as problem solvers whose main task is to achieve their clients' objectives and meet their needs. Such lawyers are frequently described as facilitators of their clients' transactions and as agents for the resolution of disputes at minimum cost in economic, social, and psychological terms.) These are among the many issues that need to be confronted and resolved before progress can be made in structuring an appropriate system of legal education.

Similarly, are officials service providers conscious of their duty to assist the public? Or are they keepers of carefully regulated resources for the benefit of the government in power? Many different consequences flow from these antithetical visions of administration, and there are clearly other issues that also need to be addressed.

The content of public legal education depends directly on the role of law and of its functionaries. Civic education, too, must school lay people in their rights and obligations. Lay people have a role in asserting their own claims to justice, and effective public legal education can help citizens gain access to judicial administration and continue

the courts and, through them, to justice. Citizens also keep legal systems accountable. A system of public legal education not only could clarify public expectations of the judicial system but could also help people secure the benefit of the law.

Changing Knowledge, Skills, and Attitudes

Education is generally thought to increase participants' store of factual knowledge, and thereby their power. There can be little doubt that education that fails to improve learners' knowledge base is a failure. But it is the ability to use knowledge for a purpose that makes that knowledge powerful. The intellectual and problem-solving skills necessary to manipulate information and plan solutions must therefore also be taught. Such skills and the requisite knowledge are, however, not themselves sufficient for operating successfully within the legal system. Such operational skills as interviewing, negotiating, and writing are crucial. Nor is any program of preparation complete unless it inculcates attitudes essential to service, such as honesty, integrity, duty, perseverance, and an abiding commitment to public service. Professionals (officials, lawyers, and judges) must put client and public interest ahead of their own.

Professionals must first know the nature, role, and function of law and the legal system in their society. Since mere technical knowledge is not enough to accomplish this, professional education must also be liberal and general, and, in turn, opportunities to put knowledge into practice must be suited to public goals and aspirations.

The curriculum consists of legal knowledge, skills, and attitudes:

Knowledge: legal theory; substantive law; procedural law, conventions, and practices; allied disciplines (finance, business, sociology, psychology); supporting disciplines (literature and language, history, philosophy); contexts and subjects that interact with law (accounting, commerce, criminology, family life); knowledge about relevant technology and management.

Skills: intellectual skills (analysis, synthesis, evaluation); problem-solving skills (diagnosis, planning, management); operational skills (interviewing, investigation, counseling, negotiation, mediation, advocacy, writing, drafting, presenting, use of technology, management.).

Attitudes, values, and beliefs: integrity, honesty, public spiritedness; freedom, equality, justice, fairness; rights, obligations, interests.

This listing only illustrates subject matter potentially relevant to legal education and training. A detailed analysis of learning needs would be required for each learner group to identify the specific curriculum contents applicable to each.

Strategic, Systematic, Quality-Oriented, and Universal Education

"Strategic" here means directed toward the achievement of specified goals. A "systematic" approach is comprehensive, suited to context, and orderly. Systems provide for the monitoring and evaluation of their elements, providing information needed for continued improvement. "Quality-oriented" entails degree of fitness for purpose and the maintenance of clearly defined standards for both processes and products. "Universal" suggests that the educational program meets the needs of everyone in the legal system—from lay people to judges and politicians.

A quality justice system requires quality education and training to support it and promote its effectiveness. The quality movement has come to the education environment from government and originally stemmed from industry. There, quality systems were devised to promote both productivity and accountability. In the manufacturing sector, "quality" meant products that met all specifications, were produced with efficient and effective processes, and came in at or under predicted costs. While the quality movement has spread rapidly to service providers, their products and activities are less amenable to rigid specification than are applications in manufacturing, which are particularly open to technical and empirical verification. Yet the quality movement has led to greater awareness of the need to promote high-quality results in a systematic and reliable way. Education, as one of the many processes that promote quality, cannot be overlooked.

In some educational enterprises, however, resistance to quality initiatives is still apparent. Vocational and professional preparation have accommodated to quality monitoring most readily, largely as a result of their competency-oriented, job-centered approach. Such an approach is, by definition, systematic to maximize the achievement of desired learning outcomes.

Critics in tertiary education outside the professions and vocations have contended, however, that a quality, systems approach is unsuited to liberal education ideals. It is claimed that learning and teaching should not be limited to narrowly prescribed objectives or means for their attainment. Nonetheless, higher educators everywhere have conceded that they, too, must be accountable for producing graduates with at least minimum knowledge and skills suited to enhancing their lives and social well-being.

Quality assurance is thus the composite of ways and means employed to assure that a particular result is achieved. A concern for quality includes a commitment to discerning the means for the continued advancement of it. To accomplish these ends, quality assurance programs must include planning, description, support, evaluation, and control for quality. We must "take care of quality" by designing appropriate processes to obtain desired results, but also by concerning ourselves with the ethos and policies necessary to influence behavior to enhance quality. And finally, we must declare the values and objectives by which a system's ultimate success will be measured. Without goals we cannot tell whether a system has accomplished what it set out to do.

In taking care of quality, educators will show concern for students by treating them courteously and fairly. They will show concern for learning by recognizing differences in styles and interests among students and not imposing conformity on them. Planning will be deliberate and participatory, involving all stakeholders. In maintaining quality, educators will seek advice widely, carry out studies of the results of training activities, seek information from employers and others who observe graduate performance, and so on. The subject of quality assurance in legal education warrants expanded treatment and should be addressed as soon as feasible.

Systematic Instructional Design

Systematic instructional design procedures are aimed at devising learning and teaching opportunities that promote the achievement of competence by graduates. While competence has been variously defined, in general terms it is the composite of qualities and abilities necessary to do a job to a prescribed minimum set of standards. It includes all necessary knowledge, skills, and attitudes. Paramount among these is the ability to know one's limits and never to exceed them.

To some extent, systematic instructional design analysis has been carried out for common law legal practice. There is no work, to my knowledge, on systematic instructional design, either for judiciary or civil law environments.

To produce competent graduates, an education and training program must first describe in clear, measurable, and observable terms the elements of competent performance. In trades and certain routine jobs, the characteristics of the finished product desired can be precisely described. Similarly, in some endeavors, it is possible to describe in minute detail the steps or procedures necessary to produce given results. In professional practice, however, it is often easier to describe what not to produce and how not to do it than to define the ideal process or perfect product. Educational and training experts, however, can advance our understanding of how to conduct job-oriented instruction.

While the process of breaking down professional practice into its identifiable elements is a complex one, the results are tremendously useful to course design. In discussing the nature and importance of detailed task analysis, the following illustration may be helpful.

Let us imagine we are trying to train persons to write persuasive prose. We must first define "persuasive prose" in terms that can be empirically verified according to preset criteria. To do so, we examine the characteristics first of effective, then of persuasive, prose, such as correct grammar and effective language and usage. The applicable rules and their products would be the starting point. Forms of effective expression would then need to be established.

We would probably agree that clear, straightforward, concise, and precisely written work is usually best. This suggests a requirement for simple words, generally, rather than complex ones. Since short sentences are more easily followed than long ones, we would opt for them. Sentences that follow the standard placement pattern would be preferred (such as subject, verb, object in English or subject, object, verb in German). Having some idea about words and word order in sentences, we would then move to the structure of paragraphs, and so on. Then after basic expression was mastered, students could move on to use what they had learned in specific forms:

reports, memoranda, briefs, arguments, and so on.

Argumentation is crucial to persuasive writing, and its elements would also need to be specified and learned. The student could study the discipline of rhetoric and related issues of sequencing, word choice, sentence form and length, and so on. Since efforts at persuasion are addressed to a particular audience, it will be critical to define the audience's skills, characteristics, interests, goals, and preferences. One must also master the points on all sides of the debate and structure the argument to emphasize the relevant ones. All this learning must be placed in the context of the type of communication—letter, memorandum, or formal document—in a specific context of legal practice.

When training someone to do a task, we must, of course, be certain that it is useful to them. The true beginning point for systematic instructional design, therefore, is performance, or job, analysis. This requires detailing the various tasks the person will perform. A thorough listing is required—no task is insignificant or irrelevant, and the relative importance of each task can be determined later. A list of legal practitioner's tasks would include:
answercontinue

the phone, provide instructions to a clerical staff member, conduct a search in a legal office, write a letter to a client, locate a statutory provision, write a memorandum of law, negotiate a settlement, examine a witness.

The next phase is task analysis—breaking down tasks into procedures in the sequence they are performed. It is clearly preferable to choose as referents persons considered competent in their work. Depending on the task and the complexity of knowledge and skill required to do it, analyzing a model practitioner could be the starting point for task analysis.

I have chosen the example of "locating a statutory provision" to illustrate analysis of a relatively straightforward, linear task. In trying to locate a statutory provision, one would carry out at least the following steps:

- Decide whether the statute is federal or provincial.
- Identify possible search aids (which vary by jurisdiction).
- Select the best search aids (having established their relative merits).
- Locate and examine search aids.
- Identify possible references to the provision.
- Decide if the provision meets the requirements of the task's objective.
- Consider whether or not there is more than one provision on the subject.
- Repeat the process looking for other pertinent provisions.
- Decide among possible provisions which ones are correct.
- Verify that the provision is in force.
- Determine whether the provision has been amended.

Judicial Reform in Latin America and the Caribbean

Some tasks are less amenable to linear analysis and will have many action branches, depending on how the other side behaves. In charting the flow of such processes, the action will proceed through different boxes, depending on the decision taken, ultimate goals, and available routes to achieve them. For example, the decision of whether or not to accept an offer in settlement of a claim would in part depend on:

The accuracy of information presented by the other side.

The criteria by which competing options are ranked.

The best alternative to a negotiated agreement.

Whether an ongoing relationship with the other side is desired.

The ability to think of alternative solutions.

The ability to discern the real interests of the other side.

Communication skills.

The ability to select and implement appropriate tactics. Tasks are then analyzed carefully to determine the skills, knowledge, and attitudes needed to carry them out.

As yet, no detailed course syllabus appears to have been derived from the perspective of the needs of a legal practitioner. In most jurisdictions, therefore, there is an ever-lengthening list of mandatory subjects that bear little relation to requirements of the job and add little value to the law practitioner's general education. This list usually fails to recognize the supporting and allied subject matter required, both for competent legal practice and an enhanced life. Lawyers are woefully prepared in history, philosophy, language, literature, finance, science, psychology, and criminology—all central to aspects of their professional work.

There are also few examples of skills-oriented programs of instruction in the civil law jurisdictions—a consequence, I suspect, of the civilian legal tradition of working from the general to the specific, rather than the other way around as is characteristic of common law. New investigations will be necessary to ensure that skills analyses conducted in common law countries are applicable in their civil law counterparts. Similarly, the skills required for judicial officers also need to be analyzed and defined.

Once identified, requisite skills can be broken down still further. For example, a cursory examination of negotiation, mediation, interviewing, advising, and oral advocacy quickly reveals such common subskills as:

Listening (both passive and active)

Speaking

Reading nonverbal communication

Questioning

Organizing

Persuading

Planning

Identifying and analyzing relevant facts

Implementing a plan of action

These subskills are sometimes called common, or generic, skills and are used routinely in different ways and to different ends. Crucial subskills include the following:

Can listen and observe.

Can use appropriate language and grammar.

Can organize information.

Can speak effectively.

Can analyze and interpret people's behavior.

Can question effectively.

Can create conditions for effective communication.

Can analyze and evaluate relevant facts.

Can identify and evaluate legal issues effectively.

Can design and implement a plan of action.

Can manage.

Can deliver the product.

Can behave professionally.

A listing such as this can help the designer of a training course to define and concentrate on skills that promote efficiency. While they will be taught for use in different contexts, these basic elements can be applied in a variety of settings.

Finally, one must analyze the attitudes requisite for quality legal services, which are generally acquired by osmosis. Although there has been considerable work done here, much depends on the ethos of the locale and the ethical codes that govern professional conduct of officials, judges, and lawyers.

In a reforming legal system, attitudes may be of importance—especially if the attitudes governing the reformed system are new or at odds with currently accepted values. Integrity is centrally important to all legal functions. Lawyers need to be able to trust one another—or at least have accepted conventions for occasions when total candidness is not expected (during negotiations, when it is common for negotiators to inflate claims, deny facts, or claim to be unwilling to settle for something they would in fact be happy to accept). Similarly, if parties are going to be willing to confide their disputes to the official legal system, they need to know that judges will make decisions to the best of their ability, without favor or bias.

There is now evidence that problem attitudes on the legal practitioner's part are at the root of a number of complaints and claims against lawyers. Everyone can recognize gross dereliction of professional behavior (such as dishonesty or disloyalty), but less recognizable problem attitudes can lead to situations where:

The lawyer believes he or she can solve all problems and therefore takes on work beyond his or her abilities.

The lawyer believes he or she must shoulder the clients' burdens and therefore fails to involve the client adequately and makes inappropriate choices based on faulty information.

The lawyer asserts that he or she can work more quickly than is in fact required, thereby creating false expectations in the client and setting up impossible deadlines.

Analyzing Claims and Complaints Against Lawyers

To determine the most frequent causes of lawyer error, it is first necessary to identify the specific basis of claims and complaints against lawyers. Such studies have been carried out in jurisdictions where the governing body or insurance carrier has sufficient data upon which to base an analysis. Where such records are not available, clients and persons who observe practitioners may be interviewed for pertinent information. Effective instructional programs need to identify errors that typically recur in professional practice in order to train practitioners to avoid them.

For example, a study recently conducted by the Streeton Consulting firm for Law Cover, a New South Wales professional liability insurance carrier, brought to light the following causes of complaints against lawyers:

Failing to establish an effective working relationship with the client.

Failing to understand a clients' expectations.

Failing to communicate with clients.

Failing to be aware of one's own limitations.

Failing to make clear to the client the actual result and consequences of a completed legal matter.

Failing to evaluate legal issues adequately (not from ignorance of the law).

Failing to complete necessary tasks under pressure.

Failing to keep adequate records.

Analyses of this kind are required for all roles for which training is planned.

Designing Learning Opportunities and Assessment Methods

While detailed outlines of teaching processes must be left aside until we know what we want learners to accomplish, it is important to be aware that many options are available to the instructional designer. Teaching is the composite of the means and contexts for achieving the desired results, that is, changing the learner's behavior from the time of entry into the learning process to its completion. To begin, one must assess the entrant's knowledge, skills, and attitudes. Curriculum contents must then be selected to fill the gap between entry- and graduate-level abilities and qualities, which must be defined as clearly as possible.

In choosing and structuring learning opportunities one must also be aware of the learning characteristics of the target population. In the area of judicial reform, reference must be made to adult learning characteristics as tempered by cultural patterns. Generally, for instance, adults learn best from experience. The more experienced the learners, the less likely they will learn effectively from books and lectures alone. Adults require that new learning be useful in their work roles and meaningful to them personally. Purely abstract learning cannot be effectively integrated outside of experience or context.

While new arrivals at postsecondary education may find traditional book-centered learning feasible, its effectiveness diminishes as their experience of the world and occupations grows. Where persons have been expected to learn only what they are told as it is told to them, furthermore, it may be difficult to make the transition to self-directed learning.

The main goal of education may be said to be the development of the ability to learn how to learn throughout life. Education, as its Latin root suggests, should *lead* continue

learners, enabling them to become self-sufficient to the fullest extent possible. Good education builds independence. This overarching goal ultimately defines the educational enterprise.

It is also important to recognize that people learn differently from one another. Some may prefer to listen and read, while others learn best from challenge and discovery, or from observing and practicing. While learning opportunities, therefore, are never uniform for all, certain approaches are more likely to produce intended outcomes than others.

Let us briefly take the example of skills training, which is usually organized around a written or oral presentation and a demonstration of the elements of a skill, followed by an assertion of the effectiveness of the performance. Participants then practice the skill, obtain feedback on their achievement, and try to incorporate any necessary changes. Needless to say, skills are learned within the context of professional practice (a client-centered approach to advising, for instance, requires appropriate skills that will help the client, rather than the lawyer, make a decision). Lawyers' skills are practiced in the context of their normal application, and most are employed in both contentious and noncontentious matters. As a result, students are offered instruction and practice both in transactional (deal-making) and in dispute settlement settings.

Instructional designers may choose among the following teaching methods, taking into account their suitability to the learner group and learning objectives:

Readings

Lectures

Role-playing exercises

Simulations

Problem-solving exercises

Demonstrations

Question and answer sessions

Games

Panel discussion or debate

Buzz groups

Journals

Field trips

Group or individual projects

Research projects (including essays)

Class discussions

Tests

Tutorials.

These teaching methods are supported by the use of various aids:

Slide projector

Overhead projector

Television

Film, video tape, photograph, illustration

Handout

Writing board

Computer.

The following are guidelines for selecting among teaming methods and aids appropriate to the task. Learning to do requires both demonstration and doing. Learning to think requires thinking. Learning new attitudes requires experience and reflection. Learning how to discover requires opportunities to discover. Learning information requires repetition, restating, and application. It is easier to learn about calculations if you can see them. Information is reinforced by notation. Learning is often facilitated by seeing printed samples of the objects of learning. All learning requires feedback to learners on their progress. All learners need new, in addition to familiar, learning opportunities to keep up their interest in learning.

Higher education is frequently based on readings, lectures, and some discussion. Yet this learning structure has severely limited effects on intellectual skills, performance, and attitudes. It must be supported by active, participatory methods that have been shown to enhance real competence.

Too frequently student achievement is assessed only from credentialing, although continuous assessment of student performance provides an excellent learning opportunity for participants and an opportunity for instructors to monitor student achievement. In this sense, assessment is part of the learning process itself, part of the formation of graduates. Through feedback regarding their advancement toward the achievement of stated objectives, instructors can directly assist learners. Teachers can also readjust their approaches to learning in the

light of overall student performance. Feedback enables learners to make necessary changes in their modes of preparation and in their final performance.

It should go without saying that fairness requires students not be assessed on matters they have not been requested to learn; nor should they be tested using methods with which they are unfamiliar. Effective instruction makes objectives clear at the outset and employs these objectives as criteria for assessment. But learning and feedback need not be reserved to the classroom. Hands on, practical experience is also necessary and may be more convenient and appropriate for teaching professionals already in practice.

Law students and judges-in-training should progress from reading and listening (and other learning opportunities), to observation, simulation, supervised practice, and monitored practice. In the practice setting, seniors must take an active part in on-the-job continue

training and supervision. They will need to acquire supervisory skills and to perfect efficient and effective ways of providing guidance that do not detract from the accomplishment of their own occupational goals. Indeed, to maximize effectiveness and ensure quality, attention must be paid to training the various instructors who participate in professional formation and public legal education.

Devising an Appropriate Curriculum

Curriculum development should build on the strengths of an existing program. Thus, an evaluation of the existing system's suitability is needed. Once the system's strengths and weaknesses are identified, a plan should be designed to accomplish specific results based on goals that are practical and achievable in resource terms. Following this initial analysis, it is likely that a new program will need to be carried out in phases and along parallel tracks for lawyers, judges, officials, and the public.

Any new educational system should suit national goals, aspirations, and priorities and match local cultural needs and imperatives. It cannot be imposed externally, but must be locally driven and devised by those who understand both the context and the goals of judicial and educational reform.

Designing an improved educational system is likely to require some outside expertise during the initial, developmental period to assist with analyses and training. Any system requires a critical mass of capable and dedicated people and such a corps can be produced through a progressive, graduated program of human resource development. Some programs may require local assistance by outsiders, while others may require that students go elsewhere to study and train. In any event, a concerted and ongoing program of professional development is required immediately.

To make sure that students improve continuously, quality systems must take care of professional development. Quality systems do not accept established expertise alone but rather view improvement—increased quality—as a process as well as an outcome. A central feature of any reformed educational (or judicial) system must be increased attention to the quality of the personnel staffing it.

Setting Admission Requirements

Admission decisions are made at many points: law study, law practice, judicial practice, and so on. At each point two main (and sometimes competing) values need to be taken into account. These are the applicants' suitability for admission and the access-to-justice needs of the community. I will deal with access to justice first.

In many jurisdictions, it is only the privileged who can undertake a professional education. Cost is the first hurdle to open access: disadvantaged people cannot afford to take time to go to school, let alone pay fees, obtain housing

away from home, or buy books and supplies. To some extent, access to a professional career can be widened by providing tuition waivers, bursaries, scholarships, and other forms of aid.

Often, however, the disadvantaged cannot attain entry to advanced study because their circumstances have not enabled them to acquire the knowledge, skills, and attitudes necessary to engage in higher education. Women, minority groups, and rural dwellers, for instance, frequently fail to consider themselves appropriate candidates for a professional career. The absence of members of disadvantaged groups in professional education then perpetuates the problem and limits the accessibility of disadvantaged persons to the justice system itself.

In today's environment, when law is becoming more pervasive and important, such people require sympathetic representation from persons who understand their plight and can relate to them comfortably and productively. Since those who can operate within the legal, economic, and political systems have real power to influence results, communities that are underrepresented are also denied full participation in governance.

In some countries public higher education is open to all high school leavers for little or no fee. This is also a double-edged sword. While open access is a worthy ideal in principle, huge student populations can rarely be adequately instructed. Once again, survival of the fittest may mean survival of the advantaged. Furthermore, many of those who do meet the minimum requirements for graduation are likely to have been poorly schooled and thus are ineffective in work settings. One then faces the admission conundrum yet again, this time at the point of admission to practice after many years of higher education. This time the problem is complicated by the concern that graduates be sufficiently competent to provide legal services to the public which believes that it can rely on the individual's credentials. Poorly preparing lawyers does not add up to "access to justice."

A system of admission to higher education must be limited to those who, given resources for postsecondary study (in terms of facilities, books, and teaching staff) can become adequately prepared for their proposed careers. It should also be limited by the number of graduates who can reasonably be expected to benefit from a legal education incontinue

pursuing a career after graduation. Law school, however, need not be restricted to intending practitioners. The number of entrants should be based on person-power planning requirements, written generously to ensure as large a corps of adequately educated and trained persons as possible. In limiting numbers at admission to law study, attention must be given to admission requirements that promote the widest possible access to a legal education and career. The criterion of marks alone will not suffice. Perhaps an aptitude test resembling that administered in North America—the Law School Admission Test (LSAT)—could be developed to aid in admissions screening. In addition, applicants' personal background, experience, and career aspiration might be canvassed. Finally, those who have prospects but do not possess the language and other skills necessary for admission could be offered special tuition to facilitate law study.

Continuing Professional Education

Most professionals confirm that to stay current they must continue to learn throughout their careers. In the early part of this century, the Practising Law Institute initiated the first formal programs for continuing legal education (CLE) in North America. Recently, CLE has proliferated. Since the 1960s jurisdictions in both the developed and developing world have instituted programs of continuing professional development offered at least annually. In England and Wales, much of the United States, New South Wales, Hong Kong, and recently, parts of Canada, CLE has been mandated for some practitioners.

The impetus behind these developments has been varied. First, law continues to grow rapidly. Both legislatures and courts are active in lawmaking, and in some jurisdictions, there have been wholesale changes in many areas of law. As a result, practitioners' knowledge is frequently out of date before they complete their formal legal

education. Second, the consumer movement has forced professionals to be more accountable for the quality of services rendered. The proliferation of complaints and suits against lawyers has forced them to try to improve their performance. Third, the legal professions have begun to take greater responsibility for their continued professionalization. Recognizing that learning and learnedness are the hallmarks of professionalism and enhance practitioners' skillfulness and knowledge, the professions are now demanding it. Fourth, as the need for legal services grows with legal change and economic development, lawyers have begun to specialize more. Continuing education provides a platform for professional development and a way to develop specialist expertise. Fifth, mandatory CLE is sometimes used to make up for perceived deficiencies in preadmission education. Sixth, some jurisdictions have resorted to CLE to remedy identified deficiencies of practitioners whose practices have been adjudged below the required standard.

It is evident that to reform legal environments practitioners, officials, and judges will all need to undergo significant professional development. The discussion above on planning education and training programs is equally applicable to continuing legal and judicial education. In structuring systematic professional development programs, one follows the same processes as with all education. Learning needs must first be determined, existing means for serving them must be scrutinized, and means to fill the gaps must be identified, planned, carried out, and evaluated.

There are myriad delivery options for CLE. In some places programs are offered as laws change or as problems in practice are identified. Some providers have created CLE curriculums with recurring and progressive elements. Programs are usually organized to suit the schedules of practitioners. Sessions may be weekend, early morning, late afternoon, all-day, half-day, or week-long; programs tend to be intensive and employ the full range of teaching methods available. Not all CLE, for instance, is face to face. There are workbooks, computer-aided instructional programs, satellite and closed-circuit television, audio and videotapes, legal practice manuals, law office management aids, and, of course, journals, papers, texts, law reports, and notices of new legislation.

Specialist organizations dedicated to continuing learning in the professions have developed apace. Judicial schools, continuing legal education institutes, and government education centers for officials have been created in many places. Such institutional arrangements dedicate themselves to the advancement of their professional members and are critical if resources and expertise are to be focused to reach the educational goals required.

Continuing professional development is itself a professional enterprise that requires expertise, energy, and resources. Professions that take their members' development seriously think broadly about the dimensions of professional practice and the role their profession serves in upholding national values and achieving national aspirations. CLE must be seen as integral to the life and wellbeing of a profession and the people it serves. Since professions exist in the public service and retain their monopolies because of their special expertise, they must chart a dynamic course of professionalization. The interests of a profession are defined by the terms of their public trust. Often, trust can only be served through selfless effort to advance the cause of justice and social and economic development.
break

Education is but one element—albeit a fundamental one—of the legal profession's program of self-development. Legal professionals have an institutional duty to promote and preserve the rule of law, to protect citizens from individuals and governments that seek advantage contrary to law, and to resist unjust and unlawful acts.

Developing a Legal Literature

No legal education enterprise can prosper without a local legal literature. Advanced learning depends on a store of writings, aimed at professional and lay audiences alike, that touch all facets of the legal system.

For proper legal, economic, and social development, changes must be documented and disseminated widely. An assessment of the quality and coverage of existing legal literature should be conducted at the earliest possible stage. Should there be any gaps in the primary materials (depending on jurisdiction, these include: legislation [primary and subsidiary, central and local], reported cases, public decrees [whatever their form], executive orders, and the like), efforts to publish and distribute such materials should be undertaken immediately. Since written works often provide the basis for educational and practice activities, work to fill in gaps should be commissioned without delay. Next in priority are up-to-date texts, commentaries, and manuals. The texts and commentaries should state and interpret law clearly and accurately and describe practice as it stands. Detailed manuals to guide judges, officials, and lawyers in their work should be created and made generally available, so that legal processes can be visible to all. To ensure minimally adequate practice, these manuals should provide a step-by-step procedural protocol for common transactions, with such explanations or illustrations as may be necessary. Reviews, journals, and other publications should be promoted to provide critical assessment of the legal system in both theory and practice. Pamphlets on central elements of reform should be available to the public. Readable material should be prepared for public consumption on all topics of interest to the general public.

Works defining lawyers', judges', and officials' skills and work also need to be written. Those that do exist are mostly in English, do not fit all contexts, and are thus unlikely to meet local needs. English-language materials, moreover, are not suitable outside their country of origin.

If the law and legal system are to unify diverse and isolated groups, a systematic program of publication will be essential. Nationally available publications strive to set a common, minimally acceptable standard for legal practice by the nation's lawyers, officials, judges, and lay persons.

Conclusion: Toward Quality Legal Education for Quality Justice Systems

Because quality justice systems do not arise without directed, systematic, and energetic efforts, reform and reeducation must proceed hand in hand. Quality justice systems use their principles and fundamental values in their daily activities, striving for excellence and seeking to model behaviors consistent with their highest aspirations. Quality justice systems cannot be maintained and improved without real commitment to the systematic organization of a range of enterprises devoted to continuing learning. Any reform agenda, therefore, must include a central role for systems and structures pledged to the growth and development of professionals and citizens alike.

PART VII— JUDICIAL REFORM IN INDUSTRIALIZED COUNTRIES

17— Judicial Reform in Singapore: Reducing Backlogs and Court Delays

Ng Peng Hong

This chapter describes measures that have been implemented in Singapore to deal with the backlog of cases awaiting hearing dates and to reduce delays in the disposal of cases. It is based on a paper contributed by the chief justice of Singapore, the Honorable Yong Pung How, to the Fifth Commonwealth Chief Justices' Conference held on May 3, 1993, in Cyprus.

At the outset, it is helpful to outline the structure of the court system in Singapore. The judicial system comprises two tiers of courts: the Supreme Court and the subordinate courts. The Supreme Court consists of the High Court and the Court of Appeal. The subordinate courts comprise the district courts, magistrates' courts, juvenile courts, coroners' courts, and small claims tribunals.

The Supreme Court

Backlogs in the Singapore courts are not a new phenomenon—a backlog problem was reported as long ago as 1949. The caseload in the Supreme Court had increased in volume and complexity over the years, partly because of Singapore's development as an international business and financial center. In January 1991 there were 1,912 suits begun by writ and 96 admiralty suits awaiting hearing dates in the High Court. At the prevailing rate of disposal of cases, it would have taken five years for the suits begun by writ to be heard and four years for the admiralty suits. It would have taken another two years for an appeal to be heard before the Court of Appeal.

The rate at which criminal matters cleared the High Court was equally unsatisfactory. Capital cases could take up to four years before being heard by the High Court, and another two years to reach the Court of Appeal.

Today, the Supreme Court no longer has a backlog problem. Between January 1992 and December 1993, the backlog of cases awaiting hearing dates in the High Court was reduced from 1,340 to 129, and the average waiting period (from set-down to hearing) cut from five years to four months. And in the Court of Appeal, by the end of 1993 the average waiting time from the filing of the notice of appeal to the hearing of the appeal had been cut to 6.4 months for civil cases and 4.8 months for criminal appeals.

Capital cases form the bulk of the original criminal jurisdiction of the High Court. In the past, such cases had to be heard before two judges and on average took fifteen days to be heard. Under these conditions, slightly fewer cases were disposed of each year than there were new capital cases coming in. In April 1992 Singapore's Criminal Procedure Code was amended to require only one judge in capital trials, and the rate of disposal of such cases has since doubled. This has enabled the reduction of the remand period of accused persons, which fell from an average of three to four years to about twelve months by the end of 1993. On average, in 1993, a criminal case was tried about six months from the date the record of proceedings of the preliminary inquiry was received.

Measures to clear backlogs and reduce delays included the following:

Restricting the types of cases that must be heard before judges.

Improving case management (pretrial conferences, refusal of adjournments).

"Overfixing" cases.

Management of appeals, including increasing the number of sittings of the Court of Appeal and establishing a permanent Court of Appeal; and speeding the hearing of civil and criminal appeals.

Increasing the number of judges and judicial commissioners.

Increasing the number of courtrooms.

Recruiting justices' law clerks.

Changing work hours and habits.

Hearing cases and applications during court vacation.

Changing court procedure and the Rules of the Supreme Court.

Amending legislation governing the composition or jurisdiction of the courts.

Recording evidence mechanically.

Restricting Cases to be Heard before Judges

Matters involving little or no law were transferred from the judges' hearing lists to save valuable judicial time. Bankruptcy petitions formerly heard by judges are now heard by the registrar. Similarly, Summonses for Directions, once heard before a judge in chambers, have since 1989 been heard before the registrar.

Members of the bar have responded positively to a request that all adoption petitions be filed in the subordinate courts, notwithstanding the concurrent jurisdiction of the High Court to receive such processes. In 1990, 162 adoption petitions were filed in the High Court. Since January 1991, when the change in procedure was requested, no new adoption petition has been filed in the High Court.

Improving Case Management

Formerly, trial dates were given as a matter of course once parties set down the matter for trial. In 1991, however, pretrial conferences were introduced on a pilot basis in both the High Court and the subordinate courts. The conferences serve two purposes. First, they bring together the parties to a civil dispute to explore the possibility of narrowing the areas of dispute and achieving a settlement. The pretrial conference may thus prove to be a step toward the development of alternative dispute resolution.

Second, the pretrial conference allows a court assessment of the parties' readiness to proceed to trial and allocation of a trial date only if the parties are ready. This prevents the occurrence of adjournments on account of parties not being ready to proceed to trial.

(Also cutting down on adjournments is the Supreme Court's strict policy of not allowing cases to be adjourned once hearing dates have been fixed. If the parties in a case have a good reason for requesting an adjournment, they must apply to a judge by way of Summons-in-Chambers for the trial date to be vacated.)

Since its introduction, the use of the pretrial conference has been extended to all civil and criminal cases in the High Court and subordinate courts. The effectiveness of these conferences in disposing of cases is recorded in table 17.1.

"Overfixing" Cases

The Supreme Court Registry has a practice of fixing more cases for hearing than there are judges or judicial commissioners available to hear them. The excess cases (usually three to four cases) are placed on a standby list. When a case that has been allocated to a judge or judicial commissioner is settled or adjourned, a standby case is slotted in its place so that judicial time allocated for the hearing of cases is not wasted.

Improving Management of Appeals

Although the Court of Appeal can hear only about twelve appeals a week, fourteen to fifteen appeals may be fixed for each week's sitting. As some appeals are withdrawn before the hearing date, the balance can be comfortably dealt with by the Court of Appeal during the course of the week.

Judicial Reform in Latin America and the Caribbean

TABLE 17.1
Disposal of cases at pretrial conferences, by method, Singapore, 1992 and 1993

<i>Type of action</i>	Pretrial conferences and trial	Pretrial conferences (settlement or withdrawal)	Settlement by pretrial conference as share of cases disposed (percent)
Disposal of cases in 1992			
Negligence suits (Jan. 1992-Dec. 1992)	272	113	41.5
Suits other than negligence suits (Apr. 1992-Dec. 1992)	617	193	31.3
Contested divorces (Apr. 1992-Dec. 1992)	196	153	78.1
Total	1,085	459	42.3
Disposal of cases in 1993			
Suits (Jan. 1993-Dec. 1993)	249	66	26.5
Contested divorces (Jan. 1993-Dec. 1993)	203	130	64.0
Divorce—ancillary matters (Apr. 1993-Dec. 1993)	517	156	30.2
Total	969	352	36.3

Source: Supreme Court of Singapore.

Fixtures for sittings of the Court of Appeal are controlled by the president of the Court of Appeal, who decides on the number of days required for hearing. Parties are informed in advance of when their appeal is scheduled to be heard. This allows for the optimum usage of hearing time. Formerly, counsel for each appeal fixed for hearing in a particular week was required to attend on the first day to provide the Court of Appeal with an estimate of the time required to argue the appeal. The Court president would then allocate time according to the estimates provided by counsel.

Sittings of the Court of Appeal have been gradually increased from one week a month at the beginning of 1991 to up to four weeks in certain months in 1992 and 1993, culminating in the setting up of a permanent Court of Appeal. This has facilitated the clearing of the large backlog of civil and criminal appeals.

The Rules of the Supreme Court were amended so that, effective May 2, 1994, the appellant in civil cases is required to file his case within three months from the time he is informed that the record of proceedings is available and the respondent is required to file his case within one month thereafter. This has made it possible to fix an appeal for hearing just four months ahead from the time of fixing. But if the appeal is one of urgency, the Court may direct that the appeal be heard expeditiously.

In 1992 the average time between the filing of the notice of appeal in civil cases and the hearing of the appeal was

10.4 months, and in 1993 the corresponding figure was 6.4 months.

With respect to criminal appeals, once a notice of appeal has been filed, the appeal is given a tentative date for hearing before the Court of Appeal, which is confirmed when the record of proceedings becomes available. The appellant has ten days from the date of service upon him of the record of proceedings to file his petition of appeal. The appeal is usually heard about a month or so after the petition of appeal has been filed.

In 1992 the average time between the filing of the notice of appeal in criminal cases and the hearing of the appeal was 6.8 months, and in 1993 the corresponding figure was 4.8 months.

Increasing the Number of Judges and Judicial Commissioners

Case management can only go so far in alleviating the backlog of cases in the Supreme Court. The main solution lies in increasing the number of judges and judicial commissioners. The Supreme Court bench has been restructured with a core of permanent judges, augmented by a more flexible cohort of judicial commissioners appointed for short terms of one to two years for the express purpose of clearing cases before the Supreme Court (and expected to stand down when their terms are over).

New judicial commissioners will be appointed in the future for the above-mentioned short terms. They will hear long cases that would otherwise upset the normal court hearing schedules; or they will hear cases when sudden surges in the caseload threaten to cause backlogs to build up again.

At the end of 1993 there were nine judges (including the chief justice and two appeals judges) and nine judicial commissioners on the Supreme Court bench—almost double the number of judges on the Supreme Court bench in the 1980s.

Increasing the Number of Courtrooms

The increase in the number of judges and judicial commissioners has required an increase in the number of courtrooms. The Supreme Court premises have been expanded to include the adjacent City Hall Building, boosting the number of courtrooms from eleven to twenty-three (including the courtroom of the Court of Appeal). Two courtrooms are being renovated into courtrooms of the future, with computer and other high-technology equipment to be installed in one of them.

Recruiting Justices' Law Clerks

The first two justices' law clerks were appointed in 1991 and by December 31, 1993, there were thirteen of them. The clerks work directly under the charge of the chief justice, helping judges and judicial commissioners with legal research, particularly in appeal cases. The clerks study the records of appeals, including the pleadings, documents exhibited, notes of evidence, grounds of judgments, writ. ten submissions, and authorities cited by counsel. They then prepare bench memorandums that set out the facts of the case, the issues involved, and the applicable law.

In their capacity as research assistants, judicial law clerks have significantly lightened the workload of judges and judicial commissioners, enabling them to devote more of their time to judging and writing judgments.

Changing Work Hours and Habits

Effect January 28, 1991, the starting time for the morning session of the High Court and the Court of Appeal was moved up to 10:00 a.m. from 10:30 a.m. The session ends at 1:00 p.m. and is followed by an afternoon session lasting from 2:15 p.m. to 4:30 p.m., subject to the Court's discretion in any single case to conclude a sitting at an

earlier or later time as it deems fit. This change has meant an

increase of about 10.5 percent in the amount of judicial time allocated for hearings.

The starting time of certain hearings before the registrar has also been moved up. Effective June 28, 1993, Summonses-in-Chambers hearings before the registrar start at 9:00 a.m. instead of 10:00 a.m. To cope with the increasing number of interlocutory applications, applications for summary judgment, and originating summonses, the number of such hearings each week has been increased from two to three. This has reduced considerably the length of the hearing lists and the amount of time a solicitor spends waiting to have his application heard.

Judges and judicial commissioners have increased their output of written judgments, and there has been a concerted effort to cut down the time between the hearing of a case and the delivery of a reserved judgment. With the better organization and spread of judicial work loads, the Supreme Court bench managed to keep the number of outstanding judgments—despite the increased number of cases—to an average of a little more than two outstanding judgments per judge as of January 1992. The chief justice has announced the objective of having no judgments or grounds outstanding for more than three months or, at the outside, six months. This will allow appeals to the Court of Appeal to be listed for hearing within a relatively shorter period.

Hearing Cases and Applications During Court Vacation

Unlike judges, judicial commissioners continued to hear cases during court vacation. Motions, summonses, and bankruptcy matters are also heard during court vacation. This helps reduce the buildup of applications before and after the court vacation and has also resulted in the increased disposal of cases.

Changing Court Procedure and the Rules of the Supreme Court

The Rules of the Supreme Court have been progressively updated to simplify the rules of procedure and reduce delays in court. Among the prominent changes is the new requirement that the evidence-in-chief of witnesses be given by affidavit, which will reduce the time spent in the examination of witnesses.

The amended Rules also require that a full written case be submitted to the Court of Appeal. The case must state the circumstances out of which the appeal arises, the issues in the appeal, the contentions to be urged by the party lodging it, and the reasons for the appeal. With this document, the need for oral explanations is reduced and court time is saved.

Hearing fees were introduced in July 1993 for open court hearings before the Supreme Court in an effort to regulate and control the use of court time. The fees are directed generally at commercial cases, which usually require more hearing time. The hearing fees, while not reflective of operating costs of the Supreme Court, must be sufficiently high to discourage the unnecessary lengthening of proceedings. To date, hearing fees assessed have been paid for no more than fourteen days.

In 1991 a simplified procedure was introduced—through the issuance of a practice direction—for the conduct of uncontested divorce petitions. Petitioners were no longer required to confirm every paragraph of their divorce petitions. Instead, they were required while in the witness box to answer only the questions that would prove the marriage, the particulars of children (if any), the grounds for the petition, and the like. This shortens the time spent on each petition and enables the accelerated disposal of uncontested petitions.

In 1993 a practice direction was issued to improve the conduct of civil proceedings and reduce the time taken in the presentation of cases in court by requiring the solicitors for each party to submit a bundle of documents (an agreed bundle where possible), a bundle of authorities, and an opening statement. The purpose of the opening

statement is to summarize the case, both as to facts and law, to give the judge a sense of what the case is about and what to look for when reading and listening to the evidence. It is also meant to clarify issues between counsel for the parties, so that time is not spent trying to prove what is irrelevant or not disputed.

Amending Legislation Governing the Composition or Jurisdiction of the Courts

Recent amendments to legislation governing the composition or jurisdiction of the courts have affected the caseload and the rate of disposal of cases in the Supreme Court.

The requirement that trials of capital offenses be heard by two High Court judges—introduced in 1970 to take the place of jury trials—has been amended to allow such trials to be heard by a single judge. Since the amendment the rate of disposal of capital trials has doubled. To ensure that the quality and reliability of justice are not threatened, an accused person who does not have counsel is now provided with two defense counsel by the state, not just for the High Court trial, but from the time of the preliminary inquiry all the way to the Court of Appeal.

In July 1993 the Supreme Court of Judicature Act was amended to allow for certain appeals to be heard in the Court of Appeal before two three judges. This move, continue

like the amendment to the Code of Criminal Procedure, has resulted in savings of judge–hours.

The amendment also restricts the matters that can be brought before the Court of Appeal. Moreover, where the amount in dispute or the value of the subject matter does not exceed (in Singapore dollars) S\$5,000, an appeal cannot be brought against the decision of a district court or magistrate's court without the permission of the High Court. Nor can an appeal be brought before the Court of Appeal without its permission when the amount or value of the subject matter is S\$30,000 or less.

Statutory amendments were also made to empower the chief justice, when he considers it necessary or expedient to improve efficiency in the administration of justice and to provide for more speedy disposal of proceedings, to transfer cases from the High Court to a district court, and vice versa, for hearing and determination. With these measures in place, sudden surges in the backlog of cases can be channeled either to the High Court or to district courts for disposal.

The Subordinate Court (Amendment) Act of 1993 also considerably enlarged the civil jurisdiction of the district courts. District courts can now deal with claims of up to S\$100,000 in value and can probate matters when the value of the deceased's estate does not exceed S\$3 million in value. The previous limits were S\$50,000 and S\$250,000, respectively. The types of proceedings a district court can hear and try have also been increased. Thus, there is now an alternative forum for some cases that previously could be tried only in the High Court. There has in fact been a drop in the average number of writs of summons filed per month since the increase in the jurisdiction of the district courts, from 236 (January 1993July 1993) to 157 (August 1993December 1993).

Recording Evidence Mechanically

A mechanical recording service is now available in the High Court, subject to payment of fees to cover the cost of the service. This offers an alternative to recording evidence manually, and trials using it can move along more quickly, thereby minimizing the use of court time.

The Subordinate Courts

Measures implemented to improve the efficiency of the subordinate courts have been instrumental in reducing the average lead times or waiting periods in civil cases from one to two years to four to six months, and in criminal

cases from eleven to twenty-two months to four to six months. The following measures have been effective: an exercise to clear the backlog of cases, a new system of mentions and fixing for criminal cases, and implementation of case management schemes for civil cases.

Exercise to Clear Backlog of Cases

As of July 1992 there was a backlog of 1,289 criminal cases and 1,025 civil cases for the years 1983 to 1989. For 1990-91 the backlog stood at 608 criminal cases and 608 civil cases.

To clear the backlog a special exercise was undertaken to bring forward the hearing dates of the cases. Assessments of all backlog cases for 1983-89 and 1990-91 were completed in March 1992 and July 1992, respectively. Special pretrial conferences were held after office hours and between 9:00 a.m. and 9:30 a.m. to determine the status of the cases and the readiness of parties for trial.

As a result, by December 1992 only thirty-nine criminal cases and twenty-seven civil cases remained on the 1983-89 backlog list, while 202 criminal cases and 450 civil cases remained on the 1990-91 backlog list. By 1993 the backlog of cases was cleared.

New System of Mentions and Fixing for Criminal Cases

The former system in which a trial date was assigned upon the accused claiming trial has been modified. The new system incorporates an intermediate step—a pretrial conference before a district judge to assess the readiness of parties for trial. The case is allocated a trial date if and only if the parties are ready to proceed. This measure ensures that the court's time is properly utilized and that requests for adjournments because of parties not being ready for trial do not occur.

Case Management Schemes for Civil Cases

Individual and group case management schemes were implemented on a trial basis as of October 1992.

In the past the court registry was solely responsible for the court calendar and for the scheduling of cases for judicial officers. The function of the trial court judge was limited to the hearing and disposal of cases.

Under the individual case management scheme, a judicial officer is allotted a certain number of cases to be disposed of within a specific time period. The judicial officer becomes directly responsible for the monitoring, control, and disposal of his own cases, with wide discretion in the conduct and management of the cases, including the conduct of pretrial conferences and the fixing of trial dates.

Under the group case management scheme, a senior officer is in charge of a group of judicial officers who are

allocated a number of cases to dispose of. The group is given wide discretion to arrange among themselves for the disposal of their cases. Instead of following the master court calendar by which the registrar fixes cases for hearing, the group has its own court calendar. The objective of this system is to give judicial officers greater individual responsibility in the scheduling and disposal of cases.

These experiments in the management of civil cases have resulted in a significant improvement in court productivity. Parties have been guided to concentrate on the issues in dispute, which has enabled them to more accurately assess the strengths and weaknesses of their cases. Many cases have been settled by compromise, freeing up trial dates for the disposal of other cases. In fact, under the individual case management scheme,

between 83 and 85 percent of cases have been disposed of without a trial.

A similar scheme was developed in 1993 for the management of criminal cases. As is true with the High Court, pretrial conferences are held to ensure that the parties are ready for trial before the case is set down.

Restriction on Adjournments

In July 1992 a directive was sent to all judicial officers to note that adjournments are not to be granted on the trial date for parties to effect a settlement or because parties' witnesses are untraceable. The adjournment of cases is no longer granted as a matter of course. The courts have taken a very strict view of this, especially in cases where the parties have not been ready for trial.

Punctuality has also been emphasized and impressed upon counsel, in order to drive home the point that the courts will sit on time so that available court time is not wasted.

Administrative Support

With the higher performance expected of the subordinate courts, measures have been taken to ensure that the administrative support infrastructure is able to cope with the workload. Formerly, for instance, cases had to be adjourned because of the shortage of court interpreters. As an interim measure, the subordinate courts have started contracting out the provision of court staff. Another measure adopted has been to computerize, wherever possible, the work of support staff.

Night Courts

The introduction of night courts in June 1991 has proved a great help in the disposal of the large number of road traffic and departmental summonses. Originally held just two evenings a week, by April 1992 night courts were operational five nights a week from 6:00 p.m. to 10:00 p.m. The night courts allow defendants to attend court without having to take leave from work. It also increases the capacity of the subordinate courts to hear cases by freeing up two more courtrooms during the day.

Hearing Fees

Since July 1, 1992, hearing fees have been imposed for civil cases going to trial in the subordinate courts. For district court cases, each day of hearing or part thereof after the first day requested or fixed for hearing, carries a fee of S\$500. For each day of further hearing or part thereof requested or fixed for hearing, a fee of S\$800 is payable. For magistrate's court cases, each day of hearing or part thereof after the first day requested or fixed for hearing, carries a fee of S\$250. For each day of further hearing or part thereof requested or fixed for hearing, a fee of S\$400 is payable.

The imposition of hearing fees has meant that parties are now required to make a more realistic and accurate assessment of their cases before setting down for hearing dates. Still, the registrar is given discretion to remit or refund all or part of a hearing fee as he thinks fit. Thus, the additional fees do not impede the litigant's access to the legal process. Moreover, litigants receiving legal aid are exempt from the payment of court fees.

New Courts

Twenty-four new subordinate courts have been added to the existing thirty-two to cope with the volume of work currently handled by the system. Also, with fifty-nine judicial officers in the subordinate courts as of December 1993, additional facilities were essential to house all the district judges and magistrates.

The new courtrooms provide greater flexibility in meeting new demands and enable more proceedings to go on simultaneously, thus preserving the progress made in shortening the lead time for cases and preventing the recurrence of backlogs and delays.

Composition Fines

Of the quarter of a million cases that came before the subordinate courts in 1992, almost half were departmental summonses. In almost all cases the offender was offered a composition of a money payment to have the case disposed of outside of court. The large number of court cases arises only because many people ignore offers of composition and allow them to lapse, leading to summonses being continue

issued to them to appear in court. Most of these people plead guilty when they finally appear in court.

Because the composition facility has not been fully used by offenders, this has led to an overburdening of the courts with cases that need not come to court. To encourage offenders to make use of the facility of composition, an intensive campaign has been launched in conjunction with such authorities as the traffic police, the Housing and Development Board, and the Urban Redevelopment Authority. These organizations will list the composition sums offered for the most common offenses prosecuted by them. A parallel list of the heavier fines that would be imposed by the court at each stage of the proceedings if composition offers are not accepted and the cases come to court has been prepared by the subordinate courts. Wide. spread publicity has been and will be given to these parallel lists of composition sums and graduated fines, so that members of the public are fully aware of the heavier fines payable if there is delay in effecting payment of the com-position offers. With these efforts, the waiting period for hearing of departmental summonses has been cut drastically. The success of this campaign will also mean that additional manpower currently allocated for the night courts can be redeployed more efficiently.

Safeguarding Achievements

To protect the achievements in clearing the backlog of cases, an ongoing program to monitor cases month by month has been put in place, so that remedial measures can be taken if a backlog problem seems likely to emerge again. This monitoring program will not be confined to a bare review of statistical information. The court administration will also try to understand more clearly the factors that contribute to a buildup in the backlog and the remedial measures most likely to be effective against them.

Conclusion

Finally, it must be stressed that the delay reduction program and the clearance of the backlogs were successful in Singapore due in no small measure to the leadership of our chief justice, the Honorable Justice Yong Pung How, who provided the support, guidance, and inspiration to see to completion the various measures adopted to improve the efficiency of the administration of justice.break

18—

Reform of the Civil Code, the Legal Aid System, and Technology in the Administration of Justice in Québec

Yvon Mercier

Recent advances in the administration of justice in Québec include progress in three broad areas: reform of the civil code, reform of the legal aid system, and improvement in technology.

Reform of the Civil Code

A civil code is a fundamental law governing the lives of people, from birth to death. It states their rights and obligations as natural or artificial persons, as members of a family or an association. It also states the rules governing property and its ownership, prescribing how it may be used and how disposed of.

The importance of such a code was aptly described when the first French Civil Code was introduced in 1804 (*Discours préliminaire*, an. IX, translated excerpt):

Good civil laws are the best thing people can give and receive; they are at the origin of good morals, the palladium of property and the guarantee of public and private peace. . . . They reach every individual, they affect the main events in his life, they follow him everywhere; . . . they are a consolation for each sacrifice the law requires of its citizens for the sake of society, by protecting them, their person and their property.

Such a code, which in Québec is part of a long tradition of written law, fosters a rapport among people because it allows them to know in advance the scope of their rights and obligations. The pertinence of the rules of a code depends on how closely linked are a society's needs and the values it upholds and enshrines as law.

History of the Reform

Before the Treaty of Paris (1763), the people of Québec were governed mainly by the Custom of Paris. Used to being governed by written rules, Francophones had to struggle during the English occupation to have their private law of French origin recognized. In the Québec Act of 1774 its application was finally recognized.

Yet the exercise of these rules was made difficult by the absence of a code in which they could be grouped, and also because of the juxtaposition, in some areas, of other rules of British origin. The French Revolution and the adoption in 1804 of the Napoleonic Code added to this difficulty, by putting an end to the old system that, in France as in Québec, had been based on the Custom of Paris.

This led Québec to adopt in 1866 a code of its own. Inspired in large part by the French Civil Code of 1804 (the Napoleonic Code), the Civil Code of Lower Canada answered the needs of the community by reflecting, in both form and content, the values of the time.

By the mid-1900s, in response to an evolving society, globalization of trade, the emergence of new economic sectors, and increased industrialization, questions started to be raised about the Civil Code's ability to meet the challenges of modernization.

In 1955 work began on reform of the Civil Code with the passing of the Act Concerning the Revision of the Civil Code (*Statutes of Québec, 1954-1955*, ch. 47). This work started slowly, but gained momentum with the passing years. Around 1965 the Office de la révision du Code civil was created, and in 1977 the office presented a report to the government recommending that a new code be adopted (Office de la révision du Code civil 1978).

Part of this report, dealing with family law, led to a public consultation in March 1979, and to the adoption

incontinue

1980 of the Act Instituting the Civil Code of Québec and Reforming Family Law (*Statutes of Québec, 1980*, ch. 39).

In 1984 a bill was tabled concerning the reform of the Civil Code and laws concerning personal rights, inheritance, and property rights (*Statutes of Québec, 1987*, ch. 18). The act was adopted on April 15, 1987. This

act was not put into force, but was incorporated into and revised within the framework of the parliamentary activity that led to the adoption, a few years later, of the new Civil Code of Québec.

From December 1987 to June 1988, three draft bills were tabled to reform civil and private international law. The proposed legislation gave rise to public consultation before a parliamentary committee.

The many stages in the reform of Québec's civil code, begun in 1955, took more than thirty–five years to complete. Altogether, nearly 200 papers were presented by individuals and groups belonging to the legal and other professions, the business community, and various social and economic groups. The result of this work, tabled before the Québec National Assembly on December 18, 1990—one hundred twenty–five years after the adoption of the first civil code in Québec—was Bill 125, the Civil Code of Québec.

The "new Civil Code," was adopted by unanimous vote on December 18, 1991. In 1992 a law containing the provisions needed for the implementation of the civil code was adopted. "Its aim is to ensure the smooth transition from the old system to the new. While preserving the individual rights of persons having legal relationships with each other, it contributes to the implementation of the new system of law so that citizens may more rapidly profit from the advantages it confers on them" (*Commentaires du ministre de la justice* 1993, vol. 3, p. 5).

Challenges Arising from the Reform

The reform is far–reaching in its attempt to modernize the old rules, codify the main trends in jurisprudence and legal doctrine, and introduce new rules adapted to the realities of the twentieth century. This is true, for instance, of the rules concerning medically assisted pro. creation as well as those concerning surrogate motherhood, the development of which could not have been foreseen in 1866. Contemporary issues relating to consent to receive care or to medical experimentation on human beings have also led legislators to introduce in our law new procedures related to the integrity of the person, thereby facilitating the exercise of those rights.

Inspired by the international charters on human rights and freedoms, development of the new Civil Code has given us the chance to thoroughly review and modify our rules, with respect for human rights as the guiding principle. In fact, one of its preliminary provisions specifies that "the Civil Code of Québec, in harmony with the Charter of Human Rights and Freedoms and the general principles of law, governs persons, relations between persons, and property" (*Statutes of Québec, 1991* , ch. 64, preliminary provision).

This new orientation led legislators to adopt rules based on the search for a "just balance" in the relationships between parties. Legislative sanctioning of the abusive exercise of rights and provisions declaring abusive, illegible, or incomprehensible clauses in a contract null and void are but a few examples. This redrafted law, with its new rules adapted to modern values and realities, introduced a breath of fresh air in the legal community and prompted jurists to keep up to date with the new developments.

Improvements on the legislative side were accompanied by a call for professional improvement among the judiciary. Indeed, the members of the judiciary themselves requested adequate training to help prepare them for the new system of law. As the honorable Gérard Fauteux wrote: "Those who appear before the Court expect the magistrate, who must rule on their claims, to be well–informed as to the rules of law. The ignorance or even the hesitations of the magistrate will undermine the confidence they have and are entitled to have in the administration of justice" (Fauteux 1980, p. 47, translation) .

To these words we must add the comments made by the minister of justice who presided over the adoption of the Civil Code of Québec: "It is now with the help of jurisprudence and legal doctrine, together with an understanding of the general principles of our laws, that we will be able to interpret the new Civil Code of Québec, in line with the values of liberty and democracy which are dear to our society" (*Commentaires du ministre de la justice* 1993, vol. 1, cover note).

Training for judges

In response to the legal profession's call for training, the chief justices of Québec agreed to prepare a professional improvement course on the reform of the civil code. This was a tall order. The new Civil Code was to come into force January 1, 1994, giving judges and other legal practitioners just one year—from the adoption of the implementation law to the projected date of the new Civil Code's coming into force—to update their knowledge.

For the judiciary, this meant:

Developing course content.

Selecting and assigning teachers.

Drafting teaching material.

Preparing course timetables.

Assigning court duties (taking into account scheduling difficulties due to training periods).

Overseeing the logistics of bringing together, at the lowest possible cost, judges from all over Québec.

The elaboration of course content, selection and assignment of certified teachers, and drafting of teaching material were carried out in collaboration with the Barreau du Québec (Québec Bar). It was the bar's duty, as the professional corporation responsible for thousands of practicing lawyers and attorneys across Québec, to make sure its members received adequate training. It was aided in this by the valuable expertise it had gained during the parliamentary examination of the reform of the civil code, specifically by reports on various aspects of the reform prepared for the parliamentary committee by several of its members.

The preparation of course timetables, assignment of judges to training courses, and handling of logistics were done by a committee of the chief justices of the courts concerned.

The course was divided into sixteen three-hour sessions and was given in both the city of Québec and Montréal over a period of eight days, between August 30 and September 24, 1993. Four additional sessions were given in October and November, in Hull and Laval, to coincide with annual judicial conferences, one of which was for judges appointed by the federal government (Court of Appeal and Superior Court) and the other for judges appointed by the provincial government (Court of Québec and municipal courts).

Of the 500 judges on duty in Québec, some 230 took the sixty-hour course that was offered. A few judges followed the courses offered by the Québec Bar because they needed to be available to maintain judicial services when required in their region.

The exchanges were fruitful. Judges taking the courses expressed their satisfaction and eagerness to meet the challenges related to the coming into force of the Civil Code of Québec.

Access to Justice

During the months preceding the adoption of the Civil Code of Québec, many people voiced their concerns that a piece of legislation of such magnitude would flood the courts with proceedings aimed at clarifying interpretations of the new texts. The fear was that the court system would be clogged, to the detriment of legal stability.

Others believed new rights had been introduced in the new Civil Code that would inevitably lead to proceedings before the courts, which meant, in their eyes, an excessive focus on litigation.

In answer to the questions raised, then—Minister of Justice Gil Rémillard defended the reform by saying that the new Civil Code had to recognize the fundamental right of citizens to go before the courts—to have access to justice. He also pointed out that several new mechanisms had been put into place aimed at reducing the number of proceedings, such as the recognition of the legal guardianship of parents for their minor children or of the mandate given in the case of incapacity (*Revue justice* 1991).

Also contributing to the citizens' access to justice were such alternative dispute resolution measures as arbitration agreements. These allow parties to a dispute to call upon an arbitrator of their choice to settle a dispute arising out of the performance of a contract—instead of going to court.

With regard to hypothecation rights, several mechanisms were introduced to allow parties—in lieu of having properties sold by judicial authority—to exercise their rights either by taking possession of properties to administer them or by taking properties in payment of debts; in addition, debtors were allowed more time to pay off debts.

Despite their value in freeing up the court system, such alternative methods raised concern among the judiciary. Judges feared they would become entangled in theoretical debates—and be compromised by conflicting interpretations of the new law—and that this could undermine legal stability. To forestall this problem, a process enabling the exchange of rulings on the new Civil Code was put in place. Court research services were asked to ensure that every ruling pertaining to the code be made available to the other judges in order to avoid, as much as possible, contradictory rulings on similar points of law.

Also, every judge received the reports on the comments made by the minister of justice before the parliamentary committee at the time the various articles of the Civil Code of Québec and its implementation law were being scrutinized. This was a valuable reference that shed light on the interpretation that was to be given to the new laws. Indeed, a recent ruling of the Québec Superior Court (*Beaudoin v La Presse and others*, Québec Superior Court, March 11, 1994) confirmed the value of these legal commentaries in promoting greater legal cohesiveness.

Conclusion

In conclusion, the role of the judge is not limited to executing the letter of the law; rather, he or she must take into account the spirit of the law:break

The Civil Code is a structured and multi-layered legislative entity. It does not cover everything; its role is to establish rules that may be adapted to the various social and human situations and to integrate scientific and social developments. The Code, [or] any other statute for that matter, will never replace the use of reason in interpreting the texts and exploring new avenues. . . . These rules must be seen as the pores enabling the Code to breathe, to gain force and adapt itself through the interpretation that will be [made] of it, in accordance with the evolution of our society. (*Commentaires du ministry de la justice* 1993, vol. 1, p. 8, translation).

Only through such use of the new Civil Code will the duties of the judge take on their full meaning. And when we are asked to render a judgment, we would also be well advised to remember the words of Montesquieu, in his work *L'Esprit des lois*: "Ce n'est pas le corps des lois que je cherche, mais leur âme" (It is not the body of the laws I am seeking, but their soul).

This said, I am one who believes that justice is human and will remain so as long as justice is rendered by human beings.

The Legal Aid System

To ensure the proper management of the legal aid system, the former minister of justice for Québec, Gil Rémillard, undertook an examination of various aspects of the system. After a series of consultations with and proposals from interested persons and working groups, he formed a parliamentary committee on legal aid to identify problems with application of the system and to come up with solutions, taking into account the current public finance problems in Québec.

In June 1993 Mr. Rémillard tabled a consultation document before the Assemblée nationale (Québec National Assembly) entitled "L'Aide juridique au Québec: Une question de choix, une question de moyens" (Legal aid in Québec: a matter of choice, a matter of means). The ensuing discussion of the legal aid system is drawn from that report.

Why the Legal Aid System was Created

In exercising or defending his rights a citizen incurs various expenses, including the professional fees of lawyers or notaries and fees related to the administration of justice. These costs are often unforeseeable and can be high. Thus, many people, because of limited financial resources, do not have access to justice even though various laws clearly establish their rights and the remedies they may use to ensure the recognition of these rights.

To correct this situation the government created a legal aid system in 1972. The system was tailored to the needs of the society of the time and to the level of resources then available to the state. Since 1972, however, there have been changes in both the needs of the clients of the justice system and the resources and means the government makes available to help them gain access to justice.

Generally speaking, people today are increasingly turning to the justice system. This can be explained in part by changes in the substance of the laws in various fields, such as human rights and freedoms and divorce; by improvements in the information and support provided to people with regard to their rights; and by an increase in the number of legal remedies made available to them. Furthermore, in certain fields the way in which claims are made or rights are defended has changed. Simpler procedures have been implemented, particularly for hearings before administrative tribunals or agencies, and mediation services have been brought in to encourage people to settle disputes out of court. Similarly, changes in certain social programs in recent years have increased clients' access to the resources of the justice system.

In summary, during the past few years laws have been amended and alterations have been made to existing legal structures and programs to take into account changes in the economic and social conditions of the population. Since the legal aid system had not undergone any major modifications since its implementation, the minister of justice considered it appropriate to review the main aspects of the system to adapt it to the current reality.

History of the Legal Aid System

In the early 1950s the first measures were taken to provide legal aid to the economically disadvantaged. A legal assistance program was set up in Québec and Montréal with the participation of the Québec Bar, which provided free professional legal services to the underprivileged. For several years, the bar defrayed the legal costs and other fees inherent in the system. In 1967 the government began to pay subsidies to allow a gradual broadening of the range of services offered. An additional step was taken in 1971, when the Québec Bar and the Ministry of Justice signed agreements whereby the bar granted the economically underprivileged free legal assistance in civil matters, but asked for remuneration from the ministry for providing legal assistance in criminal and penal matters.

Thus began the embryonic phase of a provincewide legal assistance system. Also, in the early 1970s community legal clinics appeared in four major cities in Québec, arising out of people's wish to take charge of their affairs and out of interest on the part of members of the legal profession and the law faculties.

The increase in demand for services and the shortage of human and financial resources quickly showed that an organization based largely on private initiative and volunteer work was not sufficient. Hence, in 1972 the government decided to set up a public system of legal aid, setting out the objectives and terms that must underlie a system for it to be viable:

The economically underprivileged must have access to lawyers specialized in what has recently been designated by the term "poverty law" (in French, *droit de pauvreté*).

A valid legal aid system is necessarily the fruit of the combined efforts of the various sectors involved. All segments—the clientele, legal professionals, law faculties, and government—must pool their efforts to ensure that the proposed system will fulfill the needs of those it is intended to serve.

The cost of the system—although this does not constitute the only criterion to be considered in assessing the value of a legal aid program—must not exceed the performance or the productivity of any other system comparable to it in terms of efficiency.

A case assigned under the Legal Aid Act must receive as much care and attention from a lawyer as would a case handled in private practice.

A valid legal aid system must aim to establish a relationship and a climate of trust between the economically underprivileged groups and served by the professional groups called upon to work in the system. Each group must gain an awareness of the goals of the system, so as to foster both an understanding of, and progress in, legal service to the economically underprivileged (*Journal des débats de l'Assemblée nationale du Québec* 1972, p. 2083, translation).

On July 7, 1972, the Québec National Assembly passed the Legal Aid Act, which laid the foundation for the current legal aid program. Since then, various changes have been made in the legal aid system, a number of which have affected the eligibility criteria. (The last such change was made in July 1985 and applied only to families.)

During the summer of 1989, since the system had not undergone any major modifications since its initiation, the minister of justice assigned a task force with the responsibility of reviewing the Québec legal aid system to identify its strengths and weaknesses and to suggest improvements. In August 1991 this task force submitted a report to the minister of justice that made some thirty recommendations. During the deliberations of the Summit on Justice in February 1992, the minister of justice filed a proposal setting out the changes that could be made in the legal aid system to improve access to justice.

The Legal Aid Act defines legal aid as "every benefit granted . . . to an economically underprivileged person to facilitate access to the courts, [to the] professional services of an advocate or a notary, and [to] necessary information concerning his rights and obligations" (Legal Aid Act, C.A.-14. S. 1. C.).

The main advantage of this act is the exemption of recipients from the payment of judicial fees and extra-judicial fees for a lawyer or a notary, court costs (registry fees, court documents duties, costs of transcripts), and fees for bailiffs and stenographers, as well as experts. However, a recipient who loses his case is not exempted from a condemnation to costs in favor of the adverse party, nor from the reimbursement of court costs. In addition, the recipient may be called on to reimburse the fees attached to the legal aid provided if he or she receives property or a right of a pecuniary nature in the intervening time.

In addition to these direct advantages, recipients may also benefit from the actions of the Commission des services juridiques (Legal Services Commission), which is charged with fostering the creation of information programs to inform the economically underprivileged about their rights and obligations.

Legal aid covers most areas of criminal, civil, administrative, and notarial law. However, claims for damages and offenses against laws or by-laws respecting parking are not covered by the legal aid system.

Eligibility Criteria

To receive legal aid, an applicant must, first, fulfill economic eligibility criteria set by regulations,¹ and second, establish the probable existence of a right to or need of legal services. The applicant may be exempted from justifying economic eligibility if he receives certain benefits under the Act Respecting Income Security, or if he is a member of a family that receives such benefits. In addition, at the discretion of the community legal center, the applicant may under certain circumstances qualify even if his income exceeds the established guidelines.

An applicant must submit an application at the legal aid bureau or legal center nearest his residence, providing information necessary to establish the probable existence of a right to or need of legal services and to determine economic eligibility. The general manager makes a decision on the eligibility of the applicant and issues a certificate of qualification or notifies the applicant of a refusal, continue

as the case may be. The applicant may then apply to have the decision reviewed by committee. In the event of such an application, the general manager must issue a temporary certificate, if circumstances require.

Any interested party may dispute a person's right to legal aid by filing an application with the general manager. Such a dispute may relate only to the financial eligibility of an economically underprivileged person; it must not relate to the probable existence of a right exercised by the recipient. The decision of the review committee may not be appealed.

The regulation on qualification for legal aid states that a person's eligibility must be determined taking into account the available or realizable property of such person, his state of indebtedness, the nature of services applied for, the factors and circumstances of the proceedings and their potential consequences for the litigant, and his vital needs or those of his dependents. However, in figuring an applicant's assets, family, school, and youth allowances are excluded from the gross weekly income.

In addition, a person whose weekly gross income exceeds the income levels established by regulation may, in exceptional cases, be determined to qualify for legal aid if the general manager decides that a refusal of legal aid would constitute a grave injustice or cause an irreparable wrong. Before carrying out his decision, the general manager must obtain the agreement of the administrative committee. In case of emergency, he must issue a temporary certificate. The decision of the administrative committee must be transmitted to the Legal Services Commission.

According to criteria established in 1973, persons who received social aid, who earned the minimum wage, or who depended solely on old age security benefits qualified for legal aid. Moreover, the low-income thresholds established by Statistics Canada for an urban area of 500,000 or more inhabitants were, generally speaking, about the same as the eligibility thresholds for legal aid. Nevertheless, it should be noted that the eligibility threshold for a single person was higher than the low-income threshold established by Statistics Canada, whereas the eligibility thresholds applying to other categories of families were for the most part lower.

Since 1973 eligibility thresholds have increased by proportions ranging from 88 percent, for couples with five dependents, to 147 percent, for single-parent families with one dependent (table 18.1). Overall, the increases in

the thresholds applicable to single persons and to single-parent families were higher than the increases in the thresholds for couples with children.

The eligibility thresholds in effect in 1973 did not follow the inflation-induced increases in the consumer price index, nor did they follow the increases registered for other transfer programs. There is now a considerable gap between the eligibility thresholds for legal aid and the low-income thresholds of Statistics Canada.

The use of Statistics Canada's low-income thresholds to measure poverty has several drawbacks. Indeed, the methodology used does not take into account the different levels and trends in the cost of living in different regions. Nor does it take into account the social measures applied by governments to assist the underprivileged, particularly in housing, or the tax regulations that are specific to certain provinces. For this reason, for the past several years the Québec government has not used the low-income thresholds to measure poverty rates. (Note that in comparison with the other Canadian provinces, Québec's scale of economic eligibility for the legal aid system is one of the lowest in Canada.)

A comparison of the legal aid systems in the Canadian provinces also shows that in most systems, the benefits vary because different rules apply. In some systems, the economic eligibility thresholds indicate a maximum income beyond which no benefits may be granted. And, although in most cases recipients are granted services free of charge, a qualified applicant may receive no aid or only partial aid if, for example, the person responsible for qualification judges that the cost of the service is low and does not endanger the financial situation of the applicant. In other systems, a person may qualify for legal aid even if his income is higher than the established eligibility threshold. Generally, certain managers hold discretionary power that they may exercise if the high costs of a continue

TABLE 18.1
Legal aid eligibility thresholds, Québec, 1973 and 1993
(Canadian dollars)

<i>Family size</i>	<i>Gross weekly income</i>		<i>Change (percent)</i>
	<i>1973</i>	<i>1993</i>	
Single person	70	170	143
Single person with one dependent	85	210	147
Single person with two dependents	95	230	142
Single person with three dependents	110	245	123
Single person with four dependents	120	260	117
Single person with five dependents	135	280	107
Each additional person	10	20	100
Couple	95	210	121
Couple with one dependent	110	230	109
Couple with two dependents	120	245	104
Couple with three dependents	135	260	93
Couple with four dependents	145	280	93
Couple with five dependents	160	300	88

Each additional person 10 20 100

Source: Ministry of Justice, Québec.

case are likely to threaten the financial situation of the applicant.

In Québec's legal aid system, applicants whose incomes are higher than the established thresholds can be granted legal aid under certain circumstances. Regional managers have discretion in such cases, governed by the precedent set by the legal aid review committee. The reason for this discretion is to avoid having a person whose income is higher than the eligibility thresholds renounce his rights because the expense of obtaining the services of a lawyer or a notary would compromise his financial situation.

Proposed Solutions

A number of solutions have been proposed to the problems of establishing eligibility and managing the benefits of legal aid.

Establishing criteria . In establishing eligibility criteria, the main considerations are the financial situation of the applicant, the reference period, and the correction factors used to adjust the criteria according to the applicant's family situation. To these must be added a method of reviewing the eligibility thresholds.

The task force on the accessibility of justice has proposed that the income level used to assess the financial situation of an applicant be derived by subtracting not only family allowances, as is currently done, but also the income tax credit for children, allowances for young children, birth allowances, reimbursements of property taxes, and the like. It has also been proposed that the provincial sales tax credit, amounts paid as alimony claims, and child care expenses be excluded from the income amount. (See the formula for determining legal aid eligibility, box 18.1.)

As the reference period for assessing the financial situation of an applicant, the task force recommended a one-year period.

To adjust eligibility criteria according to the family situation of the applicant, some task force members suggested using the scale of financial needs established under the income security program. Furthermore, it recommended that a grid be established according to the number of persons in a family rather than the number of adults and the number of children. Others also suggested setting eligibility thresholds according to the low-income thresholds established for various family sizes by Statistics Canada.

As to the review of eligibility criteria, all the proposals received in preparation for the Summit on Justice recommended automatic annual indexation of eligibility thresholds, which could be based on the fluctuations in the consumer price index. The government has set an objective of harmonizing the review procedures for the different transfer programs. Thus, the annual review of the eligibility thresholds for legal aid must be done taking into account not only the fluctuations of indicators, but also the budgetary availability of government funds.

Defining the eligible clientele . During the past few years, several scenarios have been presented for qualifying applicants for legal aid, ranging from maintaining the current situation to accepting persons of average income. In between are scenarios that would accept persons whose incomes are so low the government does not require them to pay income tax or persons whose incomes are below the low-income levels defined by Statistics Canada.

Determining the scope of benefits . In deciding benefits to be granted, the options are, on the one hand, to maintain free services for all qualified applicants, and on the other hand, to maintain free services for the segment

of the clientele with the lowest incomes, while gradually scaling down the benefits granted to other eligible clientele.

Two proposals have been submitted for the gradual scaling down of benefits. The first, put forward by the task force on the accessibility of justice, aims to reduce the continue

BOX 18.1	
Formula for determining legal aid eligibility and maximum contribution of a recipient	
Income considered for qualification purposes.	
<i>Less:</i>	Expenses considered for qualification purposes.
<i>Plus:</i>	Fifteen percent of the net value of assets exceeding the income security standards in this regard.
<i>Equals:</i>	Net income for qualification purposes.
<i>Less:</i>	Total of the amounts giving entitlement to personal income tax credits, increased by 23 percent.
<i>Equals:</i>	Net income for purposes of evaluating the contribution.
<i>Multiplied by:</i>	Contribution rate (7.5 percent).
<i>Equals:</i>	Maximum value of the recipient's contribution to legal aid.

benefits granted according to the income of the recipient, either by applying a totally proportional method or by using levels. This proposal implies that beneficiaries whose incomes are sufficiently high would repay the state for all services received. The second proposal, presented by the minister of justice at the Summit on Justice, was that the beneficiary would defray all costs up to and including his capacity to pay. (See box 18.1 for an explanation of how a recipient's capacity to pay could be assessed.)

Managing legal aid eligibility . An examination of the eligibility management methods practiced in the other provinces shows that eligibility for legal aid is generally assessed in legal aid bureaus.

Among the provinces in which legal services are provided both by salaried lawyers and by lawyers in private practice, Québec is the only one in which salaried lawyers are assigned the task of issuing certificates of qualification. In the other provinces, certificates of qualification are not issued by lawyers who will later be called on to represent legal aid recipients.

Moreover, during the workshops leading up to the Summit on Justice, participants mentioned that in many cases, the demonstration of the probable existence of a right is superfluous. In other legal aid systems, legislation has provided that the probable existence of a right does not have to be demonstrated, particularly when the applicant faces prosecution by the attorney general. The same applies when a person has to defend himself against a lawsuit. It thus appears that in many cases, only the economic situation of a person might have to be assessed to determine eligibility for legal aid, and hence it would no longer be necessary for a salaried lawyer to assess the qualification of an applicant. Rather, this task could be done by office staff. According to estimates, annual savings of about \$1.5 million could thus be made.² This way of operating is currently being tested within the network.

Controlling statements of income . The report of the task force on the accessibility of justice also recommended that the qualification scale be expressed on an annual basis. This recommendation received the unanimous support of workshop participants at the Summit on Justice. Currently, the qualification scale is established on a weekly basis. The legal aid bureaus obtain applicants' recent weekly statements of income and try to obtain a copy of the pay-slip. Working on an annual basis, however, would permit easier verification of an applicant's statement of income, since the vast majority of Québécois produce income tax returns. An applicant for legal aid would be required to produce his income tax return, thus allowing the system to move toward greater social equity. However, it has been suggested that if the financial situation of an applicant does not correspond to the situation reflected on his last income tax return, he could be allowed to make a declaration estimating his annual income.

Financing and Resources

To meet the legal aid needs of the economically underprivileged, the Legal Aid Act provides for the establishment of legal centers at the regional and local levels, supervised by the Legal Services Commission. One of the objectives of the structure of the legal aid system in Québec is to prevent employees of the network from having to defend the interests of their client against the state, which is also their direct employer.

Services currently offered . Beginning in 1973, notarial, criminal, civil, and administrative services have constituted the coverage available to legal aid recipients. For the 199192 fiscal year, criminal and penal law cases made up 42.4 percent of the case load, and civil and matrimonial cases 28.1 percent and 27.0 percent, respectively. Notarial services represented 2.5 percent of cases.

About ten types of cases make up 43.5 percent of all cases granted legal aid. On the hypothesis that the aver. age cost of legal fees paid to lawyers in private practice is representative of the average cost applicable to all cases admitted, it can be estimated that their cost amounts to \$31.2 million, or 43.6 percent of the total cost of the services provided by lawyers.

In Québec, 99 percent of the legal aid system is funded by two levels of government: the federal government and provincial governments. (The federal government participates in the funding of legal aid costs in all Canadian provinces.) The federal government helps fund legal aid in accordance with agreements made between the departments of justice and health and social services. In fiscal 199192 the federal government paid less than half of the costs and the provincial governments nearly all of the remainder. Only a minute portion of the legal aid budget (less than 1 percent) came from other sources such as recipients' payment for services or interest on money held by the Legal Services Commission.

Overall, the federal government's contribution in criminal and civil cases in fiscal 199192 made up 44 percent of the total. The consequences of the freeze on the federal government's contribution in penal law have not yet been assessed.

Community legal centers must send their budgetary forecasts to the Commission before September 15 of each year. The Commission must, in turn, submit its consolidated forecast to the minister of justice before

November 1. The governmental budgetary process then follows its normal course.

Since the Commission is not a budgetary organization, its budget comes under a separate heading in the list of appropriations. Once the appropriations have been made public, the Commission divides them among the regional corporations, retaining the amounts it requires for its own purposes. The corporations may not run up a deficit of their operating costs, nor may they borrow money or retain any surplus arising from operating costs or revenues received.

The government may decide to increase or reduce the appropriations applied for according to justifications presented and its discretionary powers, which, however, are limited by the obligation to provide services under the Legal Aid Act.

Tariff of services . The Legal Aid Act requires the minister of justice to negotiate, with the bodies empowered to represent notaries, lawyers, bailiffs, and stenographers, a schedule of fees applicable under the Act, together with a dispute settlement procedure and a list of matters eligible for the procedure. The government may make regulations to ratify such agreements or, failing agreement between the parties, to establish new tariffs. The government also grants mandates to negotiate the conditions of employment of lawyers and other legal aid employees.

The first version of the Legal Aid Act, tabled in 1972, allowed legal aid to be supplied by private practitioners in exceptional circumstances, stipulating that their fees could not exceed 60 percent of the normal tariff. The current Act sets no ceiling on fees. The tariff currently applicable to services provided by notaries has been in force since 1977. The most recent agreement regarding services offered by lawyers was signed in June 1990.

Two main models are used to establish the tariff of fees applicable to legal aid services provided by lawyers and notaries in private practice. Under the first model, fees for services are set according to an hourly rate determined by regulation. Such a regulation often sets the maximum number of hours that can be paid for any one case. This model is used less and less frequently. The example of Ontario, in this respect, is striking, since the tariff of fees, originally based on an hourly rate, now sets a fixed rate according to the type of case. The tariff is structured around three rates that are applied based on specific legal situations and that vary according to the experience of the lawyer.

Under the second model, currently in use in Quebec, the tariff is established on the basis of fixed rates for each stage of proceedings (first appearance, bail hearing, preliminary inquiry, trial). A study carried out by the Department of Justice on delays in the criminal justice system revealed that several judges, attorney general's prosecutors, defense lawyers, and court staff considered that the criminal law tariff encouraged certain defense lawyers to go through as many procedural stages as possible in order to increase their revenues.

Legal aid network . In March 1993 the legal aid net. work in Québec (box 18.2) was dispensing services in 115 cities and towns in Québec. It had 148 offices, including 111 open on a full-time and 37 on a part-time basis. Services were provided by 969 employees, including 548 professional and support staff, 394 lawyers with an average experience of 15.3 years, and 27 trainees and students. The Legal Services Commission alone employed 56 staff, of whom 12 were lawyers.

In addition to salaried staff, eligible members of the population could rely on lawyers and notaries in private practice. As of the end of March 1992, some 2,644 of the 14,402 lawyer members of the Québec Bar had had one or more statements of fees paid by the Commission. Among notaries, 1,072 of the 3,486 members of the *Chambre des notaires* (Chamber of Notaries) had been paid fees by the Commission.

Lawyers and notaries in private practice have an important role to play within the legal aid system, since under the current provisions of the Legal Aid Act cases must be assigned to them where expressly requested by a legal aid recipient and where the lawyer or notary agrees to supply professional services in accordance with the applicable regulations. (The first draft version of the Act stipulated that legal aid was to be provided, as a rule, by lawyers and notaries employed by local legal centers, and only in exceptional cases by private practitioners.) The current Act sets out the situations in which a mandate must necessarily be entrusted to a private practitioner—for example, when a regional corporation lacks sufficient staff, when the nature of the legal question, dispute, case, or proceedings requires specific skills, or when a conflict of interest might otherwise arise.

All professional services in the notarial field are provided by a notary in private practice since no notaries are presently employed directly by the legal aid network.

Applications for legal aid . During fiscal 199192, 328,449 applications for legal aid were recorded, of which 298,783 were accepted, an acceptance rate of 91 percent. Among the applications accepted, 59.7 percent were from persons living alone, 22.3 percent from single-parent families, 10.8 percent from couples with children, and 7.5 percent from couples without children.

The applications were referred to lawyers in 97.5 percent of cases and to notaries in 2.5 percent of cases. Amongcontinue

the cases dealt with by lawyers, 56.5 percent concerned civil law problems and 43.5 percent related to criminal and penal law. Overall, 57.2 percent of applications were forwarded to staff lawyers and 42.8 percent to lawyers in private practice.

Cost of legal aid . Total legal aid expenses during fiscal 199192 amounted to \$105.6 million. Of that total, \$53.4 million was paid out to salaried employees in salaries and fringe benefits, and \$30.4 million was paid out in fees to lawyers and notaries in private practice. The judicial fees paid by the legal aid network for recipients represented by staff or private practice lawyers amount to \$8.3 million. Other major expenses, including rental costs, taxes, and permits, reached \$6.7 million. These amounts do not include the court costs that legal aid recipients are excused from paying: judicial fees, the duties collected by registrars, and transcription costs.

On average, taking all expenses into account, each accepted application costs \$353. One-quarter of all cases dealt with cost less than \$100 each, and in two-thirds of all cases less than \$300 is paid out in fees. In almost 5 percent of cases, however, fees reach \$800 or more.break

BOX 18.2	
The legal aid network in Québec	Québec Chamber of Notaries to develop research and technical assistance programs for legal aid and to establish legal aid centers.
The legal aid network in Québec comprises the Commission des services juridiques, community legal aid centers, and legal aid clinics.	
Commission des services juridiques	Community legal aid centers
The Commission des services juridiques (Legal Services Commission) is a corporation within the meaning of the Civil Code of Lower Canada and has its head office in Montréal. The board of directors of the Commission has twelve members who, because of their activities, contribute to the study and solution of the legal problems of the underprivileged. They are appointed by the government in consultation with	On the basis of administrative divisions and judicial districts, the Legal Services Commission establishes community legal centers to provide legal aid to the people in these jurisdictions. The Commission has created eleven regional centers across Québec. Every center is a corporation within the meaning of the Civil Code of Lower Canada, and each center's name includes the expression "community legal center" and the name

these groups. The government appoints a chair, who must be a lawyer or a judge, and a vice-chair, who must be a lawyer, from among the members. The board of directors also includes the deputy minister of justice of his delegate and the deputy minister of manpower, income security, and vocational training or his delegate, who are members of the board but do not have voting rights.

The role of the Commission is to see that legal aid is provided to economically underprivileged persons. The Legal Aid Act sets out the Commission's other functions. The Commission has the administrative function of establishing and developing community legal centers and enabling them to provide legal aid. The Commission also finances the centers, encourages the creations of information programs to inform economically underprivileged persons of their rights and obligations, promotes studies and inquiries and the gathering of statistics to plan the development of the legal aid system and, finally, cooperates with universities and law faculties, the Québec Bar, and the

of the region. The centers are administered by boards of directors appointed by the Commission. Four board members must be lawyers or notaries.

To the extent resources permit, legal centers establish legal aid offices and hire full-time lawyers and other necessary staff.

Legal aid clinics

Another function of the community legal center is to recommend to the Legal Services Commission the creation of "local legal aid corporations" to provide legal aid in the center's territory when the needs of its constituency can be met in this way and where a local corporation is able to provide valid legal services. These legal aid clinics are administered by a board of directors, under the supervision of a director who is a member of the Québec Bar. The legal aid network has two local corporations, which were established before, and subsequently integrated into, the network.

Financial resources for legal aid . To illustrate the extent of the financial resources made available for legal aid in Québec, it is useful to compare the data for Québec with those for the other Canadian provinces.

In fiscal 1991/92, \$514.2 million was spent on legal aid in Canada, with expenses in Québec and Ontario reaching \$105.3 million and \$267.7 million, respectively. In absolute terms, Ontario therefore spent 2.5 times more on legal aid than Québec; when the population of each province is taken into account, however, expenses amounted to \$26.85 per person in Ontario as against \$15.32 in Québec, with Ontario thus spending only 1.8 times more than Québec. The average rate of expense per person for all Canadian provinces is \$13.72, below the rate in Québec.

Turning to the relative effort that legal aid expenses represent when compared with an indicator of collective wealth such as GDP, Québec invests \$68 for each \$10,000 of its gross domestic product. This is less than the \$99 invested in Ontario, but above the rate in the other provinces (roughly \$58). Over the past ten years this ratio—legal aid expenditures to GDP—grew from \$56 to \$68 in Québec, from \$43 to \$99 in Ontario, and from \$28 to \$58 in the other provinces, which thus gained ground during the period.

The rate of use of legal aid is 44 cases per 1,000 inhabitants in Québec, 26 per 1,000 in Ontario, and 20 per 1,000 in the other provinces. One reason for the higher rate of use in Québec is the greater range of services covered by the Québec legal aid system, which as noted, is one of the most extensive in Canada. It should also be noted that the average cost paid out per accepted application in Québec is well below that paid out in Ontario and the other provinces. Expenses per accepted application were \$352.51 in Québec, compared with \$1,040.38 in Ontario and \$682.56 in the other provinces.

Recent developments in financing for legal aid . The resources available for legal aid depend on the financial capacity of our governments. Since the publication of the consultation document by former Minister Gil Rémillard, the situation has deteriorated: economic growth, revenues from certain income and other taxes (corporate tax and tobacco tax), and the level of federal transfer payments have all been lower than expected.

The government, in an increasingly difficult financial position, has implemented stringent measures to bring the deficit down to an acceptable level in fiscal 1993/94. For future years, the 1993/94 budget proposes that a tight hold be kept on expenditure, with the objective of limiting increases in Québec program expenditures to 1 percent in coming years.

Reduced revenues and rising expenditures mean that, even in a period of economic expansion such as that currently anticipated, a deficit will be recorded each year, forcing the government to take steps to maintain or improve its financial equilibrium. Not only have revenue shortfalls, expenditures, the budget deficit, and the national debt reached unreasonably high levels, but the situation is liable to deteriorate, making solutions even harder to find.

Over the past few years, expenditures on the legal aid program have increased at a rate 50 percent higher than the rate of increase of other government expenditures (an increase of 8.6 percent each year for the past eight years compared with a rate of 5.8 percent for expenditures as a whole).

It therefore seems likely that the evolution of public finances in Québec will influence the government's stance on the direction the reform of legal aid financing needs to take: zero-cost reform or cost-reduction reform.

Conclusion

The Québec legal aid system has the lowest eligibility criteria in Canada but, at the same time, the widest coverage of services. The resources made available for legal aid in Québec, as a share of GDP, already exceed those made available, on average, in all Canadian provinces, except Ontario. And the current state of public finances precludes the injection of additional money by the government.

Thus, the improvement of legal aid conditions will involve either the allocation of financial resources in addition to those received from the government, or a reexamination of certain aspects of the system such as service coverage, the range of benefits granted, and the way the system is organized and managed. A key challenge will be determining the extent to which eligibility for legal aid should be modified as this will, in turn, determine changes to financing and other aspects of the system.

The elements of reform discussed in this section should enable interested parties to select changes to the legal aid system that will ensure access to justice for the underprivileged in society while retaining a sense of fairness for the other citizens of Québec.

Judicial Reform and Technology

The judicial system and the administration of justice in Québec are conditioned to a large extent by constitutional context; indeed, the Canadian Constitution provides for an intricate sharing of responsibilities between the federal

and provincial levels of government.

The Constitutional Act of 1867 confers on provincial legislatures exclusive jurisdiction in passing laws on matters having to do with the "administration of justice in the provinces, including the constitution, maintenance, and organization of provincial courts, [for both] civil and criminal jurisdictions, including procedure in civil matters in those courts."

Organization of the Judicial System

The Constitution grants the Canadian Parliament the power to legislate in matters of criminal law, except in the constitution of courts of criminal jurisdiction, but including criminal procedures. The Constitution gives Parliament the power to create a general court of appeal for Canada and to establish other courts with a view to providing better enforcement of Canadian federal laws.

The organization of Québec's courts generally comes under the jurisdiction of the Québec parliament. Nonetheless, the appointment of superior court judges is a prerogative of the federal government. The Supreme Court of Canada, created by the federal Parliament, heads the hierarchy of Québec courts.

In exercising its jurisdiction, the Québec parliament adopted the Courts of Justice Act, which establishes the courts operating in Québec in both civil and criminal matters. The major courts are the Court of Québec, the Superior Court, and the Court of Appeal.

The minister of justice of Québec administers the department and determines its major orientation. He reports to the Québec National Assembly on the activities of the department and submits for approval to the cabinet draft reports and orders-in-council that concern the administration of justice. The cabinet tables in the Québec National Assembly the bills that arise from government policy in the field of justice, and once these bills become law, the minister of justice ensures that they are implemented.

The justice minister chairs the government's legislative committee, which is made up of ministers and responsible mainly for examining draft legislation to ensure its legal coherence and check whether it adequately reflects the decisions made by the cabinet. The minister of justice represents Québec at the various interprovincial and federal-provincial conferences for ministers in charge of the administration of justice in Québec.

At the administrative level, the department is under the direction of the deputy minister of justice, who is automatically the assistant attorney general. As the top civil servant of the department, he directs and coordinates the activities of six general directorates, including the Direction générale des services judiciaires (General Directorate of Judicial Services). The deputy minister sees to it that the mandate and objectives of the department are carried out; presides over the Conseil de direction (Management Council), which groups together the associate deputy ministers and certain other administrators from the department and acts as liaison with the judges and the various agencies whose authority stems from the department of justice.

The General Directorate of Judicial Services has the mandate of administering the resources necessary for operating the courts while preserving the independence of the judiciary. In addition, it ensures the full exercise of powers of the officers of justice and the public officers. It also develops the services prescribed by law and provides them to the public. And it takes part in the judicial organization by providing the administrative expertise required by the department and judicial authorities.

In civil matters there is appeal to the Supreme Court of Canada of any judgment handed down by the Québec Court of Appeal where the Supreme Court is of the opinion, given the importance of the matter for the public, the importance of questions of law and fact it raises, or the nature or importance of the case in any other regard, that

further study is needed.

In criminal matters appeal to the Supreme Court of Canada of a decision by the Court of Appeal is possible only on a question of law or jurisdiction, and only with permission.

The Department of Justice of Québec is responsible for administering justice in Québec, with its minister also acting *ex officio* as attorney general, government juriconsult, and registrar of Québec. The administrative structure of the Department of Justice clearly reflects its diverse responsibilities.

The Changing Legal Context

In recent years the social, legislative, and economic context in which the Department of Justice of Québec executes its responsibilities has changed appreciably.

The adoption in 1975 of the Québec Charter of Human Rights and Freedoms, and the inclusion in 1982 of a Canadian Charter of Rights and Freedoms in the Canadian Constitution, formally confirmed a number of legal rights, which have undeniably altered our legal system. These include the right of the accused to a full reply and defense, the right of the accused to a public, impartial hearing of his case by an independent court, and the right of all accused persons to be judged within a reasonable time.

At the same time as Québécois were becoming fully aware of their rights and more and more frequently approaching the courts to have their rights upheld, continue

budgetary considerations meant that the financial resources available to the Department of Justice of Québec did not keep pace with the number of cases submitted to the courts. Under the circumstances, the legal system had to develop unprecedented efficiency.

Support for Courts of Law

Québec is vast. The Department of Justice of Québec ensures that legal services are offered to all Québécois subject to trial in the fifty–eight courthouses across the province. The department also provides Québec courts with administrative and professional support. More than 455 judges work in the Court of Québec, the Superior Court, and the Court of Appeal.

The bench is autonomous, separate from the legislative and executive branches, and everything is done to maintain this autonomy. Judges, who are appointed by the federal or provincial governments, depending on the court in question, are chosen from members of the Québec Bar who have practiced law for at least ten years and are deemed qualified to act as judges. The appointment is a federal or a provincial one.

Support activities in courts entail a considerable amount of work: the opening of roughly 750,000 files a year, the processing of nearly 3 million procedural documents, and the writing of 1 million records of proceedings. More than 200,000 files are opened annually in criminal and penal proceedings launched by some 300 prosecutors for the attorney general.

The Modernization Plan

The administration of the justice system is sensitive to current economic conditions and the demands of the contemporary world. We must constantly seek efficiency and monitor impending changes, especially in the realm of technology. In the early 1970s the Department of Justice of Québec stressed the use of modern technologies as the only way to satisfy Québécois needs and provide quality legal services. This technology conversion was part

of a sweeping plan to modernize the administration of the legal system in Québec and was largely responsible for the positive results achieved.

The plan was carried out in six phases:

Computerization of the main operations of offices of the court.

Review of the organization of the work load.

Elaboration of a management information system.

Tape recording of court proceedings.

Broadening of access to court judgments.

Broadening of access to legal information.

Computerization of operations . One of the main administrative tasks of the legal system is managing the operations of offices of the court. Legislation and rules of practice oblige offices of the court to record documents, keep up-to-date registers, make the registers available for consultation, and produce various legal documents. To these obligations must be added problems arising from tight deadlines, the enormous amount of information to be processed, and the complexity of the operations to be carried out. All of these factors make offices of the court the ideal place to introduce computerization and have led to a series of initiatives implemented in rapid succession.

Extensive spin-offs have resulted from this first phase of the modernization plan. The computerization of offices of the court and the establishment of a network have made it possible to set up and maintain a data bank comprising the court minute-books and indexes of the civil and criminal files of Québec courts. As a result, users across Québec can gain access to the legal files of Québec courts of law and quickly ascertain the course of legal proceedings in a given case.

Moreover, the computerization of offices of the court has already enhanced efficiency in the production of court documents such as lists, notices to parties, notices of judgments, and documents on financial operations.

Organization of the work load . At the same time that offices of the court were computerized, the Department of Justice of Québec reviewed the organization of the work load and produced several procedural and standard times manuals, based on work measurement techniques advocated by the International Labour Office. The review led to the standardization of various operations and to increased staff productivity. The manuals are an effective management tool, allowing quick and accurate assessment of the impact of amendments to legislation and changes in administrative processes.

Development of a management information system . The third phase of the modernization plan was the development of a complete management information system. Each month the computerized system collects more than 1,000 items of information related to the activities of the courts of law. In conjunction with the standards established in procedural and standard times manuals, the data enable us to accurately evaluate staff needs in each courthouse for each activity carried out.

Tape recording of court proceedings . The fourth phase of the plan centers on the tape recording of court proceedings. Each of the 370 courtrooms in Québec's courthouses continue

is equipped with a sound system to record legal proceedings. Moreover, the Department of Justice of Québec has just inaugurated a modern video-equipped witnesses's room in which child victims of violence or sexual abuse can testify removed from their accused aggressors.

Broadened access to court judgments and improved dissemination of legal information . To enhance the quality of the services we offer our clients and partners in the legal system, it is important to broaden access to court judgments and improve the dissemination of legal information. These facets of the modernization plan are now under way.

The commitment to improving the quality of justice is also reflected in the Department of Justice's involvement in setting up various associations interested in developing technologies in the field. The Association québécoise pour le développement de l'informatique juridique (Québec Association for the Development of Computer Applications to Law), for example, held an international congress on legal data processing in Montréal in the fall of 1992.

The administration of justice in Québec has met the challenge of modernization by investing in information technology, a course that will be maintained even though implementing new technologies clearly demands substantial investments and appreciable effort on the part of managers and staff. The success of these efforts, more over, will depend on close, ongoing collaboration among various partners in the legal system.

Technology in the administration of justice cannot be completely standardized. Even within one country, different levels of legal tribunals have jurisdiction in various domains. Nonetheless, certain challenges must be met. Just as it is the responsibility of the health ministry, for example, to maintain adequate infrastructure for administering health care, so it is the responsibility of the justice ministry to provide judges with the essential technological support they need to perform their duties.

Needs of the Bench

To fulfill their overriding responsibility of rendering judgments, judges must have access to modern tools, including a data bank of jurisprudence. The justice system today is short on time. Those who administer justice can no longer devote to each case the time needed to thoroughly research doctrinal and jurisprudential works by hand. Faced with emergency situations that demand quick, if not immediate solutions, judges must rely on modern technology to obtain the information needed to make swift and reliable decisions.

Access to Data Banks

For more than fifteen years the maintenance of data banks of jurisprudence in Québec has been largely the work of a paragonovernmental organization, the Société québécoise de l'information juridique (SOQUIJ). Courthouses throughout Québec have access to SOQUIJ data banks. Judges who have the appropriate computer technology at home may access the data banks without charge.

Moreover, members of the legal profession, particularly judges, who work in areas of the law that come under the jurisdiction of the Canadian Parliament (most commonly, criminal law) need access to pan-Canadian data banks. Since the end of 1989 the judiciary has had access to several data banks that cover the legal field throughout Canada.

Drafting and Distribution of Judgments

In 1988 the Department of Justice of Québec began providing judges with personal computers. Today, about 200 computers serve the needs of some 450 judges. The most interesting aspect of this development has been the integration into personal computers of a special system for drafting and distributing judgments.

In 1991 a new, integrated computer system was put into operation at the Québec Court of Appeal. One function of this integrated system is to computerize all clerical tasks in the preparation of judgments. A second function is to enable the transfer into a central data bank of the whole text of judgments rendered. (This data bank of judgments is at the Department of Justice of Québec in Montréal.)

Each of the computerized work stations used by clerical staff has the equipment and software required to send judgments electronically to the central computer. This allows judges to store duplicates of all original, signed judgments.

The abiding interest in consulting grounds for judgments has meant there has been tremendous concern with this data bank. In time the bank will contain all new judgments rendered by the Québec Court of Appeal, and eventually those of other courts. Use of the bank is simplified by the addition of a summary of the judgment and of the fields of law to which it is related.

The immediate priority for facilitating the drafting and distribution of judgments is thus twofold. First, it is crucial that each judge have access to the data banks from his or her workplace. And second, it is imperative that the legal community be apprised of judgments as soon as they are ready, necessitating prompt storage of the full texts of judgments in the data banks. The new computer system will help accomplish this.

Fulfilling these goals will put us in step with modern technology and will allow the magistrature to fully reap the benefits of that knowledge.

Société Québécoise De l'information Juridique

The Société québécoise de l'information juridique, created by the National Assembly of Québec in 1976 under the Act Respecting the Société Québécoise de l'Information Juridique, was given an extensive mandate. Section 19 of the Act states:

The objects of the company shall be to promote research and development in the field of legal information, and the processing of legal data, in order to improve the quality of such information and to make it more accessible to the general public. (R.S.Q., c. S-20)

The paragovernmental agency is unusual in its mission of promoting research and making legal documentation more accessible to the public. In fact, its unique character and success are closely interwoven. The agency's success is based on three key factors.

Ties to the Department of Justice of Québec . Since Québec's justice minister is responsible for administering the Act that incorporates the Société québécoise de l'information juridique, the agency has close-knit relations with the provincial department of justice. This has made it possible for SOQUIJ to work closely with those in charge at the department, to constantly improve its products, and to develop new products and technologies.

The relationship has made it possible for SOQUIJ to obtain copies of all the judgments handed down by Québec courts. Court clerks are required to send SOQUIJ copies of all judgments filed in their offices, thus ensuring access to all judgments rendered. This body of documentation enables SOQUIJ to carry out its role as a legal publisher by supplying its customers with jurisprudential publications on paper or via data banks.

The relationship has also made it possible for SOQUIJ, as an on-line public information service, to provide its customers with access to departmental data banks such as the bank of services (a court minute-book), which provides a record of current files, the bank of registry offices, and the bank that stores the revised statutes and regulations of Québec.

Judicial Reform in Latin America and the Caribbean

The board of directors of SOQUIJ is composed of members from the professional and governmental organizations closely involved in legal documentation, such as the bench, law faculties, the Québec Bar, the Québec Chamber of Notaries, and the Québec government departments of justice and communications.

The composition of the SOQUIJ board, provided for in sections 2 and 3 of its incorporating Act (R.S.Q., c. S. 20), makes it possible to base management on the needs of the main users of legal documentation tools.

Access to the court minute–book . A bank of court services is available to lawyers. New technologies have made possible quick daily access to information recorded in court offices throughout Québec. The Québec justice department runs and owns this bank; SOQUIJ provides on–line service and access to the bank.

A judge can access this bank either by going to the regional courthouse to use terminals and printers or by accessing the bank directly from his office using a personal computer, telecommunication software, and a modem. In the latter case he can query the bank after hours and call the SOQUIJ customer support team for technical support and assistance in exploiting the bank.

Access to doctrine and jurisprudence . To keep up with changes in the law and a steady increase in judgments rendered, SOQUIJ strives to process legislative and judicial documentation in a timely fashion and in a format that is easily consulted. A team of lawyers, specialized in various fields of law, select, summarize, and objectively classify and index the most important decisions handed down by the courts of general jurisdiction, the administrative tribunals, and the Supreme Court of Canada.

To provide broad access to the fruit of this intellectual effort, SOQUIJ combines traditional methods with modern technology to produce both written publications and data banks. A judge can choose either of the working tools and will find the same continuity and subject organization in both.

Judges can get hold of decisions either by consulting one of the compendiums (if they have been published in full), by printing directly from the data bank or from a personal computer, or by ordering printed texts from SOQUIJ. (Complete texts are available from SOQUIJ over the counter or by messenger, mail, or fax.)

Conclusion

Québec is a pioneer in the use of information technologies and computer–assisted rationalization and decision–making tools adapted to the fields of justice and the law. In the years to come, Québec's department of justice will invest close to \$100 million to renovate its applications and complete its data processing network.

The Department of Justice of Québec, in cooperation with the Department of International Affairs of Québec, the Department of External Affairs of Canada, and the Department of Justice of Canada, has succeeded in promoting Québec's expertise around the world by:

Welcoming delegations from foreign countries.

Sending Québec experts on missions to foreign governments and as participants in international conferences.

Making presentations in Québec city on the various technologies adapted to the administration of justice (particularly, at the Conference of European Ministers of Justice, June 1991); and making a presentation on these technologies to the ministers of justice in other francophone countries (fall of 1992).

Helping set up the Association québécoise pour le développement de l'informatique juridique (December 1991).

Participating in the International Conference on Computer Science and Law (Montréal, fall of 1992).

Helping organize the Conference of the European Council on Computer Science and Justice in Canada (Montréal, 1993).

Québec's achievements with the use of information technologies to improve the administration of justice have gained international recognition, and its cooperation is in demand. Private firms in Québec are in the forefront in developing these technologies and are looking to promote their know-how at the international level. Joint ventures between government and private enterprises, to exploit their complementary expertise, is a key to the success of operations in this field.

Notes

1. Specifically, eligibility criteria for legal aid are set by the Regulation Respecting the Application of the Legal Aid Act (A.C.179873 [1973], 105 G.O. II 2313).

2. All dollar amounts are Canadian.

References

Act Respecting the Société Québécoise de l'Information Juridique, 1976. National Assembly of Québec, Montréal.

Commentaires du ministre de la justice: Loi sur l'application de la réforme du Code civil . 1993. Volumes 1 and 3. Montréal: Editeur officiel du Québec.

Constitutional Act of 1867. Government of Canada, Ottawa.

Discours préliminaire, Projet du Code civil . Paris: Lepetit jeune.

Fauteux, Gérald. 1980. *Le Livre du magistrat* . Montréal: Supply and Services Canada.

Journal des débats de l'Assemblée nationale du Québec . 1972. 29th Legislature, 3d Session, July 7, 1972, vol. 12, no. 61.

Office de la révision du Code civil. 1978. *Rapport sur le Code civil du Québec* . Montreal: Editeur officiel du Québec.

Revue justice . 1991. "Le Code civil du Québec selon Gil Rémillard." (September, p. 19).

Statutes of Québec, 1954-1955 . "Civil Code of Québec." Ministry of Justice of Québec, Montréal.

Statutes of Québec, 1980 . "Civil Code of Québec." Ministry of Justice of Québec, Montréal.

Statutes of Québec, 1987 . "Civil Code of Québec." Ministry of Justice of Québec, Montréal.

Statutes of Québec, 1991 . "Civil Code of Québec." Ministry of Justice of Québec, Montréal.

19—

Judicial Reform in the United States: Fairfax Circuit Court's Case Tracking Program

Richard J. Jamborsky

In response to an increasing caseload and a mounting backlog of civil cases, the Fairfax Circuit Court, in Fairfax County, Virginia, serving a population of 838,000, devised an innovative Differentiated Case Tracking Program to schedule cases according to individualized timelines established by the court—not by litigants and attorneys, which was previously the norm.

Differentiated Case Tracking Program

The new tracking program drew upon research that suggests early classification of cases and court control of the docket moves court cases quickly through the judicial system. The program monitors civil cases and sets an individualized schedule of status conferences, settlement conferences, and neutral case evaluations based on case complexity.

Before the implementation of the Differentiated Case Tracking Program, the court had responded to caseload increases by hiring more judges. Each civil case was treated alike. Simple cases were scheduled for trial much later than necessary, and more complex cases were subject to repeated continuances. From 1986 to 1989 the court's civil caseload increased so rapidly that it became clear that hiring more judges was not the answer.

When the program was initiated, the theory of differentiated case management had not been tested in courts. According to the theory, since certain factors (type of case, number of parties) are indicators of delay, early screening and classification of cases can save court resources. Courts are memory-dependent; the further in time the trial is from the event that gave rise to the litigation, the less likely facts will be accurate or even recollected at all. Therefore, a system needed to be implemented that was not only efficient, but timely, so that cases needing to be heard could be scheduled in a reasonable time frame. With technical assistance from outside sources, a few courts were developing differentiated case management pilot programs. Before results from those programs were available, the Fairfax Circuit Court secured funding in 1989 to develop its own experiment with differentiated case tracking. This program is a departure from other programs, however, in that it was developed by judges and court staff. The Fairfax court is also the first to develop an automated tracking system specifically designed to accommodate the program.

The principal result of the implementation of the case tracking program was to give the court complete control of the pace of litigation. By establishing deadlines, every attorney who practices in Fairfax County is bound by court order to meet specific cutoff dates. The court assists the attorney in time planning and preparation by incorporating certainty into case flow. The results have been impressive. Prior to the program, only 50 percent of civil cases filed were disposed of within one year. Now, 78 percent of all cases are completed in a year.

In a further effort to reduce the backlog of civil cases, the case tracking program implemented the Delay Reduction Program to conclude cases that had been dormant for years. Thus, the case tracking program is helping move the Fairfax Circuit Court toward the goals of the American Bar Association's Standards Relating to Court Delay Reduction, which state: "From the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery, and court events is unacceptable and should be eliminated."

A Record of Success

The case tracking program serves citizens and attorneys in law cases (with monetary claims of more than

US\$10,000) and in child custody or visitation disputes. Fifty-three percent (7,070) of all civil cases (13,350) filed in 1992 were handled by the tracking program. Roughly 30,000 people, including litigants, counsel, and witnesses, were served by the program in 1992.

The program's success led to a number of unexpected results. The chief justice of Virginia mandated that all courts statewide design and implement a case tracking program. In addition, to automate the program, the court installed a sophisticated Local Area Network and an integrated case management software program that has made cases readily accessible via computer. The Local Area Network benefited other agency programs as well. Savings of \$50,000 to \$100,000 were realized by the court through an agreement with the software vendor in which the court, in exchange for a lower price, allowed the vendor to use the program in sales promotions to other agencies.

As the success of the program gains recognition, the court continues to enhance its objectives. Settlement conferences, which before were not considered a valuable mechanism, are increasing in popularity and are settling cases at a 65 percent rate.

In 1993 the case tracking program added to its accomplishments with the establishment of the Neutral Case Evaluation Program, which enlists seventy-five senior-level attorneys to hear settlement conferences pro bono to help reduce judges' dockets. This program plays a central role in producing the high settlement rate. Finally, the program's success merited inclusion in the National Center for State Courts' 1993 publication, *Courts that Succeed*.

Overcoming Obstacles and Meeting Costs

One of the biggest obstacles the Differentiated Case Tracking Program had to overcome and this would be the case in any jurisdiction seeking to establish such a program—was the natural resistance to change. Some lawyers were reluctant to relinquish control over their cases. Some argued that delay is not necessarily bad because cases need time to mature. Some judges even viewed the case flow management system as a threat to judicial independence. The court overcame these obstacles by working closely with the bar to develop this program.

Since the implementation of the case tracking program, courts nationwide, in addition to those in Virginia, have come to see it as a model for reducing their civil case backlog.

The cost of implementing the program was well worth the expense. The amount budgeted for the project for the three-year period, 1990-93, was \$521,305, of which \$279,579 (53.6 percent) came from the State Justice Institute and \$241,726 (46.4 percent) from Fairfax County.

Conclusion

In conclusion, the Differentiated Case Tracking Program has yielded a tremendous savings of time and money for the court. A typical civil case no longer takes years to come to trial. The case now goes through specific cutoff dates to ensure timely disposition. Lawyers and county citizens alike are pleased with the program. Attorneys are supportive and feel that the tracking system helps them manage their law offices more practically, with clear deadlines ensuring that they are prepared for every case they litigate. Citizens are pleased because they get "their day in court" much faster. And finally, the court wins as well, because it has complete control over its docket. So all in all, the program is a winner for the county and the legal community!

20—

Judicial Reform in the Basque Provinces of Spain

Mikel Elorza Urbina

Spain is a composite state comprising seventeen autonomous communities, comparable to the regions, Länder, states, or provinces found in other countries. The communities' prerogatives, especially their powers of regulation and execution (they also have legislative powers), are broader than those of some federal states, and one of today's issues in Spain is whether it would not be a good idea to turn the Senate into a chamber of representatives of the autonomous communities. The proposal is an acknowledgement of the need for a more federal framework of government.

By contrast, the judiciary is a single unified jurisdictional system with authority throughout Spain.¹ There are good historical and democratically grounded reasons for this, and no one questions it today. There is a single Supreme Court, which tries special cases.² There are numerous courts and tribunals, under a single homogenous organization; and there is one shared code of procedural law, a single national judicial career, and a single General Council of the Judiciary. A single criminal law code and civil law code have authority over the whole of Spain, except for specialized aspects in certain areas mainly affecting inheritance. All Spain shares the basic tenets of administrative law.

One problem that has fascinated legal scholars, fueled political conflicts, and led to a certain volume of jurisprudence from the Constitutional Court is the question of how to reconcile the territorial divisions of the Spanish state with the existence of a single judiciary. There are three constitutional provisions that have direct bearing on this issue. First, the territorial divisions of the judicial constituencies (*partidos judiciales*) and court jurisdictions (*audiencias*) coincide exactly with the administrative limits of the autonomous communities, and in each autonomous community there is a Higher Court of Justice (Tribunal superior de justicia) covering the same territorial jurisdiction.³

Second, as a general rule, regular cases are dealt with by the judicial organs within each autonomous community.⁴ Although administrative legal proceedings are still in a transitional phase and have not yet adapted to the Constitution, which means that the Audiencia nacional and the central courts still have jurisdiction throughout Spain, the vast majority of judicial cases are dealt with at the provincial jurisdiction level (the level of the *audiencias provinciales*), that is, before reaching the Higher Court. Thus, judicial proceedings tend to be dealt with within a closed circuit in each autonomous community, a fact of some interest as we shall see later on.

Third, Spain's constitutional system allows for—but does not automatically grant—the possibility that the autonomous communities assume the same prerogatives that the national government may accord itself in the sphere of justice. Thus, theoretically, there are only two restrictions: areas where the law itself establishes limits (regarding procedural law, for instance) and the self-governing powers reserved for the General Council of the Judiciary.

The Basque Provinces within Spain's Judicial System

The Basque Provinces make up one autonomous community.⁵ On December 18, 1979, they recovered the Statute of Autonomy forfeited forty years earlier because of military insurrection against the legitimate government of Spain. The Basque Provinces are also one of two autonomous communities—the other being Cataluña—in which the constitutional option of taking on government powers in judicial matters has been partially applied. A royal decree of November 6, 1987, provided continue

Translated from Spanish.

for the transfer, as of January 1, 1988, of powers of state with respect to the provision of material and economic resources for the administration of justice.

It is a commonplace that judicial reform should take particular national circumstances into account and be developed from within. Precisely for that reason it is worth stressing the particular circumstances that surround the Basque Provinces' reform process and that highlight on it as a model.

The judicial system comprises 190 judges, more than 100 of whom work on their own. The rest work in collegial bodies: three *audiencias provinciales*, divided into different sections, and a Higher Court with specialized divisions. In addition, there are 1,700 court officers, including secretaries and other personnel attached to the judiciary. Thus, it is a system of manageable proportions.

It is important to note that in the Basque Provinces, possibly unlike the situation in many other countries, the judiciary enjoys considerable legitimacy, irrespective of negative opinions regarding the efficacy, reliability, and timeliness of administration of justice as a public utility. As the evils of the system of political parties began to emerge in certain European countries (including Spain), citizens have considered the judiciary to be a safeguard and have thought it capable of contributing to a revitalized form of democracy.

Moreover, in the case of the Basque Provinces, plagued as they have been by terrorism, the judiciary has had to play the role of defending citizens' democratic guarantees, maintaining a difficult balance that has earned it the respect of society.

In this light, and in view of the relatively recent recovery of autonomous status (1979) and adoption of certain prerogatives with regard to judicial authority (1985), the Basque Provinces may have much in common with the countries of Latin America.

Diagnosis Prior to Modernization

At the same time that prerogatives were being transferred to the Basque Provinces, a bill was being put forward for a national Law on Judicial Jurisdictions and Infrastructure (*Ley de demarcación y planta judicial*), an attempt to implement a four-year plan for the creation of new courts. A sentence in the Preamble mentioned "the enormous shortage of courts accumulated over decades by an ill-distributed judicial system based more on ubiquity than on efficacy and sorely lacking in both judges and decision-making bodies."⁶

Probably the best indicator of the situation in Spain at the time of the transfer was the ratio of first-instance courts, both civil and criminal, to population. In 1980 there was only one court per 73,010 inhabitants, the worst ratio since 1877. Although this indicator then improved somewhat, it remained far removed from the minimum to be expected in any democratic society, which is why the 1988 Judicial Jurisdiction and Infrastructure Law attempted to practically double the number of judges within four years and to raise the ratio to one court per 19,000 inhabitants. Yet even these data fail to do justice to reality, because it is also necessary to take into account the tremendous increase in litigation since the mid-1970s.

At the same time, most people were unhappy with the way judges' chambers (*oficinas judiciales*) worked. The Special Unit for Procedural Reform of the General Committee for Codification described the situation in 1990:

Nowadays the courts and tribunals are set up to be autonomous and self-sufficient, even though there may be several with the same jurisdiction in the same town and sometimes even in the same building. Thus, each of them has its own exclusive group of functionaries, who hardly ever accept to be transferred even to adjacent offices, even temporarily and in cases of emergency; and each is assigned its own space, even when certain areas could be shared. Each one undertakes identical procedural tasks separately. For a variety of reasons, the workload may vary enormously for the different courts, without there being any chance of redistributing it.

In addition, the same model for a judge's chambers is applied in rural areas as in urban centers. It dates from the end of the last century and was designed for a less developed society, but it has subsisted since then, untouched by successive procedural reforms.⁷

To this must be added the huge organizational problems familiar to anybody who has looked into the modernization of judicial systems: the lack of professional clerks and the worrisome combination of jurisdictional and administrative tasks that judges are called upon to handle.

A further defect of the system is the obsolescence of procedural law. Bear in mind that the Civil Indictment Law (*Ley de enjuiciamiento civil*) of 1881 is still in force, propped up by some 150 regulations currently in force; and that there are seventy different types of civil proceedings.

The situation at the outset of modernization efforts can be summed up by saying that a chronic budget deficit, combined with a lack of centralized organization, continue

failure to separate diverse functions, and the persistence of obsolete procedural laws, all constituted a perverse system, defined as one in which correction of one component is negated by the disarray that that correction causes in the other components and where the net effect of any effort is minimal or even negative.

The investments needed to adapt the material infrastructure on the scale envisaged in the Law of Jurisdiction and Judicial Infrastructure could by their very nature only mature over long periods. They implied heavy expenditure on civil engineering for installations, equipment, and computer systems, areas where decisions cannot usually be reversed and where the logistics have to be planned well in advance.

Furthermore, the design of headquarters, the drumming up of material resources, and the choice of organizational model are all clearly linked. Thus, the only way open to us to end the paralysis was to opt for a *global* reform of a kind that had never before been attempted, nor could have been attempted. We simply could not afford to ask ourselves which parts of the system came under the sphere of competence of the autonomous community and which did not. That is why the approach we have adopted for the past four or five years has been global in its conception. We are aiming for integrated reform of the administration of justice.

The Modernization Plan

Functionally, the idea is to distinguish clearly between three types of activity: the *jurisdictional* function, which corresponds to the judge; the *procedural handling* (*tramitación*) of cases; and *administration* of the human and material resources at the disposal of the courts and tribunals. As far as judicial proceedings themselves are concerned, reform has been implemented based on the principles of effectiveness, concentration, immediacy, and the use of oral proceedings.

Structurally, the recognition that certain judicial procedures are devoid of jurisdictional substance—including, for example, the taking of depositions, assessment of evidence—suggests a form of organization in which analogous tasks that can be separated off from each organ are concentrated in shared services and offices, without the increase in jurisdictional organs leading to a parallel proportional increase in the rest of the judicial apparatus.

It is obvious that to achieve this goal, it will be necessary to reform sectors of the judicial system that are beyond the control and powers of the autonomous community. Something will have to be done about procedural law, about the structure of judges' chambers, and about the legal status of the staff working in administration of justice.

While our approach has been global, we have acted only sectorally, in those spheres where we had powers or were able to have powers delegated to us. There have been three such spheres: construction, computerization, and

training and professional management.

Construction

A 175,000 square meter plan was devised for the whole autonomous community (almost 100,000 square meters of which are now complete). A circulation system was established that incorporated a certain amount of flexibility to ease the transition from some occupancy schemes to others; simulations to assess types of needs were conducted, and surface and distribution models were constructed to approximate type of judicial organizational unit and a generic installation project.⁸

A distinguished Uruguayan proceduralist told us that Uruguay's new procedural code requires more judges in order to apply the immediacy principle, a new circulation and divisions system in order to protect judges from being disturbed, a separate section for across—the—counter activities, large open—space offices, and more private offices safe from interruptions. Although we do not yet have such a specific code we do have precisely those physical arrangements.

Computerization

Procedures carried out in judges' chambers have been computerized, in the belief that computer science is a key factor in creating a set of self—sufficient units that are part of a more complex and differentiated whole, and in which individual cells are connected and integrated.

The computerization has been designed not just for individual units but as an integrated system providing real—time communication between shared services and judicial bodies, between lower and higher courts, or, where necessary, between the first—instance judge and the sentencing judge.

Standard forms are used for all documents, identified according to the use to which they are applied, and each case is identified by a single number throughout its passage through the various shared services and jurisdictional instances. In addition, since an integrated system is only possible if all its components are connected, all legal bodies and services have been incorporated.

Functional specialization is another consequence of this approach, particularly with regard to organizational continue

aspects, so that our system consists of modules that can be housed in an individual organ or transferred to a shared service as soon as the organizational development of the system permits.

To give a simple example, communications and external acts (citations, summons, notifications, embargos, and the like) are dealt with by a single module. In small towns, that unit is installed in each individual juris—diction, but in the three provincial capitals and in Barakaldo (a judicial constituency of 300,000 inhabitants), it is installed in a notification service covering a whole set of jurisdictions.⁹

Since the principal information flows take place within jurisdictions, between the judges' chambers and the various shared services at their disposal, the judicial jurisdiction was selected as the central unit for computerized information purposes, to be served by a single computer or, wherever that is not possible owing to the size of the constituency, by a single local network. A metropolitan network completes the system by linking jurisdictions that are not provincial capitals to their respective higher courts and each provincial capital to the Higher Court of the Basque Provinces.

This setup meets 90 percent of information flow needs because, as pointed out above, jurisdictions are relatively closed systems within each autonomous community.

Training and Professional Management

The modernization effort would have been impossible without the provision of training. Curiously enough, the Basque Provinces have no direct powers in this area and have had to sign agreements with the General Council of the Judiciary for judges' training and with the Ministry of Justice for training of other functionaries. The Basque Provinces act as the central government's agent in training matters and training programs are planned jointly. In 1994 more than 4,000 training activities were carried out, or a little over two per person.

Professional management schemes were created, among other reasons, to implement the modernization plan itself. In this and other management functions, no problems were encountered with judges showing reluctance to give up management responsibilities, nor was it found that judges resented a perceived a loss of power. (If such management schemes had been implemented in 1988, 1989, or even 1990, there would have been considerable resistance from the judges. However, the gradualist approach and very local scope of the modernization plan—which allowed for consultation—paved the way for acceptance of changes such as new management arrangements.)

General Lessons

Modernization of the administration of justice in the Basque Provinces is now sufficiently well advanced to be considered a success in users' eyes. The Spanish judiciary shares that view. Nonetheless, the plan's achievements do not in themselves explain its success or the conditions underlying its success.

Three key factors contributed to the success of the modernization plan. First was the widespread agreement in Basque society on the need to improve administration of justice. This consensus ensured that the main lines of the plan were protected from the vicissitudes of politics. The best proof of this is that the judiciary's budget allocation has been the budget area least tampered with by the Basque Provinces' parliament since the transfer of powers took place.

It must be recognized, too, that democratic parties are only too aware of the need to have a sound judicial system, with deep roots, particularly in a society where not long ago the very legitimacy of the state appeared to be questioned. Although these factors are strictly local, there are indications that parallel conditions are inducing similar changes throughout the world, or at least in Latin America. Preservation of the legitimate order, legal protection for economic transactions, and appropriate safeguards for conflict resolution—functions of the public administration of justice—are increasingly viewed as basic for development. Moreover, the judicial authorities are viewed now, not just as part of the establishment, but as responsible for maintaining the legitimacy of the rule of law and for restoring it where necessary.

The second key factor in the plan's success has been consensus among the institutions involved. Although the Basque government was mainly responsible for executing the plan, the General Council of the Judiciary and the government division of the Basque Higher Court have taken part in the project from the very beginning, making decisions that fell within their jurisdiction and supporting the plan at critical moments.

There continue to be differences of opinion between the Basque Provinces and Spain's central Ministry of Justice regarding the scope of powers still to be transferred. These differences have at times grown into serious conflicts, not surprising in a state that has only recently settled on a territorial division and is still evolving.¹⁰ Nevertheless, the differences have not prevented cooperation. Indeed, even in the face of controversial innovations in the Basque Provinces, the Ministry of Justice continued its support of the initiatives, perhaps realizing with farsightedness that there was much to be learned from the experiment.

The third factor in the plan's success was the scope of the plan itself. Since the plan focused on territorial goals and was implemented at a regional and even local level, those in charge were able to get to know and be known by all the judges with permanent authority in the courts and tribunals dealt with under the plan, making it possible to keep open channels for consultation and dialogue, even on questions of detail. Those responsible for making decisions were well informed about developments in the autonomous community and found it relatively easy to participate in the projects and justify the changes being made.

Does this mean that wider-ranging plans have no hope of success? Surely not. On the contrary, broader planning for areas of judicial administration outside the autonomous community's sphere of competence (procedural law, the way judges' chambers are structured, personnel statutes) might be more appropriate. Still, in such cases decentralization in the programming and execution of objectives and in budgetary management would be desirable. At the other end of the spectrum, it seems important to determine the minimum scope, or jurisdiction, in which this kind of initiative can be successful. As important as its inclusiveness is, there must be a sufficiently large critical mass of bodies to create a solid working environment based on shared criteria. A more restricted experiment would probably not manage to generate a culture favoring change that would be strong enough to sustain external disturbances, such as those deriving, for instance, from staff mobility. Furthermore, resources must be in place to allow virtual self-sufficiency with regard to information flows, a criterion perhaps not feasible in smaller jurisdictional units.

This discussion has been largely descriptive, not prescriptive. My main concern was to present the vital, real-world lesson learned from the experiment in the Basque Provinces. Although we cannot change everything at once, if we have a clear idea of what we want to change and act accordingly, vigorously and unwaveringly, even if in small steps, it will be possible to break away from the past and achieve much-needed reforms. This was a tremendous lesson for us, and we hope it may be of some use for Latin America, a region we feel so close to.

Notes

1. Article 117.5 of the Spanish Constitution: "The principle of jurisdictional unity determines the way that the courts are organized and the way they function."
2. Article 123.1 of the Spanish Constitution: "The Supreme Court, which has jurisdiction throughout Spain, is the supreme legal body in all spheres of law, except where otherwise indicated in respect of constitutional guarantees."
3. Article 152.1 of the Spanish Constitution: "Regardless of the jurisdiction of the Supreme Court, a Higher Court of Justice will be the highest judicial organ in the territory of each autonomous community."
4. Article 152.1 of the Spanish Constitution: "Regardless of the provisions of Article 123, the different stages of a trial will be dealt with by the judicial organs within the autonomous community of the court of first instance."
5. The Basque Provinces cover an area of 7,261 square kilometers, have a little more than 2,000,000 inhabitants (just over 5 percent of Spain's population), and account for a little less than 6 percent of the national income.
6. From the Preamble, II, Law 33/1988 on Judicial Jurisdictions and Infrastructure (December 28).

7. From the General Committee on Codification, Special Unit for Procedural Reform, "Materials for Procedural Reform," Madrid, 1991, pp. 52930.

8. Eusko Jauriaritza, *Proposal for the Modernization of Administration of Justice*, 2d edition, Basque Provinces, Department of Justice, 1991, pp. 105 and following.

9. Article 28 of the Organic Law of the Judiciary 6/1985 (July 1): "There will be one or more secretariats in each division or section of the tribunals and only one in each court [*juzgado*]." Article 272 of the same law appears to establish for certain towns "a shared service responsible to the Dean's office [Decanato] for issuing notifications" as well as "general registration services for the presentation of written material or documents"; this appears by implication to rule out shared secretariats and to impose strict limits to the scope of shared interests. Nonetheless, in recent years the tendency has been to interpret these precepts as broadly as possible.

10. The most notable conflict was over the constitutionality of certain precepts in the Organic Law of the Judiciary that block implementation of the option to transfer personnel to work in administration of justice. A ruling on the issue (STC 56/1990) found those precepts to be constitutional.

21—

Strategic Planning within the Justice System in the United Kingdom: Organizational Theory

Peter Graham Harris

There is a well-documented tendency for organizations to become focused on urgent short-term problems at the expense of addressing important longer-term and strategic issues.¹ That tendency manifests itself in

A preoccupation with the "process" and an inattention to the developing needs of the "customer" in an everchanging environment.

A narrowing view that fails to see the whole picture and to address issues in a comprehensive way.

Once the balance tilts toward reactive, fragmented management, the burden of urgent problems accumulates and in time leads inevitably to an obsession with them as the organization is overwhelmed by the unexpected and the uncontrolled. In such cases, the organization eventually spends most of its energies on "breakdown maintenance" of their processes and systems as they become progressively more obsolescent.

In the private sector the risk of an organization going over to breakdown maintenance is dealt with by corrective market forces that either compel the managers to stop tinkering with the car's engine and to concentrate on steering and on the road ahead or that run the organization off the road as it is overtaken by competitors.

Such "rules of the road" rarely apply, however, in the public sector. There, the organizations are generally safely protected by crash barriers provided by monopoly of supply and guaranteed funding through the tax system. Hence, breakdown maintenance can too easily become a sustainable activity. For that reason, public sector managers need to build systems into their organizations that will substitute for the market correctives to "short-termism" and fragmentation.

In the absence of profit and the market, the classical means of motivating or controlling the behavior of public service organizations has been through accountability, which itself is dependent on measuring achievement against objectives through a planning process. The first part of this chapter looks at strategic planning in the context of justice systems and examines how the planning process could be used to counter the dangers of fragmented short-termism by motivating policymakers and managers to address the developing needs of their "customers" and to be proactive in seizing the opportunities and meeting the challenges the future will provide. The second part of the chapter examines the political dimensions of such a system.

This chapter draws on the work of the Lord Chancellor's Department in the development of strategic planning processes for those parts of the justice system in England and Wales for which it is responsible.

A Long-Term Planning Process

The Lord Chancellor's Department has wide responsibilities within the justice system, including:

Substantive law relating to contract, tort, property, the family and, in particular, protection of the individual in areas such as the law relating to privacy, confidentiality, and the administration of the assets of infants and adult incapax.

Administration of the courts; provision of publicly funded legal services.

Regulation of the legal professions, including rights of audience.

Appointment of the judiciary.

However, there are other participants in the system. For example, many areas of substantive law, including criminal law, are the responsibility of other departments. There are also the judges, who are wholly independent of the executive branch of government, as are the legal professions (though they are subject to regulatory control). Prosecution services are provided separately, and police and prisons are the responsibility of a separate department.
break

The Lord Chancellor's Department's strategic plan (see appendix A at the end of the chapter) has advanced the Department's ability to deliver its contribution to the justice system by bringing about a better understanding within the Department and among other players in the system of the Department's overall purpose (fundamental aim), constraints on pursuing that purpose (strategic priorities), the Department's values (guiding principles), and the high-level objectives of the various business areas (key challenges). At a more concrete level, a start has been made in developing high-level but measurable performance indicators—so-called strategic objectives and targets. In effect, senior managers have seized the high ground, mapped out the territory the Department occupies, and, through performance targets, started to plan means of meeting the major challenges the Department faces.

The plan as it stands is particularly aimed at imbuing all those in the Department with a sense of corporate identity and common purpose. It also looks to ensure that resources and efforts are not expended outside the Department's areas of responsibility. In the latter respect it provides validation for the activities of the various parts of the organization.

The current strategic plan represents the highest level in a hierarchy of plans. Below it, the Department has a management plan that sets out:

Measurable performance targets for each part of the Department.

Activities to achieve performance targets.

Resources to be devoted to achieving performance targets.²

The move to strategic planning is achieving a major cultural change in the organization. However, the current plan and the process that produced it represent a snap shot of a system that is still evolving as those concerned see new opportunities and means of exploiting the system to support and encourage strategic management.

Planning for Future Development

The planning process might be made into a more robust tool if it further enhanced the ability of senior management to:

Prioritize between competing demands for resources and determine reductions in expenditure when circumstances require it.

Look across the Department's business areas and produce a coherent plan for optimizing its overall performance in meeting its strategic purpose.

Temper the Department's response to urgent short-term problems, based on a clear picture of longer-term objectives.

Act proactively in setting the Department's agenda for the future.

The question is How? One avenue worth pursuing is long-term planning. In simplest terms, this would entail senior managers composing a scenario or perhaps alternative scenarios of a "desired state of affairs," say for five years hence, based on their view of what they expect the world to look like then and how they would expect the organization to best meet the needs of its customers in that changed environment. With that desired state of affairs established, lower-level plans for its achievement could be developed detailing measurable milestones, or targets, and associated costs over the planning period.

Looking ahead five years to a desired state of affairs would enable senior managers to shift their weight more firmly on to the front foot in setting a proactive agenda. The process of composition would itself involve them in looking across the Department's various business areas and setting priorities for which developments or areas of activity were to be sponsored with available resources. Furthermore, the scenario would provide a clear basis for coordinating action with other contributors to the justice system. As important, it would strengthen managers' abilities at all levels in the organization to meet short-term and urgent problems by means best tailored to the longterm goals of the Department—in effect, steadying the helm in the stormy and unpredictable waters that lie between the present state of affairs and that desired. It would also provide a clear expectation by which customers and taxpayers could judge the organization's achievements.

The Planning Process

The strategic planning process is often characterized as "top down." This is a misunderstanding that can seriously undermine the practical value of the exercise. Senior managers are ideally placed by their position in the organization and their broad responsibilities to take an overall view of its activities. However, they rarely have the detailed knowledge of the various business areas that would enable them to identify all the major issues, questions, or challenges facing the organization—much less to develop plans for addressing them. Hence, there is a need for dialogue between management levels, and indeed horizontally across business areas, if the managers at that level are also to play their full part in proposing elements for a coordinated plan. That communication would be an essential feature of long-term planning, the bare bones of which might consist of the following stages:

Judicial Reform in Latin America and the Caribbean

Stage 1: Identify unmet needs and surplus provision in the near, medium, and long term.

Stage 2: Develop options to meet those needs and eliminate the surpluses.

Stage 3: Select the combination of options that would optimize the organization's performance in achieving its strategic purposes as expressed through its mission statement, corporate values and priorities, and the like.

Stage 4: Plan for the development and supplementation of those options.

Stage 5: Execute the plan, including periodical reviews and, where desirable, adjustments to the plan.

To be fully effective, stage 1 would need to involve those in the business areas (whose expertise and experience would give the exercise a hard practical edge) and should rely on research and analytical work. The success of stage 2 would be heavily dependent on the commitment of policymakers in the business areas, who may be tempted to give such an exercise low priority—considering it "cake tomorrow" when they are busy just keeping today's bread from burning. Their commitment would be dependent on senior managers' commitment to the process and, in particular, their declared and convincing determination to take hard decisions at stage 3 about which options to sponsor.

Stage 3 would involve senior managers choosing among alternative means of meeting customer needs and adopting the most appropriate option in light of the overall plan and resource constraints. For example, alternatives to enable those on small incomes to pursue legal remedies might include:

Simplifying the law and procedures to enable them to litigate with little or no need of a lawyer.

Developing the role of the courts to help such litigants through the legal process without lawyers.

Providing legal representation free or through a subsidized legal aid scheme.

Formulating a combination of these means to provide best value for money.

The review envisioned in stage 5 is vital to take account of changed circumstances, assumptions, or objectives, and without it planning is an evil that is better avoided.

Obstacles to Long-Term Planning

Obstacles to long-term planning fall into two categories: obstacles to the process and obstacles to achieving the objectives it sets. Obstacles to the process include:

Lack of information about the existing environment, customers' needs, and the current performance of the organization.

Lack of the capability to look into the future and to evaluate the likely results and implications of policy and other decisions.

As to the former obstacle—lack of information—it is a virtue of planning that it highlights deficiencies in information systems and stimulates their improvement. To overcome the second obstacle—lack of capability to evaluate the implications of certain policies—long-term planning would be heavily dependent on analytical services of economists and operational researchers and on a developed research base. Unless both exist the scenarios in the early years may be fragile and need to be treated with caution or may be drawn in less detail than

would become possible as the analytical and research work progresses.

As to obstacles to achieving the planned objectives, as mentioned above a commitment at the highest levels of management is a precondition of success—in fact, the lack of such commitment is not so much an obstacle as a complete stop to delivering the benefits of the system. And lack of commitment at the point of delivery is no less fatal to success. How plans are translated down through the organization and how staff are motivated to implement them are therefore important.

As mentioned earlier, a further obstacle to the achievement of a strategic plan is distracting emergencies. It might be argued that public services are particularly prone to stumble over this obstacle because of the volatility and sensitivity of the political atmosphere in which most of them exist. Although the author recognizes this difficulty, short-term pressures are a common feature of all businesses, including those in the private sector. What perhaps distinguishes the problem in the public sector is that unlike the commercial world there is no common bottom line of profit to mediate between long- and short-term objectives.

Risks of Long-Term Planning

The abuses of planning are notorious, whether exemplified by corporate life in the West or the excesses of state planning in the old Eastern Bloc. Most abuses, in the author's view, stem from a failure to keep constantly in mind that plans are a management tool and not, once settled, a substitute for management or the need to exercise judgment to meet unexpected contingencies. If that is clearly understood, many of the threats noted below would not materialize.

Centralism is a common fault, with planners usurping the role of policymakers or second-guessing them. The danger would be particularly acute in scenario planning those in the business areas were not committed to developing planning options or if senior managers were not committed to evaluating those options—either case would leave a vacuum that planners would have to fill or risk abandoning the process.

Rigidity is another common planning vice and one that becomes more dangerous the longer the planning period and the more uncertain or complex the environmental factors. On both counts scenario planning, which looks some years into the future and across a broad horizon, scores high. To avoid inflexibility plans need to be treated as navigational aids, not blueprints. In addition to giving a sense of direction, they provide the basis for altering course if or when the destination is changed.

A subcategory of rigidity is *planning blight*. Managers and policymakers who are lulled into this state of mind cease to look about for new ideas or strategies once the plan is settled. An antidote to this might be provided by a rigorous research program. It might even be suggested that a duty of planners should be to take on a policy-scanning role to identify possible new initiatives, issues, or strategies and to bring them to their colleagues' attention. This might in turn provide a counterweight to the preciousness that plans can have in the eyes of those who crafted them.

Last among the risks of planning is its becoming *process-focused*, with planners engrossed in using particular forms and complying with timetables and attendant conventions. The danger is often symbolized by the glossy documentation produced by moribund organizations. It is the ultimate and self-defeating sin of any planner.

The Wider Context

All justice systems involve a number of participants. If their individual plans are not coherent or, worse, are in conflict, best value for money and full potential benefit to customers will not be achieved. For that reason, the need for dialogue and clarity of purpose among the various agencies and other players is indisputable, and the

need to distribute resources across the system to produce the optimum overall performance is compelling.

The Political Dimension of Long-Term Strategic Planning

The political dimension of long-term planning in the public sector, including within the justice system, raises three distinct but linked issues:

Whether the volatility of the political environment is such that it will render long-term planning a nugatory or even harmful practice.

Whether long-term strategic planning is compatible with the democratic process.

Whether strategic planning of a duration and in the detail necessary to render it useful is likely to be accepted or seen as valuable by the government of the day.

Uncertainty

Longer-term planning is not only difficult where there is a high level of uncertainty—it can be positively harmful if it hinders an organization from adapting quickly and flexibly to rapid change. Although in some organizations the level of stability and instability may fluctuate, and with it the value of long-term planning, in others uncertainty may be endemic and the case for any long-term planning thus highly questionable. The question then is: Do public services, and in particular the justice system, necessarily fall into that latter category as a result of the uncertainties of their political environment?

Changes in government and political leadership and political pressures can and do lead to changes or even reversals of public policy; but boardroom revolutions, takeovers, mergers, and changes in markets and technology have equally influential effects in the private sector. In any event, the uncertainty in the public sector may be more apparent than real when policy is seen in a broader, longer-term perspective, for the following reasons:

Many issues that for political reasons are characterized as resolvable problems are in fact persistent difficulties that must be "managed" by choosing from a limited range of similar options.

Despite emphasis on the policy differences the democratic process encourages, there is often an underlying if unarticulated consensus.

Except during periods of fundamental change, many areas within the public service are for much of the time not the subject of strong political interest and may be run and developed without being subject to sudden and unexpected change generated from that quarter.

Two other factors peculiar to many public sector organizations also reduce uncertainty: the absence of competitors whose activities in the market (e.g., introducing new and better products) cause much of the turbulence in the private sector; and the ability of monopolistic public sector organizations to "plan by enactment" in exerting strong controls over future developments.

In addition, most justice systems display a high degree of stability—some might say too high. For example, changes in the law, in the jurisdiction, structure, and administration of the courts, in the status of judges, and in the arrangements for providing private and publicly funded legal services often require enacting legislation and generally come about only after formal investigations into the current system. And although some areas within the justice system may occasionally be more volatile than others because of their political significance (e.g., criminal law), the overall picture is one of incremental change and hence of a system susceptible to the benefits of long-soft

term planning. In these circumstances, the uncertainty that politics brings to justice systems should be manageable in purely planning terms.

Moreover, as a means of staving off the turbulence that changes in government can cause if the policy alternatives of the contenders for political office can be identified, then theoretically they could be built into the plans either as variables or, perhaps, as elements of alternative long-term scenarios. In practice, however, the government of the day may not be inclined to divert resources to working up plans for its political competitors, particularly as doing so may improve the contenders' chances of electoral success.

An alternative lies in treating elections as opportunities for a planning review. The underpinnings for such a process already exist in many political systems. In the United Kingdom, for example, opposition politicians are given access to departments ahead of elections to discuss their plans, and the civil servants for their part prepare alternative ministerial briefings based on the policies of the contending parties. In this way, the existence of a strategic plan may be of considerable value. Many of its elements and especially the environmental factors and assumptions are likely to remain constant and, hence, long-term planning may be seen as having the additional advantage of providing a sound basis for altering course if an incoming administration changes some of the planned destinations.

Compatibility with the Democratic Process

To the constitutional theorist, a planning process that addresses objectives whose achievement is beyond the electoral horizon may seem incompatible with the democratic process, even given some planning review mechanism to facilitate changes of government. For theorists, such planning may conjure up the shadowy hand of bureaucracy at work in "fixing the agenda" for the future and depriving the citizen of his right to choose a new government and different policy. However, in satisfying the constitutionalist, the government machine would be condemned to short-termism, the cardinal accusation that political commentators and thinking taxpayers regularly level at ministers and civil servants, alike. Indeed, satisfying the constitutionalist would lead governments to become increasingly and finally wholly moribund as their term of office progressed, whereas in practice they need to operate in the expectation of being returned to office. Given that reality and the prospect of being damned if they plan and damned if they don't, those responsible may be unlikely to abandon long-term planning for constitutional reasons.

Political Acceptability

From the point of view of a minister in office, the attractions of long-term planning are of two sorts. First, in pragmatic terms, planning could be seen by ministers as a way of

Conveying policy messages.

Strengthening their individual position in the competition among ministers for resources.

Demonstrating a responsible, firm, and comprehensive grip of the issues.

Conveying the message that the government is confident of being returned at the next election.

That said, the value politicians put on long-term planning may be reduced by the reality of political pressures that tend to center on immediate problems and thus encourage government to concentrate their efforts on short-term system-specific difficulties at the expense of the longer term. In addition, long-term planning has a tendency to reach across departmental responsibilities and to require responsible ministers to cooperate in achieving the best overall results for the citizen. However, within many systems of government departmental ministers are in competition for resources and may be unwilling to cooperate if it involves their having on occasion to surrender

funds to each other.

A further difficulty that would need careful and sensitive handling is the articulation and presentation of the underlying assumptions and objectives of the plan. Some of the underlying assumptions may, for example, be "bad news" in political terms (e.g., forecasts of further breakdown in the family structure or an increasing gap between rich and poor in society). Certain planning objectives may be complex and open to misrepresentation by a press obsessed with headlines and by opposition politicians eager to attack the government. Moreover, certain assumptions or objectives that are fundamental to the plan may not yet have full government commitment or may not yet be ready to be made public. In this vein, some motivating assumptions or objectives may affect other players in the system who are not yet "signed up" for, or even privy to, the plan.

An additional aspect of planning that may make it politically sensitive is the clarity it introduces into decisionmaking and the consequences thereof. Not only does planning make it difficult to ignore or refuse to address hard questions but, in terms of accountability, strategic planning and even more so the management plans that spring from it will make it easier for outsiders to spot bad or fudged decisions, identify inefficiencies or underresourcing of services, and, more generally, fix responsibility for failures of policy.

Although clarity is healthful in that it ensures that power and responsibility march together, it may make continue

politicians understandably wary of the planning process and require special attention if that process is to be successful.

Appendix A— Strategic Plan for Judicial Administration

The foundations of this plan are the Department's fundamental aim, strategic priority, and guiding principles.

Fundamental Aim

The Department's fundamental aim is to ensure the efficient and effective administration of justice at an affordable cost.

Strategic Priority

In support of the government's objective of controlling public expenditure, the Department will make it a strategic priority to control legal aid costs and contain expenditure on court services, while maintaining proper standards of service by means consistent with this priority.

Guiding Principles

The guiding principles that will inform all the Department's work are

To protect and advance the rule of law.

To ensure a fair and efficient system of justice.

To safeguard the independence of the judiciary and the judicial process.

To provide service to all citizens using or involved in the processes of the law.

To ensure openness, subject only to exceptions necessary to protect individuals and the public interest.

To promote equal opportunities.

Key Challenges

Six key challenges have been identified for establishing an efficient, effective, and affordable system of judicial administration:

Ensure access to justice while reducing its cost to the parties and the taxpayer.

Sustain improvements in the quality, efficiency, and effectiveness of court services.

Gain control of the overall cost of legal aid while assuring an adequate level of publicly funded legal services.

Support improvements in the appointment and training of the judiciary.

Develop a range of policies that contribute to the protection of the rights of the individual, the family, and property; and, where appropriate, support these policies with an effective law reform process.

Build structures and mechanisms, within planned levels of resources, to enable the Department to meet its key challenges and carry out its other functions.

Notes

1. The views expressed in this chapter are the author's and do not reflect the views of the Lord Chancellor's Department (United Kingdom), for which he works.

2. The details of how such a hierarchy can be constructed for a court system and then used as a management tool to achieve the objectives of that system were discussed in detail at the Public Sector Management Retreat organized by the World Bank in 1993. A summary of the retreat proceedings has yet to be published.

PART VIII— JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN

22—

Judicial Reform in Venezuela

Pedro Miguel Reyes

Venezuela shares certain characteristics with other Latin American countries: its roots, its worldview, and its quest for identity in the face of the different cultures that have influenced its development. The country's constant political and institutional reforms reflect a desire for legitimacy, but these reforms often do not conform nor can they be adapted to the culture.

Problems in Judicial Administration

The judicial system's inability to promote social peace has made it subject to constant reform. The system lacks cohesiveness and suffers from the threat of judicial collapse, a poorly defined structure, partisan justice, procedural entanglements, and a lack of oversight.

Judicial Collapse

Venezuela's population quadrupled from 5 million to 20 million inhabitants between 1958 and 1994; the number of courts and judges only doubled during this time. As demands on the system increased, additional jurisdictional areas were created and others grew, including powers over agrarian, administrative–litigation, and state patrimony matters.

The judicial branch suffers from the same poverty that afflicts the country's economically and culturally marginalized people. Of the 1,200 lower and special courts, 150 do not have sanitation and 120 lack reliable electricity. In 1993 the judiciary received only 0.4 percent of the national budget (in 1958 it received 3.5 percent). Over the past few years the amount allocated to the judiciary in the national consolidated budget has not improved.

Judicial Structure

The Venezuelan judicial system has special characteristics. While the courts share the mission of administering justice, they are not organized in a logical or coherent manner. The system is divided into the Supreme Court, lower courts, military courts, and the justice of the peace.

The Supreme Court . The Supreme Court is the central source of judicial power and has the greatest jurisdictional influence. About 7,000 cases go before the court each year, making its role that of a third–level appeals court while it remains something other than an ordinary court. Although the Supreme Court is governed by its own functional law and it manages its resources independently, its judges are appointed by Congress. The court's culture distinguishes and distances it from other courts. Legislators, motivated by their distrust of the other courts, have burdened the Supreme Court with functions and attributes that drain its efficiency and reduce its effectiveness.

Lower courts . The judicial system comprises 1,200 lower and special courts. These national and regional courts are expressions of a distinct legal culture and differ specifically from the Supreme Court or the military courts in that they are staffed by legal professionals, administered by the Judiciary Council (*Consejo de la judicatura*).

Military courts . Military justice has its own regulations and means of assigning judges. Its activities are of a military nature, though it is linked to the other courts through the Court of Penal Appeals of the Supreme Court (both for appeals and as a regulatory body for conflicts relating to the military courts' competence).

The justice of the peace . The position of justice of the peace is being created to promote judicial decentralization.

Translated from Spanish.

This justice need not be a lawyer, will be elected by popular vote, and will be dependent on the municipality. This justice may have concrete jurisdictional powers, which the lower courts resent. The justice's role may be redefined as "local" and "community" justice in order to mitigate this reaction.

Partisan Justice

Venezuela's current judiciary dates to the 1960s, when the country was confronting a leftist-backed armed conflict. Judges identified with subversive elements were expelled to instill confidence in the system, but their politically appointed replacements often lacked knowledge, experience, and honesty. Partisan criteria continued to be used after the conflict ended. Many judges, however, adapted to their role; others succumbed to corruption. Despite efforts to depoliticize judicial appointments, the image persists that the entire service answers to political and business interests.

Political doublespeak is responsible for some of the judicial conflicts. While politicians claim to favor a judiciary that is autonomous, efficient, and nonpartisan, they also exploit their powers over the judiciary and deny it the resources needed to better the system. As a result, public confidence in the judiciary is low.

Procedural Complications

The judicial system is structured to establish a means of defense for litigants in light of public distrust of the judiciary's capacity and honesty. Procedures such as restraining orders, appeals, recusals, and other administrative and judicial options exist to prevent a judge from manipulating a case. But the lack of enforceability of the written law has reduced the impact of such procedures. This legal multiplicity burdens the judiciary with formalities, reorganizations, and rigidity, making it difficult to achieve true justice. The recent reform of the Code of Civil Procedure (1986) worsened this situation. The code complicates civil and mercantile processes, which, despite having their own procedures, refer to the code to solve their procedural problems.

Lack of Managerial Oversight

Modern and efficient performance reviews of judges and their staffs could correct systemic flaws. Current controls have no effect on the conduct of judicial personnel, increasing indifference and apathy. Training procedures are also insufficient.

Reform of Judicial Administration

Venezuela's judicial system must be reformed to make it efficient, reliable, and available to the entire population. Two main approaches have been attempted in recent reforms. Both followed a legal change approach to improve the administration of justice. The first focused on altering the Constitution (the legal structure) to produce the desired change. The second sought to transform norms with legislation, as if social change could be decreed.

To this end, the Code of Civil Procedure was reformed and later the Law of Constitutional Protection and the Law of the judiciary Council were decreed. These laws have increased systemic inefficiency and public mistrust of judicial administration. The processes have also been complicated. What remains to be changed is that part of the Constitution that has an impact on judicial reform.

Reform of the laws relating to judicial structure and function is also needed. A code is needed that contains the functional norms of the Judiciary Council, the regulations for a legal career, the jurisdiction of the justice of the peace, and the rules for the Supreme Court. These projects remain the object of study despite executive approval and congressional presentation.

The slow pace of the legal change approach led to a different strategy for improving the administration of justice. Despite some dated and complicated laws, it was felt that reform should be attempted within judicial units where conflict resolution develops. Changes were to be adopted at the tribunal level, considered the center of judicial administration. Judges at this level spend more than 80 percent of their time on administrative issues and just 20 percent on substantive issues. Tribunals need new forms of working, activating filing systems, and bringing suits;

should halt nineteenth-century practices; and must create a system for measuring performance. Many judges and their personnel believe that the tribunal is unable to change and become more productive. Despite this resistance, the internal organization of the tribunals should be adapted to the twentieth century without waiting for a law to determine the process. Reforming the tribunal should then generate the conditions for legislative change.

Challenges include accelerating modernization without waiting for new laws, which can be prepared in parallel; accomplishing reforms with existing legislation; and making tribunals more flexible. The Judiciary Council would oversee tribunal administration.

The Judicial Modernization Project

Legislative reform issues related to modernization of services or legislation are brought before the executive agency, the State Reform Committee (Corporación para la reforma del estado, COPRE). It was within this committee that judicial reform was initially proposed and the many difficulties of its achievement demonstrated. Reforms would be introduced within the system under existing laws while support from other states was being sought through bilateral agreements.

This conflict was resolved when the World Bank approved a loan to modernize Venezuela's judicial system. Since the Venezuelan legal system lacks experience in planning, creating, or participating in multilateral agreements, the project with the Bank was spelled out carefully. The Bank participated as the project was elaborated, target areas were specified, and documents were drawn up for project design.

Obstacles to the Project

A small group of professionals and politicians opposed the project, claiming that it would violate Venezuela's judicial autonomy and affect national sovereignty. It was emphasized, however, that judicial activities would be available to all citizens; that the idea of reform was born in Venezuela and a program would be implemented by local judges; that judges would continue to be Venezuelan, administering the laws enacted by Congress; and that the project would improve the country's system of justice.

Another obstacle that had to be overcome was the view that it was not economically sound to become indebted for nonproductive activities—that debt should be incurred in investment areas that generate financial resources. A finance minister held this position, delaying the project for more than six months. The financial bureaucracy and some members of the judiciary also held this view. But it has been proven that social sector investments can generate payment, such as through a better working judicial system that promotes legal security and transactional fluidity.

As expected, there was a high level of resistance within the judiciary. Some judges and judicial functionaries believed that the loan agreement should be directed at current expenses (salaries, construction, and equipment). The purpose was to direct the loan to imminent and particular concerns rather than to address medium- and long-term problems. Other judges either did not want to accept, or did not have the will to undertake, a new way of working. For them, creating more courts and appointing more judges was sufficient to improve judicial administration.

The lack of unity within the judicial system and the multiplicity of institutions involved in its reform generated conflicts over functional responsibilities. This gave rise to a lack of collaboration in many cases. Reform of the Judiciary Council has not been exempt from these hurdles.

Project Viability

These obstacles having been overcome, Venezuela must now transform its judicial power and administration of justice into an efficient, timely, and economic system for conflict resolution. The country should serve as a model for other Latin American countries facing similar challenges with their legal systems. The Bank project pioneers multilateral assistance to the judicial sector of member countries. In Venezuela it aims to improve the enabling environment for private sector development and to reduce both the private and social costs of justice. Its specific objectives are to improve efficiency in the allocation of resources within the judiciary, increase courtroom productivity and efficiency, and reduce the private sector costs of dispute resolution.

To achieve these objectives the project is supporting institutional development of the courts and of the Judiciary Council, which is responsible for overall court administration, through the following measures: improving courtroom productivity and efficiency through reorganization and streamlining of courtroom management; strengthening the administrative capacity and specialized legal knowledge of court personnel, including knowledge pertinent to commercial and business litigation, by strengthening the capacity of the Judicial School to design and deliver training; rehabilitating existing and constructing new courtroom facilities; enhancing the quality of judges through an adequate selection, training, and salary system; identifying methods for establishing legal assistance programs or justice-of-the-peace initiatives; developing alternate methods for dispute resolution; and studying ways to simplify and update laws and procedures.

The project allows ample flexibility for legal and administrative modifications. Changes ought to be compared, their consequences measured, and different proposals for the functioning of the court system tried in the pilot programs that are created as a result of the project. The project's goals should be achievable given the World Bank's experience and the enthusiasm of the Venezuelan functionaries.

Conclusion

In summary, the Venezuelan justice system needs to be modernized and decentralized. Its structure needs to be clearly defined and made more coherent. It must have unambiguous means of reaching its ends and should offer its users a system that makes clear who the appropriate judge is. If implemented with care, the project will set the stage for more profound judicial reform in Venezuela.

23— Judicial Reform in Jamaica

Edward Zacca

The judicial system in Jamaica enjoys a notable independence, and hence impartiality, that is the legacy of its grounding in English common law.

Evolution and Characteristics of the Judiciary

The Constitution of Jamaica, which came into force at Independence in 1962, was fashioned on the Westminster model. Jamaica is currently revising and reforming the Constitution, which adheres to the monarchy, and there is general agreement across the political parties that the new Constitution be republican, with a ceremonial president and a prime minister.

Central to the Constitution is the concept of the rule of law. Section 4 of the Jamaican Constitution (Order in

Council) provides for the continuance in force of all laws in effect in Jamaica immediately before Independence, August 6, 1962. Thus, the statute law and the common law of England have remained the law of Jamaica.

The Constitution provides for three separate branches of government—executive, legislative, and judicial—and thereby assures an independent, impartial judiciary.

Judges of the Jamaican Supreme Court and Court of Appeals hold office until age 70 and can be removed from office only for misconduct and only after a comprehensive inquiry has been conducted. The investigation is presided over by three Commonwealth judges with unlimited jurisdiction in civil and criminal matters, or three appellate judges, and a finding that is unfavorable to the judge must be submitted for ratification to the Judicial Committee of the Privy Council in England before it can be acted upon.

Appointment of the chief justice and the president of the Court of Appeals is made by the governor general upon the recommendation of the prime minister, who must consult with the leader of the opposition party. (Neither Parliament nor the electorate has a say in the appointment.) The chief justice presides over the Judicial Services Commission, which is composed of judges, the chairman of the Public Service Commission, and two members representing the legal profession. It is the commission's province to make recommendations to the governor general for appointments of all appellate judges, high court judges, the master (a judge in chambers) and the registrar of the Supreme Court, and all resident magistrates.

The emoluments and terms and conditions of a judge's appointment cannot be altered to his disadvantage, nor can his office be abolished during his term of office. Disciplinary responsibility for judges of the inferior courts is vested in the Judicial Services Commission.

Thus assured of its influence in the awarding of judicial appointments, its freedom from interference in the terms of the appointments, and its autonomy in enforcing discipline, Jamaica's judiciary clearly exercises independence and, as a result, impartiality. However, to be completely independent, the judiciary needs to have control over its salary system and conditions of service, and it is to this end that certain judicial reforms have been undertaken over the years.

Judicial Reform: Salaries and Conditions of Service

The Jamaican Constitution states that judges are not public officers. However, judges in the past have been treated as public officers, forced to negotiate directly with the government for the enactment of legislation providing for their salaries and conditions of service.

Despite the enactment by Parliament of the Judiciary Act of 1973, which should have made provisions for all conditions of service for judges, the latter still found they had to negotiate these issues with the minister of publiccontinue

service. Finally, after years of effort, the judges were able to persuade the government to enact legislation setting up an independent commission to consider their pay and terms of service.

The independent commission met for the first time in 1993 and made recommendations that were largely accepted by the government. As a result of these recommendations, the salaries and conditions of service of judges have significantly improved. (The Commission will meet every two years.)

Other Judicial Reforms

Judicial reform has made steady progress on other fronts. In Jamaica the *appeal process* ends, finally, in the Judicial Committee of the Privy Council in England. The governments of the English-speaking Caribbean, including Barbados, Guyana, Jamaica, and Trinidad and Tobago, have agreed in principle to abolish appeal to the Privy Council and to establish a Caribbean Court of Appeals. There is, however, some criticism of the plan from the private bar in Jamaica, with a number of lawyers wishing to preserve the current system.

One particularly important provision of the Jamaican Constitution is the establishment of a constitutional court to redress *grievances* that arise in connection with the Bill of Rights provisions of the Constitution. If anyone alleges that any provision of Chapter 111 of the Constitution has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action lawfully available with respect to the same matter, that person may apply to the Supreme Court for redress. Such grievances are heard by a panel of three high court judges.

Judicial review is also provided for in the Jamaican legal system, and cases again are heard by a panel of three judges. Judicial review cases have increased by leaps and bounds: writs of habeas corpus, and the prerogative writs of certiorari, mandamus, and prohibition, are ever-increasing. This means that the time of three judges is often monopolized, creating even more delays in the court system. The judges have recommended that all judicial review cases, with the exception of cases involving the liberty of the subject, be heard by a single judge to relieve the two other judges to preside in other courts. It is expected that this recommendation will be accepted by the legal profession.

Other examples of *judicial overload* can be found in Jamaica. Despite increases in the numbers of judges and courtrooms over the years, delays in completing trials have increased. This is partly due to a tremendous increase in crime and violence, which has swelled the roster of criminal cases. And it is partly attributable to Jamaica's economic growth, which has contributed to a heavy increase in civil cases.

But the Jamaican judicial system, like those in other parts of the world, is strapped for resources and unable to handle its heavy caseload. It lacks sufficient funds to improve the physical surroundings in which justice is administered. And it lacks the ability to attract qualified and capable lawyers, because salaries and conditions of service are not competitive.

Delays in the court system have attracted much attention. It is feared that the public will lose confidence in the administration of justice if cases cannot be heard within a reasonable time. Judges and other members of the legal profession have made recommendations to relieve some of the clogs in the system. And delay reduction training programs have been conducted for the judges and court staff.

Previously, in all serious criminal cases a preliminary examination was required to establish a *prima facie* case before the offender could be committed to trial. In an effort to expedite the trial of criminal cases, the judiciary has urged the government to abolish preliminary examinations.

Another important legal reform has been an amendment to the Offenses against the Person Act. Prior to this amendment, all murders were indicted as capital murders, carrying the death penalty. There are now two degrees of murder, capital and noncapital. Killing in the course of a robbery or burglary and killing a judicial officer or policeman are examples of capital murder and will still carry the death penalty. A noncapital murder—for example, the killing of one's spouse—will now be punishable by a lifetime sentence. A new provision in the law requires judges in capital murder cases to fix the minimum sentence to be served before eligibility for parole.

Prospects and Recommendations

To maintain a viable judicial system in Jamaica, the government will need to provide the judiciary with a more appropriate budget. It is clear that insufficient funds, coupled with the slow progress of legal reform, have contributed to extensive delays in the courts.

Better management of the court system is also necessary. To this end, the judiciary has recently appointed a court administrator for each court. Administrators will develop systems to improve case flow management and will supervise and train court staff, among other duties. Also, a statistical unit will be established and computers continue

introduced. It is hoped that these innovations will speed up the trial of cases and reduce the backlog.

To lighten the burdensome caseload, alternative dispute resolution is being introduced in Jamaica to reduce the number of minor cases that come before the courts. Training of mediators is in progress, and the willingness of lay magistrates and attorneys to act as mediators is encouraging.

To reduce delays in court cases, it has been recommended that in some instances formal documents be placed in evidence by consent, thereby obviating the necessity to call witnesses—for example, pathologists' reports in cases of murder or manslaughter where the evidence is not challenged.

Finally, a further drag on the court system may be the incentive some lawyers have to draw out cases. Legal aid is available to prisoners in nearly all serious criminal offenses. Lawyers are paid fees per diem, but these are nominal, and it appears that cases are delayed by adjournments and long cross-examinations so that lawyers can earn an appropriate fee. It is being proposed that a fixed fee be paid according to the complexity and seriousness of the offense being tried. It is likely that such an arrangement will lead to the quick disposal of cases.

24—

Judicial Reform in Brazil

José Renato Nalini

The Brazilian judiciary today is suffering a crisis that has been in the making for several decades. The justice system, immune to modernization, clinging to old forms, and burdened by cumbersome, bureaucratic procedures, is the subject of open criticism from the legal community, which calls for a faster, simpler, and more efficient administration of justice.

Early efforts at judicial reform, including a constitutional amendment issued by a military junta during the 1980s, brought about only superficial reforms that did not begin to address the changes needed to streamline judicial services.

The debate preceding the Constitution's promulgation on October 5, 1988, created a strong movement for judicial reform among all principals in the legal community. But the prospect of external monitoring of court services—as provided for in the Constitution—has discouraged the judiciary from implementing reforms, and little has changed.

Thus, after several false starts at reform, the judicial system is once again the center of controversy, this time involving broader debate—outside the legal community—in the political arena, the business community, and the

media and among the citizenry. All parties call for a faster judiciary, one that is closer to the people and whose processes are simpler and more efficient and effective.

A reading of the draft constitutional amendment leaves the reader uncertain as to whether these reform goals will be attained. True judicial reform remains an ideal whose implementation will require the involvement of its most essential players, the judges.

The objective of this analysis is to raise issues that might lead to the development of a feasible approach to judicial reform in Brazil.

Structure and Processes of the Judiciary

Brazil's judiciary comprises the ordinary courts, which are divided into federal and state branches, the labor courts, the military courts, and the electoral courts. The highest judicial tribunals are the superior courts: the Supreme Federal Court, whose principal function is preserving the Constitution, the Superior Court of Justice, the Superior Court of Labor, the Superior Military Court, and the Superior Electoral Court.

The Career Path

The federal level of the court system also includes the appeal courts. Judges follow a career development path through the ranks of the judiciary circuits, beginning with the circuits in less-populated communities and progressing to those in the main population areas. Some Brazilian state judiciaries are divided into "initial," "medium," and "final" circuits that, again, reflect the typical career path of a judge.

Career entry is as a substitute judge, with a permanent appointment conferred after two years of service. Initially, magistrates have jurisdiction over a broad range of civil and criminal matters, with specialization to follow.

The Constitution of 1934 provided for an institution known as the *quinto constitucional*. A fifth of the members of any given court are drawn from the public prosecutor's office and from the Brazilian Bar Association, upon the recommendation of its senior members. The idea is to prevent excessive secrecy in the judiciary.

Simplified Procedures

Some years ago simpler procedures were adopted for small claims court. And, to a lesser degree, simplified procedures continue

Translated from Portuguese.

have also been adopted in some Brazilian states to handle criminal lawsuits. Such experiments are thought to hold some promise for the future of the Brazilian judicial system, which is mired down with millions of protracted judicial processes and severely strapped for the resources needed to satisfy the demands of a citizenry newly aware of its rights.

Recruitment of Judges

Entry into a career in the Brazilian judicial system is primarily through public competition in a series of tests. A minimum age requirement of twenty-three years is imposed and, in some courts, a maximum age limit of forty-five years is set. Tests, administered in several stages, include an introductory examination, subsequent written and oral tests, and personal interviews; a background investigation is also conducted. And since passage of the 1988 Constitution, several states require official career training courses in addition to university degrees.

Courses are required in the distinct disciplines of civil, criminal, procedural, constitutional, administrative, business, and tax law.

Magistrature schools, which are found in almost all the Brazilian states, offer specific career training and a setting in which magistrates can strengthen their skills. Many of the schools are operated by the courts; others are operated by magistrates' associations. Draft magistrature statutes developed by the Supreme Federal Court assign an important role to this recruitment process for prospective judges and provide for the creation of centers for judiciary studies.

São Paulo is an example of a state that has created a school for magistrates (1988) to teach the judiciary career preparatory course. The school selects candidates for the judiciary through an open admissions test, after which it performs its own internal evaluations of students' progress. Only graduates of the school, which operates under the state court system with the active participation of state magistrates, may be selected for the next stages of the competition.

By regulation, the selection committees are composed of senior magistrates. In São Paulo this puts the responsibility for selections into the hands of three magistrates, besides the representative from the bar.

A great deal of attention is paid to the qualifications of candidates for the judiciary because it is understood that the success of future reform efforts will depend on the personal involvement of these magistrates, who in turn will be the main beneficiaries of a continuing enhancement of the magistracy.

Judicial Reform

The greatest complaint the Brazilian people have about the judicial system is that it is too slow. Moreover, the courts are viewed as excessively secretive, complicated, inaccessible, and expensive. Removing these deficiencies would require the following measures.

Adopting a Businesslike Approach

The Brazilian judiciary is hampered by a cumbersome structure and does not employ modern technologies readily accessible to the business community. Implementation of the "judicial reengineering" concept is thus crucial to enhancing judicial services. This would entail restructuring and adopting new technologies to increase productivity, improve quality, and lower costs.

Productivity should be boosted by optimizing resource use, including intensifying efforts to exploit informatics and cybernetics. In this way, the judiciary could expand its capacity to serve individual and collective needs, as well as to meet broader social demands.

Even though the judicial system is widely respected in Brazil, total quality control remains a goal to be striven for, through enhancement of recruitment techniques for judges and other court officials and through streamlining of judicial administration. The judicial education process, too, will be essential to fostering an awareness of, and desire for, total quality.

Finally, costs must be controlled. Resources allocated by the Brazilian government need to be well administered. A particular challenge for the judiciary will be to make its services accessible to the poor; who are largely excluded from this essential public service. The poorest segment of the population today constitutes almost 35 million people, of which 15 million are children and adolescents. The Brazilian judiciary must find a way to serve the needs of the poor and the dispossessed.

Cost-benefit analysis is an option that should be considered for evaluating performance and cost in the judiciary.

Simplifying the Judicial Process

Brazil's size and heterogeneity argue against the development of a single judicial process for regions as diverse as São Paulo and the Amazon, areas that have little in common though they belong to the same state. Rather, judicial reform in Brazil would be served best by allowing legislative initiatives from each federal state, once the general principles

established by the federation are taken into account. Ideally, the state courts could in this way promote reforms based on regional and local peculiarities. As matters stand now, the existence of a single process is the apparent cause of judicial bottlenecks and delays in the processing of cases.

Expanding the Special Courts

The mounting caseload of the judiciary cannot be handled by the formal court system alone. The alternative is the expansion of the special courts, already introduced to some extent in the form of the small-claims courts and settlement courts.

The special courts can effect a faster and less expensive administration of justice than the more formal courts. These units operate in a flexible manner, with the cooperation of professional magistrates who may be still practicing or retired. The courts are generally located in offices in the judiciary and conduct their business at night, when the offices are little used.

The special courts constitute an important alternative to the more formal court system. They are a means to prevent so-called repressed litigation, that is, cases removed from the formal judiciary system to alleviate delays and court costs. Expanded use of the special courts to include certain criminal jurisdictions could speed the processing of misdemeanor cases involving minor traffic infractions, public drunkenness, and other relatively simple matters. The formal court system, in turn, with its caseload thus lightened, would be freed up to deal with more complex controversies.

There are no regulatory obstacles to implementation of an expanded network of special courts. Indeed, the Brazilian Constitution has fostered the creation of this alternative. But political will and material resources will be required to make it work.

Improving the Education of Judges

The most significant step that can be taken to improve the Brazilian judiciary, however, is to improve training for judges. Judges must be highly qualified professionals, provided with the background and skills that will enable them to transform the judiciary into a modern and efficient public service.

Education in Brazil today has been weakened at all levels. Low salaries for teachers have contributed to a failed education system in which the focus has been more on the quantity than the quality of production. Deficiencies that originate at the primary education level continue through secondary education and on up to the university level. The result is a legion of young graduates unable to perform at the professional level.

In the face of such glaring deficiencies among college graduates, the judiciary created the magistrature schools. These institutions have made substantial progress in their effort to improve the qualifications of judges. But they are still feeling their way in search of their true role in the education process. Joint efforts with universities might provide an opportunity for shaping the education of likely recruits as early as at the bachelor's level. Through such arrangements, the magistrature schools could guide and invest in promising students, with a view to developing candidates for their own schools who would enter already as semideveloped professionals.

A more ambitious proposal would be the development of an ideal course of law studies that would be maintained by the judiciary itself and would be intended exclusively for the training of judges, in much the same way as seminaries train priests.

In any case, greater emphasis needs to be given to the issue of vocation. Judges cannot simply be technicians. The qualities required of a judge are daunting: level-headedness, sound judgment, sensitivity, a sense of humility, love of service, selflessness—all qualities without which it is impossible to administer justice in a country as heterogeneous as Brazil.

But how to develop such individuals? It would seem that the talents required of a judge are innate, and that finding promising candidates would require the talents of exceptionally insightful recruiters—or the services of a head hunter who would cast his net among already developed professionals—rather than the painstaking efforts of educators. But continuous enhancement of an education strategy, aimed at individuals with potential, will in the end bear fruit.

A discussion of the education of judges cannot overlook the importance of ethics. The Brazilian judiciary is in a moral crisis, one that mirrors ethical ambiguities and uncertainty in the executive and legislative branches and in society. Consensus on ethical issues is essential to the administration of justice, and judges must provide leadership in this area if the justice system is to become an essential public asset, responsive to society's needs.

Investment in improving the methodology for the recruitment and education of judges is the most efficient approach to judicial reform. This will ensure the performance of zealous, morally impeccable professionals, builders of a true state of law and guarantors of democracy.

25—

Judicial Reform in Argentina

Elena Highton with Elías Jassan

This chapter summarizes the legal and judicial reforms taking place in Argentina. Development, strengthening, modernization, and increased autonomy and efficiency of the system are analyzed as part of a wider process of institutional adjustment. The analysis underscores the need for aid—both general and through the creation of a judicial faculty—to enhance the infrastructure, equipment, and human resources involved in administering justice. Technical and organizational services capable of implementing legislative reforms also are badly needed. Alternative ways of settling disputes should be affordable to all citizens—acting in their own capacity or using court-sponsored facilities—to decongest the courts and provide more equitable access to justice. These changes would make possible a legal framework capable of sustaining development and democratization.

The Judicial System

Argentines have long felt that their judicial system is incapable of satisfying their need for legal support. A recent survey revealed that 49 percent of the citizens thought the system was bad or very bad and 40 percent thought it was mediocre. The criticisms focused on the system's slowness, bureaucracy, and lack of fairness.¹ This perception has created a lack of faith in the system, which has gone from being the sphere for conflict resolution to being a major source of conflict, thereby undermining confidence in institutions in general (Morello and Berizonce 1994).

The Argentine judicial system is in a state of collapse, both figuratively and literally: the buildings are crumbling under the weight of files of written proceedings. Several buildings have been closed because they were too

dangerous to continue using as courts, thus interrupting trials.² Worse, courts that have been relocated are overcrowded, poorly furnished, and lack the appropriate design or facilities. Moreover, these buildings are located far from the court district (*Barrio de los tribunales*), which increases hassle and expense for lawyers, judges, and court clerks.

Since the system has no juries, judges not only preside over hearings, produce written proceedings, sign resolutions and court orders, and handle administrative tasks, they also must make decisions and definitive judgments in the cases they hear. Since trials often lose direction as the parties involved submit petitions, make proposals, and present appeals, the system's efficiency and effectiveness are limited.

Despite a majority of hardworking judges, the judiciary pronounces a final verdict on fewer than 10 percent of the cases that it begins hearing in the same period, creating a huge backlog.³ One favorable aspect, however, is that there is an abundance of up-to-date legal literature and research, with legal journals and books that are easy to obtain or consult. There is also a constant stream of conferences, congresses, and seminars for scholars.

Addressing Problems

These problems are starting to be addressed thanks to repeated mention of the subject in the media and the interest among jurists, legal practitioners, and the public in settling conflicts by alternative means. Although no systematic reform has been undertaken, this new awareness has sparked a set of legal and administrative reforms; new technology is being implemented (often paid for by judges, attorneys, and court employees); and self-education efforts are under way. Thus, it can be said that a certain consensus exists with regard to the need and importance of judicial reform.

Translated from Spanish.

World Bank Role in Judicial Reform

The changes that have occurred are the result of Argentina's pursuit of democracy, which greatly intensified the public's demand for justice. But, despite these changes, the judiciary continues to operate, as it has for more than a century: unchanged, underfunded, and understaffed, with few resources and obsolete management techniques. The resulting backlog of files and work undermine the administration of justice and thwart the achievement of due process.

The World Bank could help the judiciary achieve its goals by investing in rehabilitation of the buildings housing the judiciary, computerization of administrative procedures, reductions of staff and workload, and so on. Instead of creating more courts, the Bank could ensure that existing courts perform well by having at their disposal the appropriate mechanisms for settling conflicts. In addition, the Bank could promote a new judicial culture and a concept of justice that goes beyond the formal justice meted out by judges.

Legal Education and Training

All those wanting a higher education in Argentina are guaranteed access to universities with the faculty of their choice. While this approach is equitable, graduates are allowed to practice without obtaining credentials. The system does not require any examination of a candidate's ability to provide legal representation for a client (Gold 1993).

Argentine law professors tend to impart abstract notions and theory rather than practical training. With few exceptions, students are not taught the use of case histories, how to draft documents or deliver a speech, or even how law can be applied to real-life situations. This system produces graduates with reasoning and analytical

skills, but with little awareness of the legal system and jurisprudence and, generally, with few decisionmaking or problem-solving skills. In addition, legal education is biased toward litigation and confrontation between adversaries. The introduction of oral and public proceedings in the legal system means that teaching will have to change to equip future attorneys. This adaptation is not yet occurring on a large scale.

Universities face several obstacles to change. Many lack such equipment as overhead and slide projectors, televisions, video recorders, and flip charts. Lecture halls are not designed for active teaching methods, group work, legal clinics, or role-playing, approaches that make students participate in learning. And most professors have a limited commitment to teaching, since it is often an expense rather than a source of income.

Reform Efforts

Nevertheless, some initiatives are moving in the right direction. Some professors are using workshop methods; others are being trained to use new techniques to impart skills. For instance, the Teacher Development Center (*Centro de desarrollo docente*) at the University of Buenos Aires offers a variety of pedagogic workshops for training teachers. The center has been emulated in other parts of the country and in other Latin American countries.

Another major improvement in legal studies at the University of Buenos Aires was to make a clear distinction—starting in 1985—between basic professional and specialization courses. Still, only in 1992 did a few teachers introduce negotiation and conflict settlement procedures into graduate courses.

Although postgraduate courses suffer from some of the same defects as graduate courses, departments of postgraduate studies, lawyers and teachers associations, and other institutions like Fores and Libra are providing advanced courses, seminars, and workshops to complete the educational needs of lawyers. These approaches increase efficiency and ethical training and teach strategies, probate methods, and more peaceful methods of conflict resolution, all of which should improve the legal system.

World Bank Role in Improving Legal Education

The transition from a litigious culture to one based on cooperation with the judiciary requires a new breed of lawyers. Although the Bank cannot reform Argentina's entire legal education system, it can certainly contribute to teacher training, assist in producing attorneys capable of handling oral procedures, and help consolidate peaceful strategies for settling disputes, such as negotiation and mediation. Peaceful conflict resolution could be introduced at educational levels prior to university, as could ideas about law and legal order. That would redirect the litigious culture and pave the way for new approaches to teaching law and administering justice.

Teacher improvement should occur in stages, led initially by a small group of well-regarded, progressive teachers who would devote more time to teaching if wages were higher. Establishing this group of leaders would produce better results than relying on a few teachers who happen to be taking a different approach to teaching law. Teacher training should stress participatory methods rather than an education based on political-philosophical principles, theories, and dogma.

Judicial Education and Training

A good judge is the best guarantee of sound administration of justice. While broad general competence is essential, a judge should also undergo specialized training in a particular field. It is essential that a centralized judicial school be established in Argentina to provide this training. This school could improve understanding of the judicial function, particularly since universities, because of their goals and expectations, are incapable of providing this type of training. Judges must have access to continuous education and opportunities to interact with

peers in an environment conducive to professional improvement.

A judicial school should focus on the skills and abilities required to perform judicial functions. Since this approach is geared toward solving practical problems, adult education theories and active student participation are essential. And since judges need to be informed about areas going beyond purely juridical matters, an interdisciplinary approach should be incorporated into judicial training courses (Lavados Montes and Vargas Viancos 1993, pp. 33639). Judges will have to receive training to adapt to the new system, which includes codes governing oral proceedings and new legal codes, as well as novel legislation and state-of-the-art banking and business practices. Adaptation is crucial, because otherwise the new judicial structures may adopt long-established vices, practices, and customs, losing sight of their essential purpose.

Reform Efforts

Steps have been taken to provide training facilities for judges, but not enough time and money have been invested. The Association of Magistrates and Staff of the National Judicial System, a private institution formed by national and federal judges, teaches high-quality courses for judges and judicial personnel. In 1990 a special commission composed of distinguished members of the bar (judges, retired judges, forensic doctors, and so on) began creating a curriculum of judicial education and training for a judicial school. A foundation was formed to raise funds transparently, with the necessary audits and appropriate sponsor participation. A bibliography was compiled and a survey carried out of previous experience in judicial education, both in Argentina and abroad, to guide in the development of curriculum, the shaping of the various stages to be implemented, and the formulation of plans for how the judicial school would operate after its establishment. To complement their efforts the organizers secured the help of Argentine Bar Association.

The project was interrupted toward the end of 1991 when the U.S. Agency for International Development (USAID) initiated a project to install a judicial school under the supervision of the Supreme Court as part of the aid program for judicial administration. The Supreme Court invited the Association of Magistrates and the Argentine Bar Association to take part in the new project to avoid duplication of effort. The court named almost thirty people to a commission without providing anything more than information about the project's existence. A few members of the commission formed a working group that acted when called upon by the project's executive management office; the group's uneven workload depended on project vagaries totally beyond the commission's control.

While the Supreme Court is familiar with the problems of the judiciary and aware of the need for further education and specialized qualifications among future judges and judicial staff, the project progressed slowly and failed to meet deadlines for the plan, which envisaged a pilot course in November 1991. The date kept being postponed, and the course never materialized. The Association of Magistrates continues to run courses for the judiciary, though not on the scale needed to fulfill the educational needs of the system.

World Bank Role in Judicial Education

World Bank support in setting up a judicial school for the training and education of practicing judges (and possibly of candidates aspiring to become judges) would be invaluable, contributing one of the seeds of authentic judicial reform. Efforts should focus on an institution that is separate from the Supreme Court—the best suited appears to be the Association of Magistrates and Staff of the National Judicial System—but working under its supervision and guidelines.

Alternative Mechanisms for Conflict Resolution

Detailed analysis of this area has been entrusted to Dr. Gladys Alvarez, who will deliver a separate paper on the subject. Still, it is worth stressing the rapid progress achieved in this area since the Ministry of Justice appointed

in May 1991 a commission to revamp the arbitration system and in July 1991 a commission to oversee the introduction of mediation.

Arbitration

Although arbitration is somewhat difficult, it is not entirely new to Argentina—it is mentioned in the codes continue

of procedure and is generally thought to be making headway.⁴ While the number of arbitration cases has not yet increased significantly, arbitration clauses are beginning to be included in contracts, which suggests that arbitration cases will soon be forthcoming (Caivano 1994).

Mediation

Considerable progress has been achieved in mediation procedures, an approach to the settlement of disputes that was unknown until fairly recently.

The Ministry of Justice established a mediation commission that formulated a general mediation plan and submitted it to the minister of justice in September 1991.

Although the idea originally had been for the commission to produce a draft law, it suggested that a national mediation plan be drawn up to make people aware of the advantages of the approach and the task ahead. This plan established the need for the following:

Preparation of draft legislation establishing mediation for conflicts of jurisdiction and others, and proposing to carry out a pilot scheme that would be voluntary but binding under civil law for certain claims.

Creation of a mediator corps with suitably qualified members.

Creation of a national mediation school to train mediators in patrimonial and family mediation initially and possibly other fields later.

Agreements with other public and private entities to disseminate this approach.

Sharon Press, director of the Center for Dispute Resolution in Florida, came to Argentina in 1991 to teach an introductory course on mediation. She was followed in August 1992 by David Jenkins, senior mediator for California, and Patricia Roback, official mediator for California. Jenkins and Roback taught training courses on patrimonial and family mediation.⁵ In August 1992 the president of Argentina issued decree 1480/92, the first legal norm recommended under the plan. It declared mediation to be in the national interest.

In October 1992 Sharon Press presented "Alternative Methods of Conflict Resolution in Argentina" to the annual conference of the Society of Professionals in Dispute Resolution in Pittsburgh, Pennsylvania. The Libra Foundation began running courses, seminars, and workshops in November 1992 on the general principles underlying alternative methods of dispute resolution, mediation, and negotiation (in Buenos Aires, in the provinces, and in other Latin American countries). The First Inter-American Encounter on Alternative Dispute Resolution took place in Buenos Aires in November 1993 and was attended by representatives of supreme courts, higher courts, judges, and staff from justice ministries from seventeen countries.⁶

In February 1994 the Supreme Court established a pilot mediation center attached to the civil courts. The pilot's legal basis is the presidential decree mentioned earlier and the Ministry of Justice resolution that gave rise to the

experiment.

Although the public is not yet well briefed on alternative methods of conflict resolution, 73 percent favor local neighborhood courts and mediation.⁷ This fits well with the trend toward deconcentration, transparency, and reduced bureaucracy implicit in the adoption of alternative methods of conflict resolution, leaving judges free to act where they are really needed.

World Bank Role in Improving Conflict Resolution

The World Bank can play an enormous role in this area given that it is a new field with considerable promise but few resources. The Bank has already collaborated in the area of arbitration, where the goal is preparing a law that could serve as a model for Latin America.⁸ As for mediation, the recently established center must be protected from the vagaries of official policies. Mediation principles should be disseminated in Argentina and the rest of Latin America through private channels that are concerned with improving judicial administration.

Legislative Reforms

Several legal reform projects and draft laws are being prepared.

Criminal Code

The new criminal code of August 1991 established oral proceedings in the Argentine judicial system—a major reform involving comprehensive changes to streamline criminal proceedings and enhance the administration of justice. The code establishes collegiate courts whose judgments cannot be appealed and upholds the principle that cases should be tried orally, publicly, swiftly, and without interruption, using sound common sense to assess evidence. Official approval of these norms was a revolutionary change in legal procedures, one supported by 91 percent of the population (González Novillo and Figueroa 1992, pp. 922; Levene 1994).⁹ break

Noncriminal Civil Code

For noncriminal cases (civil, commercial, labor, administrative, or private) a few draft laws and amendments have been drawn up with a view to replacing written proceedings with oral proceedings and public hearings, and to introducing alternative methods of dispute resolution. Two commissions prepared completely new procedural systems that were presented to the minister of justice in March 1994. The commissions dealt with the role of the judge; immediacy; the oral, public, and transparent nature of legal proceedings; settlement out of court; the introduction of alternative methods of conflict resolution; and the possibility of shielding courts from nonjurisdictional tasks.

Alternative Methods of Conflict Resolution

Although the codes have always mentioned arbitration, it has hardly been practiced or had any real impact. Several amendments are being produced. The first is now before Parliament as a draft law and the second and third form part of the revised codes of procedure.

Although mediation is new to Argentina, the mediation program is being implemented at a rapid pace. Through decree 1480/92 a commission was appointed that wrote the draft law adopted by the executive branch. Since the topic had already been incorporated into the new planned codes of procedure, there has been a certain amount of overlap. The commissions have begun swapping data in order to avoid duplicating each other's work.

Private Law Codes (Civil and Commercial)

Although the idea of unifying civil and commercial legislation and their respective codes is not new, it was given a boost by the special commission draft submitted in 1987 and approved by Congress but vetoed by the president with decree 2719/91. A new unified code draft was produced in August 1992 by a commission appointed by the Chamber of Deputies (known as the Federal Commission). It was debated in a regular session in July 1993 and was approved by one chamber of Congress. At the same time, another substantive law reform proposal was submitted to the Senate by a commission appointed by the president.

Labor Legislation

Various labor flexibility draft laws are being worked on at the parliamentary level.

The Argentine Constitution

The Argentine Constitution is about to be amended—following a vote in the Constituent Assembly—and it is likely that the new constitution will include, among other aspects related to the daily administration of justice, a Council of Magistrates. Up to now there has been only an Advisory Committee of Magistrates created to express its views regarding the appointment of judges (except members of the Supreme Court). Although this committee amounted to an incipient restriction on the powers of the executive, the committee has not had a significant impact.

The Council of Magistrates would intervene in the selection of future judges and in proposing their nomination to the executive branch, which would then seek the Senate's approval; the council would also initiate dismissal proceedings for sitting magistrates, which would then be handled by Parliament. The council would also be empowered to manage the budget for judicial administration, exercise disciplinary powers, and issue regulations regarding organization of the judiciary.

Disparate Laws Across Countries

Laws in the different countries of a region should be well aligned. Given all that the different bodies of law have in common, it would not appear to be too difficult to achieve this goal. Moreover, a legal framework that coordinates norms is essential if institutions are to attain their objectives.

World Bank Role in Legislative Reform

Despite the switch to oral proceedings, there is still a lot of criticism of criminal proceedings as currently practiced because of the lack of courts, space, and proper facilities for hearings, and the difficulty of registering evidence—defects that could carry over into noncriminal cases. Implementing a new system may require appointing new judges and judicial staff and providing adequate rooms and training. Such changes meet with resistance from those who want to keep the notarial system.

Law is not just a reflection of the forces at work in a given society, but also a potential instrument for change and development. Debate regarding judicial reform has so far focused on the most effective ways to modernize the law, with a view to enabling laws to match the constantly changing needs and norms of the societies for which they were conceived. This approach assumes that once the right amendments are in place, the legal system will prove more responsive to demands for modernization and continue

development. But since norms rarely take effect by themselves, they need appropriate institutions to ensure that they are correctly applied and observed. In other words, a juridical system does not just consist of applicable norms. It also involves processes through which those norms are to be applied and institutions responsible for

overseeing those processes (Shihata 1993, p. 287).

Since legislative reform requires infrastructure and money, Bank aid is of major importance. Mechanisms must be sufficient to ensure that legal rights are observed in practice. If there are no clear signs that the new structure will be applied effectively, or if necessary resources are lacking, or if changes are not implemented immediately for lack of strategy, then resistance to change will prevail.

Access to Administration of Justice

Although access to judicial administration is difficult to define, 88 percent of Argentines feel justice is not equally available to everyone in Argentina.¹⁰ There is a perception that ordinary citizens are ill protected by the judicial system, with 78 percent of the population feeling they receive little or no succor from Argentine courts and 88 percent believing that the courts do little or nothing for low-income people.

The administration of justice involves a set of institutions, procedural principles, and legal guarantees, as well as political and social norms, by virtue of which the state exercises legal guardianship over the rights of those subject to court jurisdiction. Ensuring access to the administration of justice means providing access as cheaply as possible and ensuring that people at different cultural levels understand procedures. In this way, the legal protection provided by the judiciary is practical rather than rhetorical.

Specific characteristics undermine the equality of a judicial system. Such features include a large disparity in the power of the parties involved, different degrees of ignorance regarding technical or legal matters that affect citizens' status and rights, insignificant economic interests at stake, and the precarious economic state of the party in conflict.

Despite the huge quantity of litigation in Argentina, there are indications that problems are not always brought before the courts and that someone with a grievance does not find it easy to obtain access to judicial administration, except in cases where damages are likely to be considerable. The judicial system is overloaded, costly, and slow, and a lawsuit requires time and dedication, making it seem hardly worthwhile or downright impossible when the amounts at stake are minor or the person involved in a conflict lacks financial resources or is relatively ignorant of his rights. Few people are familiar with procedures or have easy access to legal and professional counseling. Moreover, not everyone is prepared or able to overcome the hurdles of time, money, and possibility of appeals that a court case demands.

Thus, there is a real need to find alternative conflict resolution methods, especially if the controversy is not antagonistic, because they ease the burden on the judicial system and on citizens who for one reason or another cannot access or withstand a court case. Good dispute resolution procedures are simple, well publicized, accessible, and swift. The public supports the major amendments made or proposed and is highly optimistic about judicial administration once the reforms are accomplished.¹¹ Oral proceedings, local neighborhood courts, and mediation will decongest the courts and speed up the administration of justice, expediting solutions to all kinds of conflicts.

Although legal costs and fees make litigation expensive, cost-free litigation has long been granted to those who cannot afford to pay, at the discretion of the judge hearing the case. Judges have usually been fairly generous in granting assistance. This mechanism enables litigants to prove that they lack the economic means to cover judicial fees and court costs needed to participate in the judicial process. Bar associations, law faculties, and national and municipal public offices also provide free legal services.

Despite these facilities, the poorest segments of the population do not use formal conflict resolution systems. Even if the poor could use them without having to pay, they still have to go to lawyers or facilities at some distance from their home or place of work, paying fares and sacrificing their time and wages. One solution for

improving access to judicial administration would be installing alternative dispute resolution units in community and other local centers to which everyone has access, in addition to installing them alongside the courts.

Although the law tends to equalize people, there is still a need to overcome discrimination. Despite constitutional guarantees, equality before the law does not exist in practice, a fact clearly at odds in a society striving for democracy and development. Discrimination can be overcome with the use of methods of conflict resolution outside the formal system, coupled with the possibility of recourse to the formal system if need be.

World Bank Role in Ensuring Equal Access to Judicial Administration

If the concept of justice is broadened to include alternative methods of conflict resolution, setting up an alternative continue

dispute resolution system covering poor districts and groups excluded from the formal system is the best way to get results in a way that saves time, money, and energy.

Recommendations

The World Bank has already given Argentina a grant from its institutional development fund to help finance a study of the judicial system, the study focused on the functions performed by the federal courts and by the national courts in Buenos Aires and examined how they operate in such areas as judicial orders, case substantiation, the effectiveness of codes and other procedural norms, and various forms of conflict resolution, including arbitration, mediation, reconciliation, and minor complaints (Shihata 1993, p. 305).

Now that enough data have been gathered to direct investment and assistance efforts, such programs should begin. Further studies would only replicate the same kind of bureaucratic hangups that now plague the system. Apart from the state, a number of institutions and individuals are endeavoring, with some success, to improve judicial administration in Argentina. These groups should be incorporated in any support or assistance program. Without in any way wishing to prejudice performance criteria, Bank assistance to Argentina could be effectively directed to the following areas:

Judicial buildings and equipment (public sector, with private sector management and quality controls).

Alternative dispute resolution (private sector, with management and quality control exercised by public entities).

Judicial school (private sector, with management and quality control exercised by public entities).

A judiciary staff training (private sector, with management and quality control exercised by public entities).

Legal education and training for attorneys (public and private sectors).

Dissemination among the general public of the advantages of a reformed judicial system (public and private sectors)

As this analysis shows, the judiciary's infrastructure is deficient and needs to be revamped in order to avoid thwarting the major procedural reforms associated with oral and public hearings. Alternative conflict resolution methods involving arbitration and mediation make it possible to satisfy the needs of big investors when financial and economic relations are at stake, open judicial administration to parts of the population that have been excluded from it, and free courts to deal with cases that require formal jurisdiction. And education and legal and judicial training—of students, attorneys, judges, court staff, or the public—will provide the system with the

human resources required for true modernization, the personal commitment needed for far-reaching reform, and the consensus, openness, and active participation needed to ensure its success.

Conclusion

Only a comprehensive and coherent approach to the reform, modernization, and strengthening of the judicial system can cope with the demand for conflict resolution produced by a society in permanent flux. For such an approach to thrive, there must be confidence in the independence, transparency, and simplicity of a judicial system dedicated to, and capable of, impartiality, speed, and effectiveness in responding to problems. This is the only path that ensures both juridical safeguards and the democratic checks and balances between the branches of government that guarantee individual rights. It is also the only path that the judiciary can pursue if it wishes to maintain legitimacy in the eyes of society.

Notes

1. The survey was carried out by Gallup in March 1994.
2. For instance, out of a total 110 civil law and family courts, 31 were located in a building that had to be condemned in June 1993. Thereafter, officials and judges heard only cases requiring immediate or urgent attention, and proceedings were conducted on the ground floor of the building. One year later, there are still seven civil law courts that have not been relocated.
3. The data are taken from Decree 1480/92 on mediation.
4. The Office of the Director for Training and Communication in the Ministry of justice organized a seminar held in August 1991 on how to apply arbitration in minor cases. Lawyers who devote certain hours each week to arbitration and lawyers interested in giving courses in arbitration participated in the course.
5. The visits were funded by USAID and the U.S. embassy.
6. The event was organized by the Libra Foundation and the National Center for State Courts.
7. Data are from the March 1994 Gallup poll.
8. Valuable work was done on that by Whitmore Gray, in consultation with Alejandro Garro, during Gray's visit to Argentina in March 1994.
9. The Code is based on the Levene Project of 1975, albeit with substantial changes. Oral proceedings were already practiced in some Argentine provinces.
10. Data are from the March 1994 Gallup poll.

11. Based on data from the March 1994 Gallup poll.break

References

Bielsa, Rafael A. 1993. *El concepto de reforma orgánica del servicio de justicia*. Buenos Aires: Cuadernos de Fundejus.

Caivano, Roque J. 1994. "El arbitraje y la crisis de la justicia: Causas y efectos de un fenómeno actual."

Gold, Neal. 1993. "Los abogados en la Argentina: Su preparación científica, su formación profesional. Estado actual de la cuestión y posibles cursos de acción." Fores Foundation, Buenos Aires.

González Novillo, Jorge R., and Federico G. Figueroa. 1992. *Comentarios al Código procesal penal, Ley 23.984*. Buenos Aires.

Lavados Montes, Iván, and Juan Enrique Vargas Viancos. 1993. *Informe del seminario sobre la justicia y el desarrollo en América Latina y el Caribe* [report of the seminar on Justice and Development in Latin America and the Caribbean]. Seminar sponsored by the Inter-American Development Bank, San José de Costa Rica, February 1993. Washington, D.C.: Inter-American Development Bank.

Levene, Ricardo. 1994. "La urgente necesidad de completar la implementación del juicio oral para su eficaz funcionamiento." L.L. 4-5-94.

Lozada, Alberto Gabriel. "La reforma judicial en materia penal y el derecho a un proceso sin dilaciones indebidas." *Revista de la Asociación de Magistrados y Funcionarios de la Justicia Nacional* 7:1928.

Morello, Augusto Mario, and Roberto O. Berizonce. 1994. "Formación de jueces y abogados: La especialización."

Shihata, Ibrahim F. I. 1993. "La reforma judicial en los países en desarrollo y el papel del Banco mundial." Report presented at the seminar on Justice and Development in Latin America and the Caribbean, sponsored by the Inter-American Development Bank, San José de Costa Rica, February 1993. Inter-American Development Bank, Washington, D.C.break

26—

Judicial Reform in Peru

Fernando Vega Santa Gadea

Judicial reform is a complex and delicate task, since it necessarily affects the relationship and balance among, and independence of, the powers of the state in the course of restructuring one of the most important institutions the state administers on behalf of society. Hence, the broad outlines of judicial policy, as well as the way human resources and infrastructure are deployed to ensure that the judiciary fulfills its function efficiently, must be tailored to the historical and cultural circumstances of a particular country. Judicial reform measures, and the effects they are designed to produce, must be individualized, not standardized.

Crisis of the Traditional Judicial System

The state's monopoly over interpretation of the law and the administration of justice dates back to the rise of nation states in the sixteenth century. Today, these antiquated judicial systems—even discounting problems of infrastructure, lack of computerization, and scanty financial resources—are far too traditional, centralized, and formal to serve their purpose. There is a growing gap between the efficiency citizens demand and the legal system they are saddled with, bogged down by sluggish trial procedures and judges' inadequate qualifications.

The system has not kept pace with society and has so far failed to respond efficiently to new demands thrown up by rapid social change, increasingly sophisticated technology, and economic growth.

Tremendous delays in the legal process have resulted from an excessive backlog of cases, the complexity of the suits brought before the courts, the low qualifications of those responsible for administering justice, the lack of flexibility of procedural norms, and the deliberate misuse of procedures by attorneys to drag cases out—ailments that are common to traditional systems for the administration of justice all over the world and that affect both developed and developing countries. The worst aspect of such gross inefficiency is that the people cease to believe in the legal system.

In Latin American and Caribbean countries these problems are worsened by the corruption of those responsible for administering justice. Nonetheless, that the judicial crisis is common to both developed and developing countries suggests that reform of the administration of justice should not be geared only toward formal aspects of the system—that is, toward establishing an adequate legal framework and providing the human, economic, and physical resources needed to ensure that the system functions smoothly—but that reform should also address the need to amend the system's underlying assumptions. In other words, reform should include a review of the doctrinal foundations of the traditional system of administering justice in order to determine the role and objectives of such a system in today's changing world.

Social Impact of Deficient Administration of Justice

The purpose of the judicial system is to safeguard the rights and freedoms of citizens, and the social consequences of neglectful, inefficient administration of justice can be grave indeed.

This paper was presented by Eduardo Moane at the World Bank conference on Judicial Reform in Latin America and the Caribbean, June 13-14, 1994.

Translated from Spanish.

One such consequence is that the very notion of justice is devalued. This hurts society because people are thereby encouraged to act in bad faith, since there is no effective state sanction punishing their actions. Another consequence of mistrust in the system is that individuals are encouraged to take justice into their own hands. This leads to violence, disorder, and degradation of the image of the state as custodian of social peace.

Efficient administration of justice should contribute to pacification within a society, in the sense of a political and social process conducive to a decrease in acts of violence toward people and society which, in turn allows citizens to fulfill their aspirations. Unfortunately, the Peruvian system of administration of justice has not managed to play this pacifying role, a phenomenon we shall expand on later when we discuss the issue of terrorism in Peru.

Economic Impact of Deficient Administration of Justice

In recent decades Latin American countries witnessed an unusual increase of state interventionism, to the detriment of individual enterprise and citizens' rights. This led to a distortion of both law and the economy.

Fortunately, many countries in the region have embarked on programs designed to correct these distortions and to modernize their economies within the frame work of liberal policies that provide an appropriate setting for productive agents, while reducing and streamlining the role of the state in social and economic activity.

In that regard, one of the major hurdles faced by market economy models in Latin American countries is the lack of efficient administration of justice. Although it is extremely difficult to measure the economic impact of slow and unpredictable administration of justice, and the cost of a legal order far removed from reality, recent research in Peru suggests that the impact is enormous and alarming.

A few of the consequences of a deficient judicial apparatus are, for instance, the impossibility of demanding fulfillment of contracts, the lack of guarantees that legally recognized rights will be respected, and the greater risk and legal instability both these factors imply for business activity.

Failure to respect contracts leads in turn to

Contracts drawn up in bad faith, by people and institutions exploiting the weakness of the system and making commitments they have no intention of honoring.

Noncompliance with contracts, even those drawn up in good faith, whenever situations occur in which one of the parties could benefit significantly (or substantially reduce losses) by breaking a contract.

Research shows that the economy responds to these two types of behavior by developing two sides. On the one hand, there is a sector generally considered serious and that fulfills its commitments, and on the other, a sector that nobody trusts. A company or individual just starting to run a business is normally classified in the second group and has to make a huge effort to graduate into the first group.

This situation reduces competition and raises prices, because companies prefer to deal only with well-known firms they can trust. This hampers the development of new companies, which have to reduce their margins enormously to compete.

All this anarchy has given rise to an "informal" legal sector, with a parallel market, pseudo-attorneys, false documents, forged title deeds, nonexistent identities, and virtually no legal guarantees.

Finally, for lack of a body enforcing legal standards, public and private property is invaded, the environment is contaminated, more accidents occur, and negligence is fostered.

In short, a deficient system of administration of justice generates less competition, higher prices, less investment and employment, defective allocation of resources, lower levels of efficiency and competitiveness, environmental degradation, and hurdles in the path of potential new entrepreneurs.

The situation in Peru, with all its deficiencies, has thrown into relief the close links between efficiency in the administration of justice and the possibility of implementing and firmly establishing the government's Social, economic, and institutional reforms. The government has thus set about creating the necessary conditions for a revival and strengthening of the legal and institutional framework for the administration of justice in Peru.

Social Response to the Judicial Crisis

Given the generalized mistrust of the judicial system and the public's perception that it cannot obtain efficient and timely redress through the state's legal apparatus, both individuals and groups begin to devise informal mechanisms or procedures other than those of due legal process to settle their disputes.

North American society, which has the highest litigation rate in the world, has responded similarly to the inefficiencies of its system of administration of justice by continuing

creating the movement to establish what is known as alternative dispute resolution. It took the operators of the traditional legal system fifty years to recognize the movement, which today has revolutionized the legal system to the benefit of society.

In Andean countries the indigenous and native communities, who have had to put up with the abuses and inefficiencies of the traditional judicial system since it was imposed in the colonial period, have continued practicing their own long-established mechanisms of conflict resolution; and these practices have been re-created and adapted, for example, to circumstances on the Peruvian coast, where they are now being used efficiently by informal shantytown organizations, traders, and producers.

Thus, in Peru age-old alternative legal customs help overcome the gap between law and the real circumstances of indigenous, peasant, and underprivileged groups, easing to some extent the tensions between the judicial system and such groups' cultural practices and contributing to the democratization of society. But care should be taken with imitations of forms and procedures applied in countries that are historically and culturally very different. It is, rather, necessary to identify dispute resolution mechanisms suitable to our own societies.

Countries in which most of the population consists of ethnic or cultural groups with traditional devices for dispute resolution should proceed to reinforce and grant full force of law to such mechanisms and freely admit that state institutions have become overwhelmed by the structural difficulties of administering justice efficiently in a socially and culturally diverse society.

The recognition by the state of the effectiveness of alternative legal processes is not just due to the physical need to disencumber judicial institutions. It is also based on an innovative vision of the individual and of society, one that respects the right to take private decisions and recognizes the possibilities open to individuals and social groups that are better placed than those running the traditional legal system to achieve swift, inexpensive, and satisfactory solutions to their disputes.

The Peruvian government, aware of this need to diversify the administration of justice, has in its new Constitution recognized arbitration courts and special courts for Andean and indigenous communities, in addition to the judiciary and military tribunals.

In addition, in shantytowns and among informal sector traders and producers, pilot schemes are being devised to enable determination of the best way to support those social organizations in the solution of their disputes, in order to be able to proceed toward full legal recognition of the various informal procedures used by this vast sector of the population.

Judicial Reform in Peru: Background

The first documented attempt at judicial reform in Peru dates back to 1569. It was ordered by the Viceroy Francisco de Toledo, who even in those early days understood how the inhabitants of the land were overburdened by excessive regulations and maltreated by lawyers and officials responsible for administering justice.

Judicial Reform in Latin America and the Caribbean

Problems with administering justice are thus not new in Peru. Nor is the demand for judicial reform. It would surely be no exaggeration to say that every government since the Republic began has initiated judicial reforms of one sort or another, to no great effect.

By the 1950s Peru's judiciary was at a crossroads, with the needs of the population beginning to strain its antiquated structure and operational capacity. From that time on, popular discontent increased—as did the ire of politicians and the authorities—because the country began growing at a quickening pace, and with it the demand for efficient administration of justice, while the system proved incapable of rising to the occasion or of adapting to change.

The military government (1968-80) and the civilian governments that followed it severely criticized the judiciary, but they failed to initiate structural reforms that would have made it possible to have an efficient judicial system, free to operate without political interference and endowed with honest and properly qualified personnel.

By the 1970s an attempt at reform had created special (agrarian and labor community) jurisdictions, which had an enormous impact on the structure of the judiciary. The new courts were designed to accompany certain reforms, but the problem with them was that they became red herrings, because they were bodies that to some extent skated around the central issue of how to structure jurisdictions within the judiciary.

Throughout the 1980s, while the 1979 Constitution remained in force, efforts were made to find a new organic law to govern the administration of justice, modernize it, and solve certain problems with it, such as the distribution of jurisdictional organs and government organs. But the judiciary did not at that time have such government bodies; it did not in fact distinguish between magistrates with specific jurisdictions and officials governing and administering the judiciary. This contributed to disorder and a lack of perspective and planning.

Thus, in 1990 the government, headed by President Alberto Fujimori, found a country immersed in the worst social crisis of its history, with a politicized judiciary that continue

was corrupt from top to bottom, buried under a backlog of cases, inadequately funded, and worst of all, completely lacking in credibility, in the public's eyes, as an institution capable of administering justice efficiently.

Current Reform Efforts

Fortunately, it is clear to the Peruvian people, politicians, and legal practitioners alike that there can be no democracy without a working judicial system; building one is thus a national priority. It is necessary to define the jurisdictional structure of the judiciary in such a way as to bring the system closer to the ideal of efficient justice, and, most fundamentally, to help the administration of justice rediscover its bonds with civil society.

We know that it will take many years to solve the problems besetting the administration of justice in Peru, because comprehensive reform of the system presupposes training a corps of attorneys and magistrates that are inclined to take a nonlitigious approach in their legal practice. It also requires that society be educated in such a way that an effort will be made to solve disputes before taking them to court. Other prerequisites are computers and adequate buildings and infrastructure. Nonetheless, it can be said that important strides have been made in reforming the administration of justice and in achieving pacification within the society.

Pacification

For the past thirteen years Peru has been embroiled in a devastating struggle with terrorism in which more than 25,000 people have lost their lives. The money spent on repairing the damage and rebuilding infrastructure exceeds the total foreign debt.

Despite the fact that this situation threatened the very foundations of the state and of civilized life, between 1990 and 1991 more than 200 people arrested on terrorist charges were freed by the judiciary for "lack of evidence" and no one was sentenced to prison in that period. Most of those set free joined death squads and carried out kidnappings, murders, and car bombings. Today, most of these people have been recaptured by the security forces.

As of April 5, 1992, it was decided to combat terrorism using a political–military strategy, unifying the intelligence services, improving the antiterrorism directorate, boosting the operations carried out by the armed forces and the police, creating peasant farmer militia, and establishing a comprehensive legal framework that would tackle not just substantive aspects but also procedural and jurisdictional issues.

Within the legal framework that is making the longed–for pacification of Peru possible—Decree Law 24518, "Basic Law of the Government of Emergency and National Reconstruction"—the government has promulgated various instruments to establish the criminality of terrorist offenses and the procedures to be followed in the investigation and trial of such offenses, including: the imposition of life sentences, trial by military court in cases of treason, rules governing visits to persons imprisoned for terrorism, and the Repentance Law.

This set of legal instruments has proved effective. Today, there are more than 3,000 people in prison on terrorist charges, and over 400 convicted terrorists have been sentenced, 70 of them to life imprisonment. There are almost 1,000 "repentant" terrorists.

The drop in the number of terrorist incidents over the past year has restored the population's confidence in the protection of law and in the administration of justice by military courts, which are playing an enormously important role in the mission of pacification with which they were entrusted by the state.

Some foreign analysts have criticized certain provisions in the antiterrorist legislation, arguing that they lack guarantees of due legal process. This facile assertion should be countered using an argument that is never mentioned: every state has the right and duty to defend the institutions of the country, its inhabitants, and its very survival as a nation. Those who have suffered the horrors of the insane terrorist bloodbath are proud of achievements so far. It is clear that the Peruvian people are responding with faith, hope, and optimism to a country being born again and that they are giving the government and the armed forces and police credit for their efforts.

Peru is close to winning its struggle against terrorism. This achievement will clear the way for an analysis of legislation currently in force and for the proposal of amendments in keeping with the new sociopolitical circumstances in the country.

On other fronts, pacification of the society is being achieved by addressing two severe problems: human rights abuses and drug trafficking. The protection of human rights through criminal proceedings initiated against members of the state apparatus who abuse them was enshrined in Decree Law 25592, which contains more precise sanctions against the crime of forced disappearance of persons.

With regard to drug trafficking, legislation (Decree Laws 25428 and 25632) was issued to establish controls over chemical inputs and to curtail money laundering and the like—in other words, legislation aimed at the acts leading to trafficking and its source of gain.
break

Politics and Prison Infrastructure

Between 1985 and 1990 there was anarchy and a total absence of authority in Peru's penal establishments, where terrorists ruled the roost, freely indoctrinating their followers in the arts of selective assassination and fabrication

of explosives for use in car bombings.

The lack of authority meant that a "revolutionary" quasi-state existed in our prisons, which led the government to take forceful steps to reestablish control in the prisons and to impose harsh rules governing visitors. Today, the prisons are orderly, disciplined, and clean.

With regard to prison infrastructure, of the 108 prisons in Peru, 75 percent were in a ruinous state. Today's prison population of 19,500 requires no more than fifty prisons comfortably holding 500 inmates each. (Three of the prisons vastly exceed that capacity.) Peru is currently executing the first comprehensive prison infrastructure project, and it is hoped that it will prove to be a model for Latin America. Once these improvements are effected, it should be possible to rehabilitate inmates, while respecting their human rights. There will be a gradual elimination of fifty old prisons that are totally unsuitable for holding prisoners safely and humanely. Construction is under way on ten new prisons, while twenty more are being totally renovated.

These prisons, which are designed and financed using Peru's own resources, have maximum, medium, and minimum security wings; an internal and external double security system; rooms for conjugal visits, workshops, and schools; a women's wing and a child care center; sports and recreation areas; special facilities for judges and attorneys; and courtrooms.

Organic Law of the Judiciary

One of the main features of the legal framework for the reform of administration of justice was the promulgation in 1991 of a new Organic Law of the Judiciary, written by a review committee chaired and composed of members of Congress, the judiciary, the executive branch, the Lima Bar Association, the National Assembly of University Rectors, and the National Association of Magistrates.

This body of law was modified in November 1992 to establish a modern organic structure. The Executive Council of the Judiciary was created, as the highest governing body within the judiciary. It is composed of representatives of the Supreme Court, the higher courts, and the Board of Deans of the Peruvian Bar Associations.

Another major problem of the Judiciary in the past was that there was no distinction between jurisdictional and administrative functions. Thus, the new Organic Law of the Judiciary created (with financial support from USAID) a management unit for the judiciary, charged with planning, directing, and supervising nonjurisdictional administrative activities dealing with financial, logistical, and real estate management aspects, computer services, and human resources management, in accordance with the policies and development plans approved by the Executive Council. This unit is performing valuable administrative tasks, particularly in budget preparation and analysis and in the introduction of computer systems in the judiciary.

Both the 1993 Constitution and the Organic Law of the Judiciary have recognized the importance of the justice of the peace as an institution, considering its role to be basically one of conciliation. Moreover, given the close ties between justices of the peace and local communities, the Constitution stipulates that justices of the peace may be elected by the people. The Constitution goes further to allow for the possibility of a law being passed that permits election of first-instance magistrates.

Thus, the Organic Law of the Judiciary has proved to be a crucial tool for laying the foundations for reform of the administration of justice, distinguishing jurisdictional and administrative organs, redefining the role of the Supreme Court as a court of appeal, and moving toward decentralization and specialization.

New Laws on Legal Procedures and Arbitration

In the past three years two important codes of procedure—the criminal code of procedure and the civil code of procedure—have been promulgated. Although these modern instruments are not sufficient for a thoroughgoing reform of administration of justice, they are a response to a longstanding demand and open up possibilities of improving and replacing obsolete procedural regulations.

The new *Code of Criminal Procedure* opts for a largely prosecutory model that makes the Public Ministry responsible for investigating offenses, in a way similar to the German and Colombian models and the 1988 Model Code of Procedure for Ibero–America.

The Code of Criminal Procedure also includes the so–called opportunity principle (*principio de oportunidad*) for the advancement of criminal suits, which will make it possible to remove from criminal jurisdiction such cases as traffic accidents, negligent injury or homicide, and contempt of court. Properly applied, the opportunity principle should considerably reduce the backlog for these types of offense, which constitute 70 percent of cases pending before the courts and in which the victim is not so much interested in persecution or punishment as in reparation.break

The Code of Criminal Procedure invests authority in two key institutions: the first focuses on offenses in which guilt is minimal and the second is restricted to cases in which the accused acquiesces. The application of these two instruments makes it possible to conclude a trial immediately, greatly to the benefit of society as well as of the accused, whose sentence may be reduced to the extent that he or she makes a sincere and spontaneous confession.

A new *Code of Civil Procedure* has been promulgated, giving judges a more active role in directing judicial proceedings. Greater weight is attached to the conciliation hearing as a key stage in the proceedings in order to facilitate a settlement by agreement of the parties with the judge acting as intermediary. This will ease the burden of work in judges' chambers.

Furthermore, a *General Law of Arbitration* has been modeled on the United Nations Commission on International Trade Law (UNCITRAL), which correctly eliminated the useless distinction between "arbitration clause" and "arbitration award" that has done so much harm to the arbitration process in Latin American countries. Although this was a move in the right direction and despite the progressive nature of the new law with regard to the recognition and definition of arbitration as an institution, a year's experience with the law has shown that certain modifications need to be made to prevent excessive interference by the judiciary in various aspects of the arbitration process.

The new codes and laws discussed above are attempts to further a much longed for reduction in the role of the judiciary in the administration of justice and to reserve that body for the efficient resolution of socially important disputes that demand a judgment by the judiciary; to eradicate the use of illegitimate force; and to exercise state coercion through the courts only as a last resort.

Within these guidelines, the idea is to restructure the system through which justice is administered in Peru—not just in the sense of improving an exclusively state function, but also in the sense of opening up the system so that those seeking or receiving justice take part in the process either individually or in an organized fashion. Opening up the system will require disseminating and reinforcing the use of different mechanisms for dispute resolution, both within the judicial system and at the level of family, school, workplace, business, community, and municipality.

Education and Specialized Training for Judges

The 1993 Constitution created the National Academy of Judges (Academia nacional de la magistratura), making it the institution responsible for training those embarking upon a career in the judiciary; the National Academy was also made responsible for providing further education, advanced training, and specialized courses for judges, state attorneys, and other civil servants in the judiciary.

An independent judiciary, subject only to the Constitution and the law and capable of resisting external influences, is reinforced if judges and attorneys have a sound educational background that allows them to be discerning and independent in their thinking.

The Executive Council of the Judiciary is currently trying to swap information with magistrates' academies in Colombia and Costa Rica in order to ensure that implementation of the Peruvian academy takes into account the experience acquired in those countries.

One of the great steps taken to improve training for future judges was the creation of a Civil Service for Law Students (SECIGRA–DERECHO). Since April of 1993, under the new program, some 2,000 law students in their final year at universities in Lima have been helping out in various branches of public administration, especially in the judiciary. This has made it possible for judges to have assistants with better legal training than the current judicial staff, who have little or no training. The system offers other benefits: students who have already set their sights on a law career become familiar with administration of justice through their participation; and other university students, who may be undecided about a career choice, may be inspired to enter the judicial career, a vocation not widely respected in the past.

Appointment of Judges

In 1990 it was discovered that the previous government had filled all key positions in the judiciary with members of a certain political party, who lacked the moral and professional qualifications required for the job. So on April 5, 1992, the government, with the massive support of the Peruvian people, began to restructure the judiciary, dismissing about 60 percent of the judges in Peru.

To appoint replacements, a so-called Tribunal of Honor of the Magistracy was set up, composed of jurists known to be independent, honest, and professionally competent. This tribunal appointed the members of the Supreme Court, as well as those of the higher courts, by public competition, and did so in a completely independent manner. Arrangements are currently being made to extend the tribunal's mission to include the appointment, via public competition, of judges of first-instance courts.

The Tribunal of Honor is a temporary body that will function until the National Council of the Magistracy begins operation. The National Council, a body created

by the new Constitution, comprises members of the Supreme Court of the Republic, the Board of Chief Government Attorneys, bar association members, rectors of state and private universities, and others. This body will in future appoint judges and district attorneys, oversee their ratification every seven years, or order their dismissal, as the case may be.

In addition, as mentioned earlier, the Constitution has established that justices of the peace, and possibly first-instance judges as well, be elected by the people. This means that magistrates at these two levels will be representative of and accountable to the people in their jurisdiction.

Aware that Peruvian magistrates have not been remunerated at a level in keeping with the functions they fulfill, the government has recently ordered an almost 100 percent increase in the salaries of first- and second-instance judges, and in the salaries of administrative staff.

Committee for Restructuring the Administration of Justice

In early 1993, with the backing of the United Nations Development Program (UNDP), the Ministry of Justice convoked a committee for restructuring the administration of justice, to serve as a forum for analysis and discussion of the problems besetting administration of justice in Peru. This committee, which was initially composed of academics in law faculties and former judges, has carried out several tasks and, in particular, has identified the areas in administration of justice that need to be studied more closely in order to determine the best way to proceed with the above-mentioned comprehensive reform of the judicial system.

With the UNDP's support, several diagnoses have been made for different areas of administration of justice. One especially noteworthy achievement is the first national register of buildings belonging to the judiciary. The register has made it possible to decide which buildings need to be adapted in accordance with the demands made by the new codes of procedure regarding the activities of judges and state attorneys; and to determine in which cities it will be necessary to construct new buildings to house members of the judiciary and the Public Ministry.

Furthermore, the committee for restructuring agreed on the need to convoke representatives from the judicial and executive branches of the state, the Public Ministry, the bar associations, and private research institutes, as well as jurists and other experts, in order to set up committees in the eight areas perceived to be most crucial in the process of judicial reform. Most of these committees have been in session since last February and in May a successful forum was held to discuss and coordinate the work being done. It was attended by representatives of Congress, the judiciary, the Ministry of Justice, the Public Ministry, the presidents of all the higher provincial courts, and leading national and foreign jurists.

The studies carried out, as well as the texts of the speeches and recommendations for reform of the system, will be published by the Ministry of Justice, as a reference work to be consulted on matters pertaining to the administration of justice in Peru.

Once the proposals have been studied, a decision will be made as to which parts of the project will be financed out of state funds and which could, possibly, be funded by development finance entities whose project cycle coincides with the schedule for implementation of the reforms.

In conclusion, it must be said that just as absolute justice is unattainable, so a perfect system of administration of justice will never be achieved, above all in a country like Peru, which lacks financial resources and contains a great variety of cultures that are gradually integrating and creating a modern pluricultural society. With that understanding, the government is nonetheless striving to improve the system to the fullest extent possible, in order to achieve acceptable levels of trustworthiness and efficiency.

The Peruvian people and government have made huge efforts to overcome economic and social crisis and to attain the longed-for goal of national pacification. Government leaders and others involved in judicial reform are prepared to share and discuss ideas with national and foreign experts who wish to collaborate in good faith in the country's efforts. But it is unacceptable for foreign, politically biased commissions of inquiry, set up with pre-established agendas and little or no knowledge of the complexities of a country like Peru, to prepare reports that ignore the progress that Peru has made and to put forward idealistic solutions that are completely unsuited to Peru's circumstances.

Judicial reform in Peru is an immediate priority for the government and one that calls for comprehensive solutions devised by those familiar with the complex problems besetting the Peruvian judicial system. This is not to say that

there is no room for comparative studies nor lessons to be learned from the experience of other Latin American countries in similar circumstances.

But in the end, bringing justice closer to the people, eliminating corruption in the judiciary, devising ways to ensure the independent appointment of honest, upright, and competent judges, modernizing the buildings and equipment used by the judiciary, training judges, recognizing and promoting alternative forms of justice, and endowing the administration of justice with the funds needed to ensure the desired level of efficiency—all are long-term tasks, many of them complex, which only the continue

individual state, by virtue of its powers and internal policies, is competent to carry out.

As a final note, I would like to take this opportunity to thank the United Nations Development Program for helping finance research into Peru's judicial system, as well as USAID for its participation in portions of the judicial reform project. Above all, I appreciate that these institutions have not conditioned their financial support on certain requirements, either of form or substance, thereby demonstrating their sensitivity to the difficulties of implementing judicial reform in Peru.

27—

Judicial Reform in Ecuador

Jaime Espinoza Ramírez with Esteban Moreno

In legal systems in Latin America generally, and that includes my country, Ecuador, there have frequently been periods marked by two typical aspects of institutional backwardness: the sheer absence of jurisdiction and the inability to judge and settle conflicts effectively.

Problems in the Administration of Justice

The problems traditionally besetting the administration of justice in Ecuador are:

Organizational problems

Inefficiency.

User dissatisfaction and low opinion of judges.

Irrational distribution of courts and other judicial facilities over the national territory.

Persistent corruption at the lower, and even higher, levels.

The purely decorative role of public attorneys, who lack judicial authority and responsibility.

Failure of the police to support the judiciary; lack of forensic skills.

A lack of public defense lawyers.

Lack of professionalism in the judiciary.

Management problems

Inconsistency: the lack of uniform procedures for judges.

Deficiencies in citing and notifying.

Inadequate or nonexistent judicial statistics.

A lack of accountability in many areas.

The nonexistence of technical equipment and computers.

Administrative problems

A backlog of cases; long, drawn-out proceedings.

Deterioration in the quality of administration of justice from one year to another.

Increasing numbers of prisoners who have not been sentenced.

Increases in the prison population.

Irrational budget appropriations.

Incompetent judges and auxiliary staff.

Steps Toward Reform

On December 23, 1992, a series of constitutional amendments affecting the judiciary were promulgated in Ecuador. They are aimed at modernizing the administration of justice and making it more agile and efficient. The idea is to apply the law more effectively and to simplify administrative procedures.

The main amendments are:

Depoliticization of the judiciary, which has always been controlled by politicians.

Increased independence of the judiciary to ensure judicial impartiality and to safeguard the role of the judge as a third party above those in litigation.

Changes in the procedures for appointing judges, including increasing the academic and professional requirements. Open competition on the basis of qualifications and past experience is the only proven democratic procedure for selecting the candidates technically best suited for jobs requiring a high degree of professional skill. It is the only way that permits public monitoring of appointments. It may not always guarantee that the best are appointed, but at least it excludes the worst.

Creation of a National Council of the Judiciary to ease the administrative burden for judges. In addition, this council audits the time taken for each trial and proposes a program for criminal law judges to enable them to have better control over their own cases and courts.

Translated from Spanish.

Judicial Reform in Latin America and the Caribbean

Reduction in the number of instances a case can be tried to a maximum of two, by converting the Supreme Court, through its specialized divisions, into a court of appeal.

These structural changes are to be seen as part of a process of modernization, a term that is often misused and misinterpreted, but which should be supported and developed to enable us to maintain the pace of change, now that the reforms are under way.

That is why the Government of Ecuador signed an agreement with the United States Agency for International Development (USAID) specifically to support judicial reform efforts. The agreement established the Joint Working Group of the Ecuadorian Judiciary comprising a delegate of the Supreme Court, a delegate from the public prosecutor's office (Fiscalía general), a delegate from the office of the attorney general, and a representative of the presidency of the Republic.

The purpose of this group is, first, to design a comprehensive judicial reform project for Ecuador that could be partially financed by USAID and other donors; and second, to carry out studies and prepare the analytical papers needed to strengthen institutional and human resources management in the judiciary, and to identify the technical assistance, training, and resources needed to implement the reforms in Ecuador's judicial system.

The studies to be carried out are:

Paper compiling data and statistics on the backlog of cases to be tried.

Study of the real time required to conduct trials in different fields.

Study of prisoners not yet sentenced (number detained but not charged; number awaiting trial).

Additional studies and other measures that are needed, but for which there are no funds, include:

Study of training needs in the various institutions of the judiciary.

Analysis of the roles of the Office of the Attorney General and the Office of the Public Prosecutor and of possible changes in the way they are organized.

Development of a strategy for the practical application of a law for the judicial career.

Initiation of a public defense project in Ecuador. On that topic, it is worth pointing out that a 1991 study of public defense in six countries (Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Panama) concluded that public defense services are limited or do not exist in most cases.

The lack or poor quality of technical defense counseling not only violates a fundamental human right; to the extent that justice is not administered equally, it makes a mockery of the judicial system's claim to be fair.

It should, however, be pointed out that Ecuadorean law contemplates court-appointed defense attorneys in criminal cases and for poor people in civil cases. Parties to a suit are not allowed to represent themselves. The law lays down that judges must appoint lawyers as ex officio defense counsel, but such appointments are not remunerated and are never satisfactory because they do nothing to help the defendant.

An Agenda for the Future

We in Ecuador must recognize that if national economies are to compete internationally, judicial systems have to do so, too. Economic performance and the legal system are linked. Thus, judicial systems are part of the

development process. That is why we want to correct mistakes and combat dishonesty and the defects of our system by paving the way for successful reform. Our aspiration is to turn a fragile judicial system into one that is both impartial and effective.

We admit that the application of far-reaching reform programs is hindered by the weight of established practices. A lack of consensus regarding the origins of the problems that are creating a need for reform frequently leads to disagreement as to whether such change is necessary or even advisable. Nevertheless, we believe that reform starts with a sense of how those within the system grasp the changes to be brought about. Changes in judicial systems that do not alter existing practices do not amount to major reform.

Introducing the Indictment System

The reform that has enjoyed most backing in court practice in South and Central America is the shift from written to oral proceedings. For instance, in Ecuador an effort is being made to solve problems in criminal law courts and to reform and improve the administration of justice by introducing the indictment system, the main feature of which is that the judge has a neutral role in the proceedings. Under the indictment system, theoretically the public prosecutor should accuse, assisted by the judicial police. It is up to them and the defense counsel to produce evidence during the investigation phase. In essence the trial is a public, oral battle between the prosecutor and the defendant's defense counsel. This is how the evidence is discussed, not at some earlier stage. The judge's role is simply to act as arbiter in the case, in addition, of course, to seeing to it that all procedural requirements are met.

Under the inquest system, in contrast, the judge monopolizes the proceedings. He has complete control

continue over the investigation, and oral statements are unimportant. When there is written evidence, the judge bases his ruling on the documents presented.

The advantages of the oral system are that it is more flexible and transparent. However, it does require properly trained judges and all kinds of technical support. In our country, where even physical infrastructure is in short supply, that is a major problem. Indeed, Ecuador lacks a system of ongoing legal education for either judges or lawyers.

One of the proposals that would undoubtedly be well received in Ecuador is the idea of turning the Office of the Public Prosecutor into a group of prosecuting attorneys, thereby laying one of the principal foundations for the indictment system; under such an arrangement, prosecuting attorneys could concentrate exclusively on prosecution, the defense counsel on defense, and the judge on his main task, which is to rule on the guilt or innocence of the defendant.

This division of labor would have the added advantage that criminal cases are not handled by just one person, the judge, but are organized by all those playing an active part in the suit. And with the establishment of such a system of public prosecutors, the judicial police would be supervised in the investigations they carry out.

This scenario, though vital to the reform process, has not been promoted adequately in Ecuador. What is needed is more debate about the current state of affairs and proposals of solutions.

Streamlining the Judicial Process

We must reconcile the obligation to pronounce judgments according to law with the need to process cases swiftly, and that calls not just for well-trained judges, but also for the design of a specific set of methods and reforms to allow us to manage the judicial system effectively.

Attempts have been made to streamline the workings of Ecuador's judicial system throughout the country's history, either through the elimination of certain procedural norms hindering the administration of justice or by cutting deadlines for the different phases of proceedings; but time has taught us that the changes introduced were insufficient and that judicial services will only be brought up to date if we undertake a comprehensive transformation of the system as a whole.

Computerization . The best way to monitor and streamline the administration of justice is to computerize the judicial system, as that allows us to take full advantage of technological progress to achieve our goal.

Arbitration . Reconciliation between parties as an alternative way to settle conflicts also needs promoting in Ecuador. A step in that direction was taken in 1991 with labor reform. However, the changes introduced fell short of what is required. Arbitration is a topic that deserves to be discussed and looked at again from the point of view of the national interest.

Educating the Legal Profession and the Public

The key to reform is education. Each new program must include an extensive educational component tailored for lawyers, litigators, and the general public, which gets the point of the reform across and induces interactive participation. Likewise, this conference on judicial reform, attended by so many of us who are striving to achieve similar goals, encourages us to persist in our efforts and at the same time obliges us to learn from both the errors and achievements of others.

28—

Modernization of Judicial Systems in Developing Countries: The Case of Chile

Luis Manriquez Reyes

Demands for improvement of the judiciary are commonplace in any developing country, and in legal circles there are numerous suggestions as to how this may be accomplished. This is not just a concern of developing communities and countries, however. Highly developed economies are also preoccupied with this issue, because they too have problems ensuring efficient administration of justice. In short, modernizing judicial systems is a major preoccupation throughout the world. The demand for greater efficiency in this field is a natural consequence of the way societies develop.

The extraordinary development of free market economies has had an impact on law, altering traditional legal institutions governing the marketing and exchange of commodities; and the pace of change is constantly quickening: the remarkable progress achieved in telecommunications means that any major activity is reported internationally and has a daily impact on the economic sphere concerned.

But accompanying these positive developments—casting a shadow and spoiling all progress—is an increase in illicit behavior. Man's capacity to commit crime is as great, and as creative, as is his urge to achieve and to pursue the common good.

Why Judicial Systems Must Adapt

Economic crimes are so complex that they need to be tackled at once by judicial systems. Highly specialized judges and experienced advisory services are becoming more and more essential in the administration of justice.

To the problem of economic crimes must be added the tremendous damage caused by the resurgence of violence, both in forms we have long recognized and in the peculiarly insidious and evil form it takes in the world of illicit drug trafficking, the trafficking in human organs, and other hideous manifestations. In this kind of environment even the best-equipped judiciaries need to adapt to change.

In Latin America another factor is at work that accentuates how backward judicial systems are with regard to the social convulsions of the modern age. This is the extraordinary fact that, in the institutional development of each republic, the judiciary is the least privileged power of state, compared with the executive and legislative branches. This has historically been the case in Chile. From the foundation of the republic until today, the Chilean state has failed to provide the judiciary with enough funds to perform its normal functions. Even now, despite the economic boost fostered by the Alwyn government, the judiciary is allocated less than 1 percent of the national budget. In fact, out of a total national budget of US\$11,790 million, the judiciary gets \$84.2 million, or 0.7 percent.

It would be worth doing a comparative study of the current budget allocations for judiciaries in all Latin American countries. The resulting information would prove invaluable when drafting the outlines of a modernization plan.

A Push for Modernization

It is heartening that development agencies, such as the World Bank, are helping to hold conferences and to foster study groups on the problems of the judiciary in developing countries, because progress is intimately linked with the maintenance and protection of the rule of law. As the president of the Supreme Court of Chile, Minister Marcos Aburto Ochoa, has said on more than one occasion, people can survive without wealth, and even without goodcontinue

Translated from Spanish.

health; they may live badly, but they will survive. What they cannot do is live without justice. Justice is part and parcel of the quality of life—and it is the most urgent issue facing the world today.

Let us consider, using Chile as an illustration, the reasons for the backwardness of the judicial system. It is likely that the same defects plague judicial systems in the other countries in Latin America.

The judiciary is not the same as the judicial system, properly speaking. The latter is generic and global, in the sense of covering the whole sphere of justice, whereas the judiciary consists only of the courts and tribunals (*cortes y juzgados*). In Chile's judicial system, as in any other country's, great importance is attached to the public entities and services that work with the courts. The Chilean police (*carabineros*), the investigative police, the forensic medicine service, the Civil Registry Directorate, the gendarmes, and the juvenile police force all assist in the process of administration of justice. Together with the courts and tribunals they make up the Chilean judicial system. Defects in any of these services adversely affect the overall structure and ultimately contribute to the backwardness of the legal system in our country, especially constructive in the densely populated urban areas.

The relationship between the judicial system and the more narrowly defined judiciary is fairly widespread in Chile and enhances the prospect of achieving the modernization to which all sectors aspire. The interdependence of the courts and tribunals with the ancillary services means that innovations permeate the whole system and modernization goes beyond just updating the organization and procedures of the courts and tribunals.

Once the modernizing milieu has been established, the next step is to foster shared and interrelated planning between the judiciary and the larger judicial system. Nothing will be gained by making procedures more flexible, speeding up legal steps, shortening deadlines, and expanding education courses for judges and training for clerks,

if at the same time deficiencies in the ancillary services are not remedied.

The experience Chile has acquired, enlightened by comparative law and familiarity with recommendations arising out of conferences such as those sponsored by the World Bank, is contributing to the formation of a more technical and professional approach to the modernization of justice in Chile. Short-term and makeshift policy concerns—usually designed to alter structures at the top—have been abandoned, since they made no real contribution to improving the administration of justice. On the contrary, such approaches tended to increase bureaucracy in the system, at the expense of social concerns about administration of justice at the base of the population pyramid.

Conferences on judicial administration have clearly indicated that modernization must include complete respect for the independence of the judiciary. It should also be fundamentally geared toward ensuring every community, and especially the least privileged sectors of society, access to justice. Modernization should also aim at making the best use of the time available to judges, relieving them of administrative chores or any other tasks that, directly or indirectly, might distract them from their essential function, which is to administer justice.

Having established these basic goals of modernization, the next step is to implement specific measures designed to bring about the desired effects. Such a set of initiatives needs to be backed by a national consensus. As that consensus emerges, funds should be forthcoming to allow all this effort for the common good to be put into practice and, later, maintained.

The Administrative Corporation of the Chilean Judiciary

In Chile, the Supreme Court, which according to the Constitution is entrusted with economic, directive, and corrective supervision of all courts in Chile and which must be consulted by the other two powers of state regarding any attempt to modify its constitutionally mandated powers and organization, is not self-sufficient. Upon its own initiative, it fostered and incorporated into its own constitutive law the creation of a technical advisory body for the judiciary. The pertinent legislation, Law 18,969, was passed in Chile on March 10, 1990. Along with other amendments to the Organic Court Code (*Código orgánico de tribunales*), it substituted a new title XIV, thereby giving rise to the Administrative Corporation of the Chilean Judiciary. This is a legal entity subject to public law, with its own budget, and domiciled in the same city as the Supreme Court, Santiago, Chile.

The Administrative Corporation is governed by the Higher Council (*Consejo superior*), which establishes the broad outlines of the corporation's work and is composed of the president of the Supreme Court and four minister-members of that court.

The Corporation's Responsibilities

The Administrative Corporation is responsible for administering the financial, technological, and material resources allocated for the courts and tribunals in Chile. It is governed by the aforementioned title in the Organiccontinue

Court Code and by the regulations issued in that regard by the Supreme Court. It is subject to the usual rules governing public financial administration.

The Corporation's principle responsibilities are the following:

Preparing the budgets; administering, investing, and controlling the funds assigned to the judiciary by the national budget law.

Administering, acquiring, constructing, fitting, maintaining, and repairing the buildings and furnishings provided for the courts.

Providing the Supreme Court with technical advice concerning the design and analysis of statistical information, and the development and application of computer systems.

Organizing informative courses and conferences for judicial personnel.

Carrying out studies for the gradual transfer of administrative tasks from the courts to the Administrative Corporation, which exists for that purpose; carrying out studies on the rationalization, organization, and methods employed by the courts, and on how to make the most of judicial personnel.

The Corporation's Role in Reform

The creation of a body like this implies a major change in the institutional structure of the Chilean judiciary. It forms part of a wider campaign by the judiciary to bring about improvements in all structural aspects. Nowadays, corporations like this, by being efficient, make real contributions to a country's economic and social development.

With the assistance of the Administrative Corporation, Chile's Supreme Court has been able to set rational priorities for the creation of new courts based on proper technical information and up-to-date statistics on the number of cases before the various specialized jurisdictions all over the country; it has also been able to tap into research that has been done on the internal workings of courts and tribunals. The Supreme Court has also been in a position to hold regional conferences of presidents of appellate courts to analyze zone by zone the judicial infrastructure available in each region of the country. It is worth mentioning that such regional conferences are attended by delegates from the Ministry of Justice, who thus familiarize themselves with both general and specific analyses of what is right and what is wrong with the judicial system. The conclusions drawn at those conferences have proved invaluable in furthering the modernization of the administration of justice in Chile.

The Administrative Corporation has greatly facilitated communication between the Supreme Court and other state entities, as well as with bodies of a similar legal nature in the private sector, universities, and legal studies institutes. In this respect there has been a complete opening up. With all these bodies, an attempt is being made to address issues of concern to society and which require a more agile approach from the judiciary.

To highlight another area of improvement, the statistics designed and interpreted by the Administrative Corporation have become the most reliable tool and source available for innovative reform projects. The Corporation is engaged in large-scale exchanges of information at the international level and is currently looking into the possibility of holding a major conference of presidents of the supreme courts or other higher tribunals of all Latin America, an idea initially put forward by Minister Ochoa.

In short, the Administrative Corporation of the Chilean Judiciary has provided a technical framework for the modernization of the judiciary, as envisaged in the major conclusions reached at important specialized conferences held in various countries in the Americas.

The Administrative Corporation has been helped in its work by its rather special composition. It is an agency of the judiciary and its Higher Council consists of ministers from the Supreme Court of Chile. This reinforces the principle of an independent judiciary and provides it with a status permanently on a par with bodies of a similar nature in the other two central government branches. Thus, ideas put forward are first discussed at an administrative and technical level and then passed on to the highest decisionmaking level.

Consensus and a Shared Responsibility for Reform

As mentioned earlier, modernization presupposes some minimum conditions: first, the existence of a national consensus in favor of it; second, complete respect for the independence of the judiciary; and third, a willingness on the part of the authorities to back that consensus, and the initiatives to which it gives rise, with proper funding.

The reform process sparked by that consensus should strive for specific objectives, beginning with the simplest measures and proceeding gradually to more complex goals.

Currently, the international consensus emerging from conferences and seminars indicates that it is better to broaden the jurisdictional base for providing access to administration of justice than to put forward schemes for extending or strengthening top-level structures; that it is necessary to foster the creation of private bodies engaging in pretrial conciliation procedures before cases are

brought before a court; that oral procedures should be introduced to speed up trials in general and criminal cases in particular; that it is preferable to create new courts only after a technical assessment of priorities; and likewise, that it is wise to adopt a policy of ongoing training courses for magistrates and to encourage the provision of technical support designed to streamline judicial procedures, following an assessment of needs.

Modernization of the judiciary is a matter of public concern, and the three powers of state—the executive, legislative, and judicial branches—are all equally called upon to help bring it about. This does not mean that the executive forfeits its power of initiative or that Parliament renounces its legislative powers. Rather, once a general consensus exists, the early stages of modernization should be handled cooperatively, with committees having representation from the three branches reaching agreements prior to legislative procedures.

Given that it is a matter of urgent public concern, modernization of the judiciary should be allowed to go forward, free of any ideological bias. The judicial authorities are not opposed to innovation. Indeed, in Chile the Supreme Court is doing its best to speed up the process. In this vein, it should also be noted that any well-intentioned efforts could come to naught if the executive and legislative branches ignore the opinion of judges.

Judicial reform is proceeding as it should in Chile. The president of the Supreme Court has taken a firm and intelligent line in support of a program of basic changes, and the government of President Eduardo Frei has declared, in the words of its minister of justice, Mrs. Soledad Alvear Valenzuela de Martínez (at the Third Conference of Presidents of Appellate Courts held in Concepción, April 1994), that "any improvement to our judicial system will be done with our judges, not without them or against them."

I am convinced that in Chile we have embarked on the right path to satisfy today's pressing demand that every community enjoy an efficient, timely, and dynamic judicial system for the administration of justice and one that, at the same time, provides for its civil servants a standard of living in keeping with the high standing of the function they perform.
break

29—

Improving the Administration of Justice in Costa Rica

Hernando París Rodríguez

For years it was thought that a country's development depended solely on improving output, the economy, and technology. Today it is understood that modern and efficient legal systems are also needed for development to

come about and democracy to be consolidated. The words justice and law are undeniably part and parcel of today's vocabulary of development.

French epistemology has left us Latin Americans with a rigid notion of how the law is applied: Once a judge has established the facts, the legal consequence contemplated in the corresponding legal norm automatically applies. Today, however, that mechanical application of the law runs up against a society in constant flux. The stability that the law afforded us for decades, with its clear and unchanging rules governing social relations, is disappearing. Flexibility is the rule today, because we can make progress in our development efforts only if we are able to adapt rapidly to change.

The main characteristic of this century is not that it generates changes, but that it does so at an increasingly heady pace. Alvin Toffler warned us of this in *Future Shock*, when he asserted that the world was embarking on an era of change. Today the "winds of change," to use Harold MacMillan's famous phrase, are ushering in a new world of globalized economies, computer science and technology, and competitiveness and progress. In this phase of transition, the legal order is crucial. All the activities through which a country develops depend on the law and on its correct application. Ultimately, every contract, promissory note, letter of credit, mortgage, and insurance policy is backed by the law. Their effectiveness, and the legal security surrounding these transactions, will depend on that law being correctly administered. We need sound legal institutions that allow us to carry out the economic activities that the modern world requires. We also need lawyers and judges trained in these new spheres of law and capable of breathing life into them the law is to facilitate rather than obstruct development (París 1992).

Legal Safeguards for Private Investment

One of the main challenges today is to endow Latin American countries with modern and efficient legal systems that make it possible for citizens to carry on their activities in an atmosphere of security and confidence. Without legal safeguards, an efficient judicial system, and clear, precise, and flexible rules that allow economic and financial transactions to take place in an atmosphere of trust, development is impossible.

However much we talk of the importance of opening up markets, more state-of-the-art technology, greater efficiency in production, relative stability of the currency, and relatively low levels of unemployment and illiteracy by Latin American standards—and the other indicators that give cause for hope that Costa Rica's development potential will be realized— little progress will be made without a parallel, profound transformation of Costa Rica's legal and judicial system. For Costa Rica successfully to pursue the path to development, new industries are needed along with capital flows, greater volumes of domestic and foreign investment in productive activities, and a climate of confidence in economic transactions. Legal security is a prerequisite for all of these.

What investor or business executive will feel secure if the state fails to fulfill its role of guarantor of the legal security of its citizens? However much we might like to trim the size of the state, it must perform some minimal functions efficiently and effectively. Settling conflicts is one such function.

Translated from Spanish.

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. That is why international cooperation agencies have turned their attention to this area and become our new allies. The international financial institutions and development assistance agencies now run ambitious programs to strengthen the legal framework for economic development.

Ibrahim F. I. Shihata, Senior Vice President of the World Bank, declared at a seminar on justice and development in Latin America sponsored by the Inter-American Development Bank that "it should come as no surprise that the structural economic reforms underway in so many developing countries push governments into undertaking reforms of the legal system, including that of the judiciary, as a necessary complement to economic reform." According to Shihata, "the subject is gradually gaining ground in development forums, due, above all, to its direct impact on sound management of resources and on the creation of a propitious climate for investment" (IDB 1993, p. 290).

Out-of-Date Legislation

Dr. Enrique Iglesias, president of the Inter-American Development Bank, has said that

... a fundamental aspect of the modernization or reform of the state is the updating of its legal order. The viability, fluidity, and stability of economic transactions, investment, corporate organization, solutions to labor disputes, regulations governing numerous social or family situations which exacerbate poverty, and the settlement of conflicts among the agents involved in all these processes are all liable to be adversely affected by the persistence of antiquated legal institutions and norms. Modernizing them is an essential ingredient in development. Thus "Modernization of the Law" is seen as an indispensable requirement if Latin American countries are to take up the challenge and strive for social and economic development. (IDB 1993, p. 9)

Although Costa Rica has progressed on several fronts—for instance, the promulgation of the Code of Criminal Procedure of 1975, the Civil Code of Procedure of 1990, and the 1993 Criminal Reform Package—major adjustments still must be made, in both legislation and practical application of the norms.

We will doubtless be called on to discuss in coming months topics such as the oral nature of civil, labor, and family law proceedings; the elimination of unnecessary legal procedures; and sanctions for abusing the right to sue. In addition, the training of judges and access to the legislative, jurisprudential, and doctrinal data needed to ensure correct judgments in the cases brought before the courts are key aspects of any modernization of the judiciary.

As Judge Edgar Cervantes Villalta, president of the Supreme Court of Costa Rica, said:

The universities do a fairly good job training lawyers to fight a case, but they do little or nothing to teach them how to negotiate and reconcile the interests of the parties. Marked changes have to be introduced in lawyers' professional training in order to prepare them for this new role which by no means diminishes their importance, but rather reinforces their role as conciliators, negotiators, and promoters of development.

Yet change must go beyond that. Today the legal profession must address such issues as the new technology that can be applied to administration of justice and modern judicial management techniques, among others. This means that curricula have to be adapted to teach law students how to face these challenges.

The new curricula will routinely have to cover areas such as environmental law, computer science, banking and financial law, alternative ways to settle disputes, integration or community law, the public and private international instruments required as a result of the globalization of our social and economic activities, unconventional crimes, the new areas of human rights, copyright and patents, computerized data transmission, modern economies' insurance systems, and other related topics. (Cervantes Villalta 1993b)

But most important is knowing how to think. Using modern databases, it is relatively easy to become acquainted with laws. What is important is to apply laws in ways that benefit society and promote development.

As Judge Cervantes Villalta said in a speech at the Faculty of Law of the University of Costa Rica:break

A judge is the organ of state entrusted with defending the legal system and the principles underlying it. . . . It is not enough to apply norms mechanically. A judge has to weigh up the social circumstances they are supposed to address. . . .

In training judges and lawyers . . . we neglect the human being whose job it will be to apply the law. In law school, we impart a large amount of theory and some practical lessons, but we frequently fail to train students as human beings. Creativity in applying legal norms, that touch of brilliance characteristic of great thinkers, study habits, and the moral and ethical values needed to practice the profession—these are elements that should be part and parcel of any law faculty and underlie everything we teach our students. Only then will we create the judges and lawyers that this changing, innovative world requires. (Cervantes Villalta 1993a)

Thus, it should be recognized that a judge is not an automator that is merely called upon to turn rules and facts into verdicts. Rather, he is a human being fulfilling a social role, called upon to make decisions in accordance with the legal and cultural traditions and values of the society in which he lives.

There are two ways to solve this serious problem of adaptation to change. First, the law school curriculum must be reformed so that lawyers are better equipped to face the challenges of the twenty-first century. Second, training courses must be designed to bring judges and lawyers up to date and to give them the specialized knowledge needed to adapt to change.

Lack of Alternative Methods of Conflict Resolution

The Costa Rican Constitution assigns the judiciary the job of solving civil, commercial, labor, and any other cases. But recourse to the courts should be the exception, not the rule, when it comes to solving social conflicts. The deep-seated legal tradition in Costa Rica, combined with a culture that encourages litigation, leads people to go to court as soon as a conflict arises instead of trying to resolve the conflict through negotiation, conciliation, or other such methods. To relieve the congestion in the court system alternative methods of conflict resolution should be encouraged.

Two of the most commonly used such methods are mediation and arbitration, which are usually administered by centers or institutions. The Arbitration Court of the International Chamber of Commerce, based in Paris and founded in 1919, operates internationally, and in this region we have the Inter-American Commercial Arbitration Committee, founded in 1934. In the United States there is the American Arbitration Association, based in New York. In several Latin American countries, chambers of commerce and industry, commodity exchanges, specialized chambers, and professional associations offer arbitration, conciliation, and mediation services. In the inter-American system, there is the Inter-American Commission of Commercial Arbitration, founded in 1934.

Mediation centers include the Chicago Center for Conflict Resolution; the South West Alternative Dispute Resolution Group, which has centers in California, Texas, Wisconsin, and Washington, D.C.; the Dispute Mediation Service, Inc., in Texas; the Conciliation Centers in Colombia; and a center in Argentina supported by the Libra Foundation.

These success stories should encourage us to implement mediation and arbitration in Costa Rica to strengthen Costa Ricans' capacity to converse and negotiate in a spirit of compromise.

Under an agreement with the U.S. Agency for International Development, the Costa Rican judiciary has established the Alternative Conflict Resolution Program. It is also at an advanced stage of negotiations with the Inter-American Development Bank for additional funding from the IDB's Multilateral Investment Fund, since proper promotion of alternative methods of conflict resolution creates favorable conditions for private investment. Most of the program's resources will be used to design and implement publicity campaigns, produce printed materials, and train lawyers, judges, and others. This will pave the way for active private sector participation in

the creation of mediation and arbitration centers to complement the work done by similar centers run by the state, universities, and professional associations.

Mechanisms to resolve conflicts, such as arbitration, have existed since men began submitting their squabbles to third parties for a judgment. Arbitration was highly developed in ancient Rome. In Latin America, civil law codes and civil codes of procedure have preserved arbitration as an institution. Costa Rica is no exception. Its Constitution envisages recourse to arbitration as a way to solve property disputes (Article 41), and the civil code and the new code of civil procedure contain important norms regarding arbitration procedures.

Some believe that such methods have not caught on in Costa Rica because the population has faith in the judicial system—despite its slow pace. Others attribute the lack of interest to simple ignorance of the benefits and the expense of educating the public in the value of these avenues.

Today, the backlog of cases before the courts, judicial inefficiency, and the complexities of modern business life continue

all make it imperative for us to practice alternative mechanisms of conflict resolution, such as mediation and arbitration. The extensive media coverage of the Supreme Court's Alternative Conflict Resolution Program since its inauguration on January 27, 1994, offers hope for the program's success.

The Backlog of Court Cases

The administration of justice is generally believed to be hampered by delays caused by the backlog of cases before the courts, the lack of legal safeguards for private investment, insufficient access to justice, administrative inefficiency, and outdated resource management systems, among others.

These problems were identified in the meetings that led up to the First National Congress on the Administration of Justice, held in San José in September 1993, and in other meetings throughout the country. The slowness with which the judiciary operates is perhaps the most widely perceived defect.

Criticism of the slow pace of judicial proceedings in Latin America is commonplace. As noted at a 1993 seminar, "In Latin America and the Caribbean, administration of justice is neither efficient nor, in many cases, even effective, because of the cumbersome, nonfunctional tools it works with and the lack of rational and effective solutions to the obstacles that arise" (IDB 1993, p. 276).

The judiciary in Costa Rica is not immune to this problem. Although there is deep-rooted trust in the courts, as mentioned earlier, the judicial backlog has worsened in recent years, which could lead to a loss of confidence in the system. The number of cases pending in the Supreme Court rose from 1,806 in 1990 to 4,235 in 1992.

Cumbersome Procedures and Excessive Formalism

Despite the major efforts at reform and training promoted by the Supreme Court, the Costa Rican judiciary tends to be slow and excessively formalistic. Decisions are delayed because of a lack of state-of-the-art technology; lack of access to up-to-date information about the law, court practice, and doctrine; excessive red tape; and the shortage of expeditious means of communication.

The formalities required for certain types of court proceedings hinder citizens' access to justice. For example, until a recent reform the Code of Civil Procedure required that actions under civil law, commercial law, and administrative law be filed on special paper.

Many legal reforms have been undertaken to streamline judicial proceedings. Article 97 of the Code of Civil Procedure, for example, allows a judge to dismiss a petition or claim if the litigants engage in delaying tactics. However, much remains to be done to expedite the administration of justice. Computer science alone will not solve the problem. A study should be made of how advanced technology can become a useful tool and an integral part of a modern, efficient system.

Excessive Legal Remedies and Objections

Costa Rica's 1990 Code of Civil Procedure came out of an effort to streamline judicial proceedings. Toward this end, the code reduced the number of court resolutions that lawyers could appeal. But lawyers nonetheless continue to lodge an excessive number of appeals and legal objections in order to delay cases. Judge Gerardo Rojas (1994) has stated that "despite the fact that Article 582 of the Code of Civil Procedure restricts the possibility of lodging appeals for annulment, lawyers continue to initiate all kinds of actions against judgments by courts of appeal, even though the law specifies that there are no remedies."

Appeals are clearly a necessary legal provision. They provide a guarantee that the parties can seek redress in a higher court if in their view the lower court has not fully complied with appropriate legal standards in deciding their case. As legal expert Eduardo J. Couture (1990) has noted, appeals are checks granted the parties in a trial. Through the appeals process, the parties may gain a rehearing before the same judge or a higher judge. But if the right to appeal is misused, trials become so cumbersome and justice so delayed that it becomes inaccessible for ordinary citizens.

Couture (1990) observed that "the tendency nowadays is to increase judges' powers and to cut down the number of appeals. That represents the triumph of prompt and firm justice over the need for good but slow justice" (p. 349).

The Pace of Trials

In the interest of bringing trials to a speedy conclusion, the 1990 Code of Civil Procedure allows judges to set the pace of civil suits. This provision represents an improvement over the old code, which gave this power to the attorneys of the parties to an action. Although civil judges are unlikely ever to enjoy the same range of powers as judges in criminal courts with respect to the pace of a trial, it is to be hoped that judges will take a firmer hand in the conduct of proceedings. As Gómez Pérez (1972) noted, "In most court cases, speed is a factor which enhances the chances that justice is done . . ." (p. 118).break

Courts As the Recourse of Last Resort

Costa Rica's legal tradition and culture contribute to the ever-increasing backlog in the court system. The courts are choked with cases ranging from land disputes between neighbors to an appeal to the Supreme Court by a football player who was suspended from playing in a match.

Why not promote a culture of dialogue and understanding and the pursuit of consensus? In such an environment, problems could be solved without resort to the courts (see París 1994b; Villalobos 1994). Courts should be the last resort. Even if the state cannot delegate this responsibility to private individuals, it should try to ensure that citizens have at their disposal instruments allowing them to harmonize their interests rather than pitting them against each other in court cases.

Costa Rica offers fertile ground for the promotion of this culture of dialogue. That is why—even if the judicial system cannot be privatized—every effort should be made to encourage the settlement of disputes through negotiation, mediation, conciliation, and arbitration, actively supported by the state but administered outside the

formal court system. These methods have many advantages: low cost, speed, flexibility, ability to achieve harmonization of interests, low degree of tension between the parties, and confidentiality. In addition, democracy would be strengthened if the judiciary were restricted to criminal cases and those that can be addressed only by the courts. There exists a growing consensus that the courts should concern themselves only with disputes or problems that cannot be solved through alternative forms of settlement between the parties (IDB 1993, p. 18). In Colombia, for example, as part of the effort to relieve the burden on the courts, conciliation centers were established to handle conflicts that, because of their relatively low importance, do not merit setting the formal judicial system in motion.

Promotion of alternative methods for settling conflicts—which are widespread in Colombia, Mexico, and the United States—will expedite the administration of justice by reducing the number of cases that come before the courts. The climate of confidence that will be generated will in turn facilitate investment and the development of the country.

Lawyers usually do not envisage the possibility that disputes can be settled through channels other than the courts. Dr. Marco Gerardo Monroy (1994) noted that "lawyers usually initiate legal action without attempting to get the parties to reach agreement, and that is one reason why there is such a backlog of cases" (p. 29). Add to this tendency the fact that courts lack the infrastructure and wherewithal to solve disputes correctly and swiftly, and you have two reasonable explanations for the backlog in the courts.

Although the practitioners of alternative dispute resolution methods need not be lawyers, they should understand both legal principles and the communities in which they work. They also must be totally impartial and independent of any political groups or organizations.

Lack of Easy Access to Legal Information

The prompt administration of justice requires judges to be familiar with the latest trends in legal thinking. Ignorance of contemporary legal problems and their solutions by those applying the law creates uncertainty, which results in cases being set aside until the information needed to pass judgment (in the case of judges) or take legal action (in the case of lawyers) is obtained.

Although the judiciary has made an effort to provide judges with up-to-date information, lawyers, social researchers, and citizens also need such information.

The Costa Rican court system has assigned a high priority to the creation of an electronic legal documenter center. Both judges and private individuals would be able to use the center to rapidly access judgments of the court system. With regard to legislation, the attorney general's office has under way a project to document all legislation currently in force. The Faculty of Law of the University of Costa Rica is systematizing legal doctrine. The above-mentioned systems will create a national legal network, allowing rapid access through computerized information to the law, court practice, and doctrine that are sorely needed by legal practitioners.

Inadequate Access to Justice

As noted earlier, given the backlog of cases awaiting action by the courts, there is an urgent need for alternative methods of conflict resolution. Some cases do not merit judicial proceedings and could be settled by applying standards of equity.

Dr. Marco Gerardo Monroy (1994) suggested setting up conciliation centers similar to those that have operated in Colombia since 1991. At these centers private individuals solve their own problems with the help of their neighbors. Legal reforms will probably be needed for such centers to be established in Costa Rica.

With regard to public administration, the recently created Public Defender's Office (Defensoría de los habitantes) is a mechanism that enables citizens to turn to the state rather than the courts to solve their conflicts. The work this office can accomplish through mediation and by continue

exercising *la magistratura de influencia*, or sheer clout, suggests that this new organ could play an important role as an alternative means of conflict resolution.

In recent years Costa Ricans have, through strikes and public demonstrations, expressed frustration with government inefficiency and a low level of confidence in the promises of politicians and government officials. The Public Defender's Office could help restore public confidence in government and strengthen dialogue and negotiation as methods of resolving disputes between individuals and the state.

The general public's ignorance of the way the legal system operates and how to gain access to it clearly is an obstacle to the administration of justice. Low-income individuals have great difficulty accessing the judicial system to claim their rights or defend them when they are taken to court in criminal cases. The economic problem has been largely solved by the practice of court-appointed defense counsel. Some question whether the defense counsel can handle the caseload, however. There are two problems with the current system. First, the defense counsel appointed by the court to represent a defendant during the initial hearings is replaced when the case goes to a higher court. Second, free legal counsel is available only in criminal cases, leaving many low-income citizens without representation in civil cases. Although legal consultancy services exist to counsel the poor, these services suffer from a lack of resources. Moreover, there is no requirement that law students perform their 300 hours of community service at these offices. Law students should be required to perform compulsory service at these legal consultancy services, and law schools should train students to develop their skills as advisers, mediators, and litigants. An additional benefit of this requirement is that students would become sensitive to social problems.

Dr. Marco Gerardo Monroy (1994) has suggested that by training law students in conciliation methods, legal consultancy services would help relieve the courts of their caseload. The First National Congress on the Administration of Justice also recommended that universities collaborate with the judiciary by training students to provide officially recognized social services (Costa Rica, Supreme Court 1993).

The Public's Ignorance of Its Rights

The public does not always have a clear and accurate grasp of its legal rights and obligations. If citizens are unaware of their rights, they may become victims of injustice. Ignorance of the law can also lead individuals to commit unlawful acts unintentionally.

Despite Costa Rica's long civic tradition and reliance on the rule of law, it does a poor job of educating its citizens in the law. The civics courses in schools and colleges teach little beyond the structure and functioning of the government. The texts that exist are far from adequate. The discussion in the media is restricted to narrow legal cases and issues. There is a need for civic education courses to supplement the civic education now provided in schools and colleges. Media campaigns could help reinforce the curriculum taught in these courses.

Legal Protections for the Environment

Preventing environmental contamination and degradation and exploitation of natural resources calls for joint efforts by the state and its citizens. Costa Rica's natural resources are as precious as they are limited. For that reason, legal tools are needed to ensure conservation and protection of the environment in the interest of human development.

In the past twenty years the Supreme Court has issued a series of major judgments in which defense of the environment has been the guiding norm. A judgment of May 16, 1973, dismissed a charge that the Forestry Law was unconstitutional because it infringed on the right to private property. A judgment of May 17, 1984, dismissed an appeal involving the same law, based on alleged violations of Articles 45, 50, and 56 of the Constitution, among others. In this second judgment the Supreme Court ruled that "the state must safeguard and respect the rights of man as a free individual capable of deciding what to do and of choosing his own objectives. But when his conduct conflicts with other interests of paramount importance, the legislator must opt for the higher values and restrict the freedom of the individual." The court concluded that "the classical concept of property as an absolute, unrestricted right has varied considerably, making it possible nowadays to base certain restrictions on social grounds, as allowed for under paragraph 2 of Article 45. This made it possible for lawmakers to establish that one essential function of the state is to see to the protection, exploitation, conservation, and development of the country's forestry resources."

In keeping with agreements reached at the June 1972 Stockholm Conference on the Environment, states possess a sovereign right to exploit their own resources within the framework of an environmental policy. The definition of such a policy is thus a duty of all states, because only in that way can they guarantee rational use of those resources and their conservation for future generations.

Judgment 189 by Ricardo Zeledón in the First Division of the Supreme Court on October 30, 1991, recognized the existence of ecological law. Other measures to protect the environment that are under discussion include amending the Constitution in order to accord the envi-soft

ronment a higher level of protection, establishing courts specializing in environmental matters, and extending the environmental training courses to the entire public sector.

Administrative Ineffectiveness in the Judiciary

Many problems in the administration of justice stem from deficiencies in the judiciary's administrative functions. Centralization of the judiciary's administrative functions in San José has created a problem for other judicial circuits. This situation could be remedied by creating regional administrative headquarters, each under a regional administrative manager whose job would be to provide immediate solutions to the operating requirements of each office in his region. This solution was proposed by the Alajuela Regional Forum (Costa Rica, Supreme Court 1993).

Participants at the First National Congress on the Administration of Justice (San Jose, 1993) reached the same conclusion when they opted to implement a project with the U.S. Agency for International Development to finance the establishment of regional management offices. In addition to improving the administrative functions of the judiciary, these regional offices will relieve judges of the bulk of their administrative workload. Judges, attorneys, and defense counsel will be able to devote more time to their responsibilities and their caseloads.

Inadequate Administrative Systems

The administrative systems of the judiciary hamper the efficient administration of justice. A first problem is the system of communication among offices. Communication is principally by mail or telegram, which results in delays in the delivery of documents. Speedier communication methods, including messenger service, interoffice fax, and E-mail, should be adopted. René Hernández Valiente noted recently that the judiciary in all of Central America suffers from inefficient communications systems. He lamented that "huge sums are spent maintaining obsolete instruments when they could be spent acquiring appropriate technology" (IDB 1993, p. 50).

Each court office should also be equipped with a state-of-the-art computer system so that information on cases' progress can be easily retrieved by lawyers and assistants. The First National Congress on the Administration of Justice also recommended a continuous education program to train the staff in judges' chambers.

In addition, court judges' chambers should be reorganized. In Costa Rica each judge's chambers has its own staff, which often leads to duplication of effort. The possibility of centralizing some of the administrative functions under a single administrator deserves consideration.

Poorly Trained Staff

Given the complexity of the administrative functions carried out, staff must be properly trained. Administrative staff are as much in need of specialized training as judges. The administrative side of the judiciary must be staffed by professional administrators who have the technical and practical know-how needed to perform their work confidently and efficiently.

Lack of Fiscal Independence

To operate effectively, the judiciary must have an adequate budget and be free to allocate that budget as it sees fit. Article 177 of the Constitution provides for the judiciary to receive 6 percent of the governmental budget. Although this guarantee of a minimum appropriation prevents the executive and legislative branches from putting economic pressure on, and hence influencing the judgments of, the judiciary, nonetheless the judiciary remains subordinate to the Budget Department, a technical organ of the executive branch that is established by law.

Despite the fact that the judiciary's budget is guaranteed by the Constitution, the judiciary received less than the 6 percent allocation throughout the 1980s. In 1981 the national budget totaled a little over 9 billion colones, with current revenue of about 7 billion. The judiciary received only 382 million colones, or 5.1 percent of current revenue. In 1982 the judiciary received only 4.4 percent, and in 1983, 4.7 percent. The Supreme Court's struggle to enforce compliance with the constitutional budget guarantee resulted in a national budget appropriation for the judiciary of 6 percent of current revenue in 1991. President Rafael Angel Calderón Fournier backed the Supreme Court's demand for compliance with the Constitution, thereby strengthening the judiciary's economic autonomy and confirming its functional and economic independence.

However, although the judiciary has the authority to execute its own budget independently, delays in the monthly budget transfers are common.

Reforming the Costa Rican Judiciary

Reform of the Costa Rican judiciary is clearly needed. But how can effective judicial reform be achieved? The maincontinue

points that should be considered in reforming the judiciary are discussed below.

Leadership

At the International Conference on Judicial Delays, held in Panama City in October 1993, Bill Davis, consultant for the National Center for State Courts in the United States, warned that the process of judicial reform must start from within the Supreme Court, and not be imposed from outside. He emphasized that reform of the judiciary can succeed only if top officials are fully convinced of the need for change and sure of the direction in which they want to move. When leadership of the reform process comes from outside—however laudable the intentions of the reformers—it infringes a basic principle of any democratic rule of law: the independence of the judiciary.

In the case of Costa Rica, Davis's cautions are not a concern, since the judicial reform process was initiated within the Supreme Court and has involved all members of the judiciary and the general population as well. The First National Congress on the Administration of Justice provided an important forum for the exchange of views on how judicial reform should proceed and the form that it should take.

Comprehensive Reform

Simply patching up a few defects in the system will not lead to real improvement. Nor is new technology a panacea in and of itself. The reform process must encompass every area of judicial activity. The process must begin with a complete diagnosis of problems, enriched by a national debate and the views of both members of the judiciary and the general public. Next, the causes of the problems must be identified. Finally, possible solutions must be proposed and then tried on a limited, pilot basis.

Through this process, judicial reform will result in a modern and efficient system for the administration of justice that will encourage investment and human development.

Broad Participation

Only with society and members of the judiciary working together will judicial reform succeed. In the case of Costa Rica, a national congress elicited the enthusiastic participation of the public and members of the judiciary. The First National Congress on the Administration of Justice had two clear objectives: first, to encourage the participation of the general population and members of the judiciary in decisions regarding the administration of justice, and second, to elicit the best ideas on how to modernize and improve the administration of justice in the twenty-first century.

The organizing committee for the congress was charged with organizing a national dialogue among members of the judiciary and different segments of the population. The committee was assisted by dozens of members of the judiciary, who formed working groups on such subjects as computerization, transport, security, medical services, per diem payments, secretarial work, aides-de-camp, public relations, and the press.

Regional workshops were held throughout Costa Rica to unite members of the judiciary and local communities around the common goal of providing Costa Rica with a modern and efficient judicial system capable of furthering the country's development. This open process was unique in the history of Costa Rica. It was the first time that a branch of government asked citizens how they viewed a public service and how it could be improved. Rafael Medaglia Gómez, president of the Bar Association of Costa Rica, noted that congress evidence of the opening up of the judiciary.

This institutional openness was greeted with great enthusiasm by the members of the judiciary and by representatives of other sectors. The message emanating from the regional workshops was that, by working together, Costa Ricans can bequeath to future generations a modern, humane legal system.

In 1992 Edgar Cervantes Villalta, president of the Supreme Court, said in a speech inaugurating the 1992 judicial year: "A year ago we announced that we would seek to integrate the judiciary into Costa Rican life and that we would maintain an open-minded approach both internally and towards the rest of society. Today that goal has been achieved." And in 1992, for the first time, the ceremony marking the start of the judicial year was attended by the presidents of all branches of government. The occasion was also marked by academic, cultural, and sporting activities, in which many members of the judiciary took part.

This process of open and free dialogue then continued with the inauguration of the 1993 judicial year, when, for the first time in its history, the judiciary held ceremonies in all the judicial circuits of the country. In addition to members of the judiciary, local associations also participated. The celebrations made members of the judiciary

realize that great things can be achieved for Costa Rica.break

International Cooperation for Judicial Reform

The judiciary has established close and cordial relations with three main sources of international cooperation:

The United Nations Development Program has been a partner of the judiciary since the signing of the framework agreement on justice and development. That agreement gave rise to the First National Congress on the Administration of Justice and some parallel academic activities, such as a conference on criminal justice held at the start of the 1994 judicial year.

The U.S. Agency for International Development has awarded three grants: a \$1,030,000 grant for the judiciary, a grant of \$100,000 for the judicial school, and a grant of \$100,000 for the National Commission for the Improvement of the Administration of Justice. Those funds will be used to strengthen the national commission, make improvements to the judicial archives, and launch an awareness campaign on alternative methods of conflict resolution, and to staff an office to coordinate these kinds of projects. In the framework of this assistance, direct contact has been established with the U.S. embassy's information and cultural service (the United States Information Agency, or USIA) and several Worldnet television programs have been transmitted throughout Latin America. An exchange program on judicial reform has also been established, and in the first six months alone, seven judicial and administrative staff members have won fellowships in the United States.

The Inter-American Development Bank may provide a loan of more than \$10 million, as well as a major grant, to develop alternative methods of conflict resolution.

For the first time in many years there is a consensus between the judiciary and the private sector, and between government authorities and international organizations, concerning the important role the judicial system plays in Costa Rica's development. One manifestation of this consensus is the recent creation of the Interinstitutional Technical Commission for the Improvement of the Administration of Justice (CTI), under the auspices of the National Commission for the Improvement of the Administration of Justice. The CTI comprises technical representatives from the Ministry of Justice, the Office of the Attorney General, the Public Defender's Office, the Costa Rican Bar Association, the Law Faculty of the University of Costa Rica, and the Association of Chambers of the Private Sector (Unión de cámaras). The function of the CTI is to help achieve the consensus needed to back technically formulated modernization projects developed using the technical and financial assistance provided by the Inter-American Development Bank.

Another illustration of the consensus that has developed in this area is the fact that the Supreme Court opted, at its president's behest, to approve a plan to modernize the judiciary and to obtain the technical, financial, and human resources needed to ensure prompt execution of the plan.

The government's development plan also includes a section on its support for judicial reform. That plan states: "As far as the judiciary is concerned, our objective is to support the modernization programs promoted by the Supreme Court, in order to attain swift and correct administration of justice. The Executive will support international cooperation agreements to modernize administration of justice, especially those activities designed to streamline court cases and to ease the pressure of work on the courts through alternative methods of dispute resolution" (Costa Rica, Supreme Court 1993, p. 38).

With the commitment of the Costa Rican people and the international cooperation noted above, Costa Rica has a historic opportunity to develop a modern, efficient, and humane system of justice.

References

Cervantes Villalta, Edgar. 1993b. "Justicia y desarrollo" (Justice and development). Inaugural speech for the 1993 lecture series of the Faculty of Law, University of Costa Rica, San José.

———. 1993a. "Perspectivas y necesidades en la enseñanza del derecho en los albores del siglo XXI" (Outlook and requirements for the teaching of law on the threshold of the twenty-first century). Speech delivered at a seminar sponsored by the Escuela libre del derecho, December 14, San José, Costa Rica.

Costa Rica, Supreme Court. 1993. *Plan de modernización del poder judicial* (Plan to modernize the judiciary). San José: Departamento de Publicaciones e Impresos del Poder Judicial.

Couture, Eduardo J. 1990. *Fundamentos del derecho procesal civil* (Foundation of civil procedural law). 3d ed. Buenos Aires: Depalma.

Gómez Pérez, Rafael. 1972. *Deontología jurídica* (Juridical deontology). 1st ed. UNSA, Pamplona.

IDB (Inter-American Development Bank). 1993. *Justicia y desarrollo en América Latina y el Caribe* (Justice and development in Latin America and the Caribbean). Seminar held in San José, Costa Rica, February 46.

Monroy, Marco Gerardo. 1994. "Reforma de la administración de justicia" (Reform of the administration of justice). Report presented to the Inter-American Development Bank, Washington, D.C.

París, Hernando. 1992. "Derecho y nuevos horizontes" (Law and new horizons). *La Nación*, May 31, p. 15–A.

———. 1994a. "Diagnóstico del sector justicia" (Diagnosis of the judicial sector). *La República*, February 24.

———. 1994b. "Privatizar la administración de justicia" (Privatizing the administration of justice). *La República*, January 27.

Rojas, Gerardo. 1994. Tribunal Superior Primero Civil, San José, February 17 (conducted by Ana Patricia Villalobos).

Villalobos, Lorena. 1994. "Antes de ir a la corte" (Before going to court). *La Nación*, February 21, p. 5–A.

30—

Judicial Reform in Bolivia

Guillermo Arancibia López

After thirteen years of military rule, Bolivia elected a democratic government in October 1982. But the country went on to suffer three years of the worst inflation in its history, with up to six-digit increases in the cost of living. The negative ramifications of that period were felt for some time and explain the very low rates of average growth in subsequent years—for example, 3.4 percent in 1993. Private investment has also been low—estimated at just 6 percent of GDP in 1992–93. Economic adjustment programs, although they carried a high social cost, gradually rebuilt the economy and stimulated growth; inflation in 1994 was projected at only 7.5 percent, a respectable rate by both Bolivian and South American standards.

A major feature of Bolivia's traditional economy is public sector dominance in the productive sphere. Under this system the state, in addition to running such strategic areas as mining, oil and gas, air and rail transport, and communications, also has control of less key industries such as sugar, glass, edible oils, and so on. This is likely to be changed by the current government, which wants to make a complete about-face.

The recent "capitalization" law takes a step toward opening the market to foreign investment by offering extensive facilities to investors. It is expected that internal savings will get a boost as a result, which would provide resources badly needed to pay off the social debt and alleviate poverty and unemployment in severely depressed rural areas and shantytowns on city outskirts.

Need for a New Institutional Framework

Bolivia's Constitution was last amended in February 1967. But, as in its previous reforms, Bolivia failed to undertake major structural changes in any depth. Today, the demands for reform have become intense, ratcheted up, in part, because of the pressure of recent world events that have shaken and transformed the foundations of many countries.

In the spring of 1994 the Bolivian Congress approved a Constitutional Reform Law that questions and seeks to alter the very structure of governmental power by creating a fourth entity, in addition to the legislative, executive, and judicial branches. This new body would have the same rank as the Supreme Court of Justice. The reform law also institutionalizes new ways of electing parliamentarians, lowers the voting age from 21 to 18, creates a body whose members will act as "ombudsmen" (*defensores del pueblo*), and, most important, establishes new, more flexible mechanisms for amending the Constitution.

The pressure for a new institutional framework has grown as the country struggles to find ways to accomplish constitutional changes that have been mandated by such laws as the Capitalization Law, the Law on Popular Participation, the Education Law, and earlier laws such as the civil, criminal, and commercial codes, codes governing family law, and codes governing minors.

The Judicial System: Current Status and Limitations

The judicial system comprises four levels: the Supreme Court of Justice, the top decisionmaking body; the superior district courts, the first-instance courts; and other trial courts. There are also special jurisdictional courts in the executive branch for mining, labor law, agrarian law, administrative law, tax law, minors, and women. Under the new Law on Organization of the Judiciary, almost all these courts are to come under the judiciary's purview. This presents a challenge, both organizationally and incontinue

Translated from Spanish.

terms of quantitative and qualitative requirements, that will have to be faced in the not-too-distant future.

Institutional Autonomy

Over the years successive military coups in Bolivia have sparked numerous sudden changes in the Supreme Court, as well as in the district and first-instance courts—in the thirty years between 1952 and 1983 there were seventeen reorganizations. During spells of democratic rule party politics was chiefly to blame for the functional instability of the system.

The recent "two-thirds" law, enacted in conjunction with the latest Law on Organization of the Judiciary, greatly advanced the independence of the judiciary by requiring a two-thirds majority in Congress for the election of

district court judges and Supreme Court magistrates. This implies a virtual consensus, in contrast to the previous practice in which the ruling party virtually nominated the judge they preferred and could thus rely on docile courts.

Economic Autonomy

Economic autonomy for the judiciary is envisaged in the Constitution and consists mainly of a series of prerogatives for raising funds. Such mechanisms have proved successful in the past in raising the necessary funds to endow Bolivia's major cities with appropriate infrastructure. However, the new Law on Organization of the Judiciary drastically reduced the scope for the use of own funds, compensating for the reduction by ruling that 3 percent of the national budget be allocated to the judiciary.

Weaknesses of the Judicial System

There is widespread discontent—from both inside and outside the judiciary—with administration of justice in Bolivia. At the very least, this discontent has resulted in a disinclination to resort to the courts in search of justice. The reasons for dissatisfaction with the system are complex.

Judicial Delays

Much of the discontent can be traced to judicial delays. When all is said and done, timeliness in conflict settlement is the overriding goal to which all the elements of the judicial system contribute. Blame for the delays must be attributed to the law itself and to lawyers, judges, and the parties in dispute.

The legal system is overelastic and has loopholes that permit excessive use of delaying tactics, with few restrictions, which effectively increases the burden of work for the judiciary. Such distortions have to be eliminated by legislative means.

Lawyers also contribute to the delays by indulging for their own benefit in unethical practices designed to prolong cases and increase associated income and fees. There appear to be few legal remedies against such abuse.

Judges, for their part, contribute to delays by adopting a passive attitude and allowing the pace at which cases are conducted to be determined by the parties—a practice once sanctioned by regulation but now outmoded.

The parties in dispute add to delays by their capricious behavior and preoccupation with inflicting harm on the other side.

Lack of Professionalism

In Bolivia a judge, once appointed, begins work with no specific prior training. There are no academic programs tailored to the needs of prospective judges. Nor are there any training courses for practicing judges. One exception is the occasional seminars—mainly refresher courses—organized by the Supreme Court. But although these are helpful, they have little impact because they are infrequent and there are insufficient funds and facilities to offer them on a large scale. This state of affairs should change, however, given that the new Law on the Organization of the Judiciary envisages the creation of a training institute for the judiciary as part of the mission of the Supreme Court.

Another factor that cannot help but contribute to the low level of professionalism among the judiciary is the lack of incentives for judges. A judge's pay bears no relation to the importance and dignity of the function he performs. Just as harmful, a judge's right to pursue a career in the judiciary is by no means assured; the office of judge is not recognized as a career position. This means that judges are not accorded the respect befitting their position. Nor

can they count on job stability. With these drawbacks, it is no wonder the judiciary fails to attract and keep high-caliber professionals.

A related issue that must be addressed is provision of training for other, auxiliary staff in the judiciary.

Limited Access to Administration of Justice

The legal system suffers from a considerable degree of imposition, which is to say that little attention is paid to appreciating, analyzing, and consulting the cultural values, local circumstances, or specific factors involved in a dispute. As a result, a large segment of the population, continue

above all aboriginal or indigenous groups, does not feel that the system can serve them.

In addition to this cultural gap, many are denied access to administration of justice because they cannot afford the high fees involved. Most unfair is that small farmers in rural areas—usually the most deprived in the population in economic terms—often fall prey to illegal surcharges that take advantage of their ignorance of the system.

Although corruption in the judiciary has declined in the face of the Supreme Court's recent decisions, it is still prevalent among lawyers, witnesses, and court experts and constitutes one more barrier to the administration of justice.

The ritualistic procedures associated with the legal system, and which the bulk of lawsuits must contend with, erect another formidable obstacle to access to justice. Written proceedings are heavily relied on, which tends to drag out court trials. Add to this the lack of nontraditional methods of conflict settlement, such as conciliation, arbitration, and mediation, and you have a legal system bogged down in long, costly, and overly complicated proceedings—and one that effectively denies access to many of the country's citizens.

Strategy for a Reform Program

Against this background, it was clear that a comprehensive, far-reaching reform of the judicial system needed to be undertaken. Specifically, measures were needed to streamline procedures and clarify guidelines, to upgrade human resource management, and to improve the functioning of the judiciary, with a view to turning it into a modern organization.

Roots of the Reform Program

The program arose out of needs and concerns expressed by Bolivia's Supreme Court of Justice, to which the World Bank responded. Preliminary contact was made in 1993 in Williamsburg, Virginia, during a Round Table on Judicial Reform organized by the National Center for State Courts. Dr. Felipe Saez, of the Trade, Finance, and Industry Division of the Latin America and the Caribbean Region at the World Bank, has contributed decisively to the progress that has been made.

The Plenary of the Supreme Court approved the overall structure of the program. This paved the way for the creation of an office in charge of the program and subsequently for the setting up of the Consultative Committee, composed of two ministry-level members of the Supreme Court; three superior court judges representing the eastern, western, and southern regions of the country; and the president of the Bolivian Bar Association. Program planning was based on the findings of three workshops. The most recent was held in Washington, D.C., where the focus was on agreeing to a definite schedule for the reform program.

Organization of the Program

Although the program was envisioned as a collaborative effort, all stages—planning, execution, evaluation, follow-up, and others—are the direct responsibility of the Supreme Court of Justice and the judiciary, and all departments within these bodies are expected to make a contribution. The Bolivian Bar Association is a member of the Consultative Committee and, as such, also has a major role in the program. Moreover, the program is being coordinated with the Ministry of Justice in order to ensure a joint, cooperative approach with the executive branch. In the end, though, it is well understood that carrying out the reforms from within the judiciary is critical for their success. Similar programs conducted from the outside have ended in failure.

Program Objectives

Program objectives are straightforward, stressing the fundamentals.

To ensure equal treatment in cases brought before the legal system.

To comply as much as possible with the population's needs for administration of justice.

To provide adequate access to justice for all sectors of the population.

Program Components

The program's overarching purpose is to improve the quality and efficiency of administration of justice in civil law cases. It includes the following components:

A program for improving the administration of justice .

A judicial policy program . This component involves preparation of judicial policy papers and Supreme Court circulars. Policy directives will be used to deter misuse of procedures and other legal devices by parties to disputes. Circulars will set guidelines for the application of legal provisions and will simplify procedures and standardize court practice.

A professional training program . An intensive professional training program, including both course work and practical application, will be designed and implemented. Both continue

judges and auxiliary personnel will receive training in how to conduct trials and resolve disputes.

Judicial information systems . A computerized information system will be designed and implemented. The idea is to vastly improve judicial information systems, so that they not only efficiently record the duration of trials and keep the register of the caseload, but also become part of an expanded computer network system that covers the first-instance and higher courts, registering the current phase of each trial and measuring compliance with targets.

A judicial management program, which spells out organizational criteria and auxiliary functions and provides training in judicial management. The goal is to make administration of justice more professional and to define functions and roles in court practice.

A legislative reform program, encompassing both procedural reforms and substantive reforms. The aim is to study amendments to the civil and criminal legal codes as well as substantive reforms in both these spheres. This program component is to be coordinated with the Ministry of Justice.

A human resources program . A human resources program is to be undertaken as an essential complement to other judicial reform measures. This program aims to establish a well-defined judicial career, with proper selection, appointment, and promotion criteria and incentives to encourage judges to pursue excellence, managerial efficiency, and personal integrity in the exercise of their profession. Creating a judicial career will at first require a temporary system for evaluating and selecting judges, in particular one that allows for a survey of sitting judges and an assessment of their performance, with an eye to refining selection criteria. Following a study of the current status of human resources, the plan is to prepare professional job descriptions for positions in the judiciary, and to devise criteria for the selection, evaluation, promotion, and remuneration of judiciary personnel. In this way a permanent judicial career pattern will be set. The same process will be applied in defining an administrative career for auxiliary personnel.

A judicial training program . The program will include training for new judges, with candidates drawn from among carefully screened lawyers interested in pursuing a career in the judiciary, and refresher and continuing education courses for practicing judges.

A judicial ethics program . The goal is to establish a code of ethics for judges. In addition, special mechanisms must be devised to guarantee that practicing judges are correctly evaluated, and procedures must be formalized for investigating and applying sanctions and corrective measures.

A program for developing strategic management capacity . An ongoing, periodic planning system for courts and judges must be gradually introduced. This will make it possible to evaluate and improve their performance, in coordination with the appropriate organs.

Administration of the Reform Program

The Consultative Committee is a key component of the reform program. Its role is to define reform strategies and study the policies needed to implement the program. The committee receives advice and guidance from the director-general of the program, who is in charge of executing the program's strategies and policies. The director-general follows guidelines contained in a manual defining organization and functions and a manual governing purchases and contracts.

Coordination of the various program components is also the responsibility of the director-general, who acts as a liaison, for example, between the office in charge of the program for improving administration of justice, the office in charge of the human resources program, the office in charge of computer applications, and so on.

A Permanent Planning System

With an eye to institutionalizing and preserving achievements in judicial reform, a permanent planning system should be established, run by an office that should belong to the judiciary and that would be capable of formulating institutional development plans and judicial policies.

A Legal and Jurisdictional Studies Unit

A legal and jurisdictional studies office would be created to analyze whether current laws are still in force or are in fact obsolete, and to promote legislative amendments. It should also help standardize court practice and determine the best and timeliest ways to disseminate jurisprudence.

A Judicial Initiatives Fund

Finally, a fund should be established to support efforts to find solutions to legal and judicial administration problems; to fund new training and educational initiatives; and to promote specific reform projects that may not

have been envisioned in the initial planning of the reform program.

PART IX— CLOSING REMARKS

31—

The Role of the Judicial Reform Conference in Dissemination

Sri-Ram Aiyer

The World Bank has been pleased to host this conference on judiciary reform. We were particularly pleased to see so many distinguished participants, heads of judiciaries, secretaries of justice, heads of institutions, attorneys, and others coming from Latin America and the Caribbean, from North America, from Europe, and even from East Asia. We are also pleased to see representation in large numbers from our colleagues at the Inter-American Development Bank, USAID, and UNDP, all of whom are active and becoming increasingly active in an area we have all recognized as central to the reform of the state and to the delivery of better services of the kind that only the state can deliver.

I have been receiving feedback from my colleagues about the excellent quality of the presentations and the discussions—again this is only because the quality of the participants was so good to start with. You have spent these two days covering a lot of substantive themes. So I will not talk about the substance of the conference, except to say that judicial reform is an area where there is much to be done, and as countries change their economies to increase the share of the private sector, a well-functioning judiciary that delivers high-quality services promptly and in a transparent manner is essential for their continued growth.

We in the technical department of the World Bank's Latin America and the Caribbean Region will continue to emphasize dissemination through activities such as this conference because it allows us to share what we are learning in different parts of the world, and, in turn, to learn from the experiences of others. Most important, however, is that it allows countries in different parts of the world to share with each other their experiences, successes, problems, and solutions, and thereby to find common elements and solutions—or parts of solutions—that can be adapted to the particular conditions in their own countries.

On this last point—the sharing of experiences among participants—I hear again from my colleagues that this conference can be considered an unequivocal success. The consensus seems to be that it has been an enriching two days, filled with good presentations about many issues of interest to all. The two-day limit for the conferences is something we want to keep to ensure the quality of the presentations. We have found this kind of conference particularly effective in communicating to country participants that reform is important—and why—and that it can work, especially if appropriate approaches and strategies are followed.

What do we take away from this conference? I have heard suggestions about areas for future work: for instance, what proportion of budgetary expenditures goes to the judiciary, and is this declining or increasing? Has demand for services increased? Given the fiscal constraints of the Latin American and Caribbean countries, is there a case for increasing the share of expenditures on the judiciary? What are the costs and what are the benefits? We will leave with these and other questions in mind and, together with our colleagues from the Inter-American Development Bank, USAID, and UNDP, we will see what can be done to further the learning—the analytical work—in these areas.

We also urge you, on your return to your countries, to carry on this kind of discussion domestically, with or without assistance from outside, with or without participants from other countries. Such forms can be especially useful to build coalitions for reform and to build consensus on strategies. The dialogue must continue to feed a continued effort to learn and improve—the feature that makes some countries modern or developed and others less developed.

PART X— BACKGROUND PAPER

32—

Judicial Reform in Developing Countries and the Role of the World Bank

Ibrahim F. I. Shihata

Relevance of Judicial Reform

Law has long been recognized not only as a reflection of the prevailing forces in a given society but also as a potential instrument of change and progressive development. These two attributes enable it to play two seemingly conflicting roles: that of a keeper and interpreter of the *status quo* and, simultaneously, that of a catalyst for its change and the mechanism through which such a change may be brought about in an orderly manner.

The intricacies of the role law can play in introducing policy changes and influencing the pace and pattern of development and, conversely, its possible role as an obstacle in the face of further development are yet to be fully understood. A branch of legal education attempts at present to address the role of law in the development process. Building on earlier writings in jurisprudence, it also attempts to provide answers to the time honored questions related to the true role of law in society and why it may function at times to serve its originally intended purposes and at times to promote different or even conflicting purposes.¹ A number of modern national and international institutes also provide training and encourage research in the various practical aspects of the subjects raised by these questions.²

Yet, for the most part, the discussion of legal reform has hitherto concentrated on the most effective ways in which law may be modernized, that is the introduction of changes in the rules (both substantive and procedural, primary and secondary, etc.) to enable them to meet the constantly evolving needs of the societies they are meant to regulate. This approach assumes that once appropriate changes are introduced in the rules, the legal system as a whole will be more responsive to the demands of modernization and development. Rules, however, are seldom self-executing and even when they are, they need appropriate institutions to ensure their correct application and enforcement and to settle disputes which inevitably arise in the course of their application. A legal system, in other words, consists not only of applicable *rules* but also of the *processes* through which these rules are to be applied and of the *institutions* in charge of these processes. Without such processes and institutions, rules may remain abstract concepts which do not always reflect the law in force.³

An adequate legal reform program cannot therefore be limited to a review of existing rules with a view to introducing the most appropriate changes under the circumstances of the society concerned. It must also include such *legislative*, *administrative* and *judicial* reforms as may be needed to ensure that the rules will be changed to serve the public interest, will be applied in a correct and fair manner so that they may continue to serve this purpose, will be complemented by the necessary regulations and interpretations which facilitate their application and will be subject to future reviews to ensure their continued relevance and usefulness. Such reforms must

equally be concerned with the process and outcome of conflict resolution so that the mechanisms of such a process may always be, and appear to be, efficient, fair and nonarbitrary.^{break}

This background paper was submitted to the Seminar on Justice in Latin America and the Caribbean in the 1990s, organized by the Inter-American Development Bank, San José, Costa Rica, February 1993. The paper was published previously by the Inter-American Development Bank. The author is Vice President and General Counsel, The World Bank; and Secretary-General, International Centre for Settlement of Investment Disputes. The author wishes to acknowledge the assistance of Mr. Paatii Oforu-Amaah and Ms. Gillian Kettaneh in the preparation of this paper and the comments made by Messrs. Andres Rigo, Antonio Parra, Peter Fox and Malcolm Rowat on earlier drafts. Responsibility for the views expressed in the paper rests with the author alone.

The need for a comprehensive reform in the rules, processes and institutions which express and implement policy reforms in every field of societal organization is all the more evident in the context of the prevalent transition of many economies from a command to a market system or from the predominance of the public sector to that of the private sector, with the inevitable redefinition of the role of the state which accompanies such transformations.

Private investors in particular, whether domestic or foreign, and their financiers even more so, take into account in their investment decisions, along with the primary issues of financial returns and political risks, such questions as whether the legal system allows investors' rights to be enforced routinely and disputes arising out of their activities to be resolved in an evenhanded, expeditious and efficient manner. Indeed, serious investors look for a legal system where property rights, contractual arrangements and other lawful activities are safeguarded and respected, free from arbitrary governmental action and from pressure by special interest groups or powerful individuals. In this respect, the proper functioning of the judicial system is of immense importance, even where an investment is of sufficient size and importance to attract its own special legal regime, as, for example, is common in the mining and energy sector in both developing and developed countries.

Such a proper functioning is often lacking, however. In a typical developing country the following features are only too commonplace:

The court system and judiciary may follow protracted procedures resulting in unreasonable delays and may be unable to enforce judgments. No system of commercial arbitration may exist. Even minor commercial disputes may remain unresolved for years. The local legal and accounting professions may be underdeveloped or, given the excesses of the regulatory framework, may perceive their role as agents of avoidance or evasion of binding rules. This situation makes investment decisions more difficult and costly for domestic and foreign investors alike.⁴

Other problems have also been noted by writers describing the judicial systems in developing countries in the context of the role of law in social change and development.⁵ In particular, they have observed cases where the lack of independence necessary for judges to discharge effectively their function has been obvious, especially in disputes arising between the government, on the one hand, and individuals or corporate entities on the other hand. In many developing countries today, the judiciary is strongly influenced, if not controlled, by the executive or legislative branches either directly or indirectly. This influence is manifested in the appointment, promotion and removal of judges, in the determination of their salaries, allocation of budgetary resources required to carry out judiciary functions and, in certain situations, in the control of the outcome of judicial proceedings through special tribunals and quasitribunals.

In addition, the judiciary may lack the experience and knowledge necessary to apply new legislation. In many cases, there is also a dire need for well-developed administrative and other facilities, including buildings, office space and equipment, and for appropriate systems for the communication of laws to the population at large. In addition, arbitration facilities and an appropriate legal framework for arbitration are not readily available in many

countries. Typically, cases take years to be decided whether by civil or penal courts.⁶ The predicament of the judiciary in many developing countries is most obvious in rural areas where "the judge frequently lives as something of a stranger among the people he is assigned to serve, lacking knowledge of their language and customs."⁷

With this background, it is not surprising that the ongoing structural economic reforms in many developing countries are leading governments to address the reform of the legal system, including the judiciary, as a necessary complement to economic reform. The subject is also gaining increasing recognition in development fora due in particular to its direct effect on good governance in the management of resources,⁸ and especially on the creation of a hospitable investment climate.⁹

Elements of Judicial Reform

Underlying any successful program of judicial reform are two basic prerequisites: (1) the building of consensus among the judiciary and in the other branches of the state on the relevance and importance of judicial reform and, based on this consensus, (2) an ensuing commitment to make available the required resources on a sustainable basis. Indeed, lack of funds is among the principal reasons for the understaffing of judicial positions and inadequacy of court buildings and other facilities that together account for the congestion of courts prevalent in most countries. Almost every judicial reform program must therefore attempt to tackle the issue of budgetary constraints, as is the case in any reform program of an institutional nature. It would be a mistake, however, to reduce the question of judicial reform simply to a financial issue and to believe that increasing the funds available to the judiciary would continue

automatically alleviate the congestion of courts or upgrade their services. As will soon be seen, the process has many elements; for its successful implementation, financial resources constitute only one of the basic prerequisites.

Among the issues to be addressed in a developing country's judicial reform program, the following may prove to be crucial elements. Such elements are not of course a substitute for, but should rather be considered a necessary complement to, the continued search for the causes of disputes with a view to reducing them through legislative and regulatory reform. This latter reform, which is a precondition for private sector development,¹⁰ would greatly benefit from comparative experience in other countries and should keep abreast of developments in legal science and the constant attempts towards harmonization and unification of law, on the regional and universal levels.

Role of the Judiciary

While the judiciary is generally seen as the arbiter of legal disputes and the provider of criminal justice in the society, the scope and boundaries of the judicial function differ from one legal system to another and, indeed, from one country to another. Greater differences in this area may also be found in jurisprudential writings. One extreme view claims that the only true law is judge-made law.¹¹ Others assert that "[j]udges make law only in the way that electrons make physics, amoeba make biology and Trobriand Islanders make anthropology."¹² Another extreme position limits the role of the courts to merely declaring the law as issued by the legislature, the judge being nothing but the mouth which pronounces the law.¹³ A host of mainstream views concede, however, that the role of the judiciary is the interpretation and application of the law in specific disputes but differ in the acceptable latitude accorded to judges in the process of interpretation and application. The fact is, courts under all systems apply existing law (legislation, binding custom and, in the Common Law system, accumulated judicial precedents) but occasionally have to fill gaps in applicable law, sometimes explicitly recognizing such *lacunae* and sometimes treating them under the cloak of "interpretation."¹⁴ In the increasing number of countries where the judiciary reviews the constitutionality of laws (usually through the highest court or a specialized constitutional court) judges can play a more active role in the preservation and promotion of constitutional principles and values

as they interpret them. In these contexts, courts do play a role in law-making, although the extent of that role differs from one system to another; the "Common Law" and "Islamic Law" systems being the most explicit and the broadest in their recognition of such a creative role.¹⁵

While the question will remain controversial among scholars, three requirements seem to me to be essential from the practical viewpoint of having an appropriate system of administration of justice.

First, the judiciary in a given country should, as a starting point, have a clear and uniform approach to the nature and extent of its role. The extent of the role of the judiciary is a basic feature of the legal system in every country and is usually defined through the highest court in the land which overrules decisions deviating from the generally agreed approach. Where different courts hold different or conflicting views on the extent of the judge's role, for instance, on whether the judge can abstain from applying a certain statute, unwanted confusion and complications may be expected.

Second, while the legal codes of a country may deny a creative role for courts and refer them in the absence of text and custom to such sources as "natural law" or "the general principles of morality," it is probably more useful to concede, as the Swiss Civil Code does, that in such cases the judge will rule according to the rules he would have established had he had to act as a legislator.¹⁶ In doing so, one recognizes the need for developing a system to assist courts in the identification of appropriate rules. Such a system may result in what a well known French scholar has termed "free scientific research" in the sense that it is removed from the action of positive authority and is based on objective elements identified only through scientific research.¹⁷ In this way, to quote Justice Cardozo, the judge would not "innovate at pleasure" but could "draw his inspiration from consecrated principles . . . exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life."¹⁸ Such a disciplined innovation may indeed be inevitable in the modern world where sophisticated commercial practices reach from the developed to the developing countries through international business and finance, a process which often includes adapting and adopting international codes and statements of practice where no local rules exist, for example, in areas such as bills of exchange or letters of credit.

Third, the judiciary should be conscious of the important role it ought to play in the protection of basic individual rights, especially in countries where both legislative and executive powers are held by the government either because of the nature of the political system or because of emergency situations which allow governments to legislate by decree. In such situations, the judiciary constitutes the only safeguard against tyranny. While a constitution "does not demand the impossible or the impracticable,"¹⁹ the judiciary should be able to develop criteria to ensure that rules, including emergency rules, continue

are applied in a nonarbitrary manner and only to serve the public purpose for which they are enacted.²⁰

Thus, the challenge to legal reform programs in developing countries is not simply to outline the role of the judiciary in an unambiguous manner but, where necessary, to redefine it to enable the judiciary to ensure the most effective administration of justice under the prevailing circumstances. It could be argued that this goal may require a greater degree of activism by the judiciary, that is an expansion of its responsibilities to enable it to protect the individual from the abuses of government and deliver to the individual the promise of the welfare state. Such activism, if exercised, will have to come from within the judiciary itself, since it can hardly be legislated or mandated by the other branches of the state. For this reason, it would have to be exercised disinterestedly and with the greatest possible measure of objectivity, lest the process become one of individual judges independently "wresting the law to their authority."²¹

Independence of the Judiciary

The notion of the independence of the judiciary has now been established in most developing countries through specific constitutional provisions or through appropriate legislation. This notion is rooted in the separation of powers doctrine, which, though hardly applied in an absolute sense, has long been advocated as a cornerstone in the checks and balances system characteristic of a democracy.²²

In many developing countries, the independence of the judiciary is enshrined in their Constitutions²³ or in statutes in order to protect the judiciary from political pressure and other influences, especially from the executive branch, which may interfere with its objectivity and independence. In several cases, this substantive judicial independence is assured by the protection of the personal independence of judges through the guarantee of tenure for judges, the safeguarding of their salaries and strict constitutional or statutory safeguards for their removal from office (only in cases of misconduct or proven incapacity).²⁴ It is only in such an environment of substantive and personal safeguards that judges are assured a degree of independence conducive to the impartial administration of justice.

However, examples exist in some developing countries where the executive branch has unilaterally dismissed judges for decisions unfavorable to the government. An extreme incident took place in Ghana in 1963, when a panel of Supreme Court judges acquitted several persons who were charged with subversion by the executive branch. The Government took action against the judges and finally dismissed them after obtaining in 1964 a constitutional amendment giving power to the President to dismiss judges for any reason which seemed to him to be sufficient.²⁵ The predicament of the judiciary in many African countries, which may also be true in a host of other developing countries, was explained by the fact that:

It would seem that on the whole governments in the newly independent countries hanker after the simplicity of the colonial arrangement, with the primary aim of the courts to uphold the power of the State, enforce its laws and provide stability. The courts' function of protection of the individual from the abuse of power is relatively new and less well appreciated. . . . In any event until the people develop values to guide their courts, other than that of upholding state power, the constitutional enactment of the separation of powers is bound to remain largely a declaration of intent.²⁶

The importance of the independence of the judiciary has led some countries in Latin America to provide in their constitutions that a certain percentage of the government's annual budget (6 per cent in the case of Costa Rica) should be devoted to the judiciary. The executive branch would thus have no means to influence the judiciary through budgetary allocations. The predetermination of the judiciary's financial needs in such an arbitrary manner may not be advisable however. What is important is that the judiciary should have a say in the planning and allocation of its budget and that the resources allocated to it should meet adequately the needs of modernizing and upgrading its services according to well thought out programs which receive the broad support of the legal community and the society at large.

While the independence of the judiciary is an important element of a judicial reform program, it should be recalled, however, that such independence is not an end in itself. Rather, it is a means to achieve the goal of the impartiality of the judge and the fairness of judicial procedures.²⁷ This, along with the great expansion in the role of courts in modern societies, have led to the growing recognition that judicial independence ought to be coupled with judicial accountability and that judicial immunity cannot therefore be an absolute concept.²⁸ Indeed, the liability of judges for "wrong" judicial decisions is being recognized increasingly, albeit within certain limits, in developed countries.²⁹

The principle of the independence of the judiciary should not therefore mean that judges be free from any continue

responsibility; it does suggest, however, that disciplinary action should not be left to the executive branch of government. While some countries entrust their parliaments with such a function, it might be more appropriate to vest formal administrative powers over the judiciary in a judicial disciplinary tribunal or council consisting mainly of senior judges, but with significant participation of respected persons from outside the judiciary. Such a council can be of an *ad hoc* or permanent character. In any case, a transparent and open system should be in place to enable litigants and their counsel to request that judges disqualify themselves from considering the dispute in cases of conflict of interest or prior involvement and to make complaints regarding the incompetence, prejudice or corruption of judges, subject to strict safeguards against the abuse of such procedures. Indeed, judicial accountability and the transparency it requires are necessary corollaries to the independence and security which must be accorded to the courts.

Security of Judges, Prosecutors, and Other Judicial Officers

Closely linked to the question of the independence of the judiciary is the issue of security of the judges, both personal and financial. In a few countries, members of the judiciary lead a risky life which requires physical protection from the threats of organized crime and at times from persons in power. Their ability to perform their duties independently and conscientiously under such circumstances becomes a matter of concern and a primary duty of the state.

Security of tenure has also been mentioned as a means of promoting the independence of the judiciary from the other branches of government. Equally important is the adequacy, not only of remuneration but also of post-retirement pensions and other benefits. While the former provides financial security that reduces the vulnerability of the judiciary to bribery and corruption, the latter provides judges with the insurance needed for the carrying out of their function without the fear associated with an early or abrupt retirement without a secure income. A judiciary which is constitutionally independent will still fail to meet the needs of society if low salaries and a prevailing atmosphere of corruption combine to undermine such independence in practice or to select out potential candidates to judicial appointment who are the most capable and honest.

Simplification and Streamlining of Judicial Procedures

The objective of this area of reform is to improve the efficiency of the system of administration of justice without sacrificing due process and the safeguards inherent in an appropriate judicial process. The methodology is to identify administrative bottlenecks, in other words, those procedures which create delays and backlogs, and then find ways of eliminating or alleviating them. It is imperative in this respect, however, to find appropriate solutions while maintaining for the parties the protection which was meant to be provided by the procedures that have proved to be cumbersome in practice, that is, to make sure that simplified procedures maintain the opportunity of a "fair hearing" for each party to the dispute.

The processing of cases through the system can be accelerated by the implementation of procedures conducive to the expeditious review of cases, the elimination of duplicative or unnecessary measures and the replacement of written procedures with oral ones in certain situations. These improvements can be achieved through revisions of civil and penal procedure codes and the reorganization of court systems to create parallel streams for different types of cases, for instance, small claims tribunals and specialized courts for complicated types of cases such as bankruptcy cases. Where administrative courts do not exist, the creation of a separate system for administrative justice may be advisable in view of the highly specialized nature of this area of the law.³⁰

Also along these lines are programs to introduce alternative dispute resolution mechanisms. These may include informal procedures which emphasize the rapid settlement of disputes and ensure at the same time that justice is being provided for all.³¹ They may also include quasijudicial tribunals in fields such as labor disputes, regulation of financial markets and restrictive business practices where membership may not be limited to magistrates and the tribunals may have investigative staff.³² Here again, one of the challenges is to ensure that these alternative

procedures are carried out in an evenhanded manner, providing the parties with the same safeguards against arbitrary decisionmaking as those available under the traditional judicial system.

It has been reported for instance that congestion of appellate courts was alleviated in certain states of the U.S. through the use of "settlement conferences." In this system, "[t]he parties and their attorneys appear before a settlement conference judge, who may be a sitting judge, a retired judge or a seasoned staff attorney, depending on state requirements"³³ with the aim of encouraging early resolution of the dispute (as is more common under the so-called mini-trial system in private arbitration).

Improving Judicial Management

The objective of improving the efficiency of the system of the administration of justice can also be achieved through continue

the introduction or enhancement of managerial and administrative functions of non-judicial staff within the judiciary and the law enforcement agencies. Management and administrative personnel in the courts may thus be given increased responsibilities in "case load management" and may be trained in time saving office technology skills. This could considerably reduce the non-judicial duties of courts which often occupy a significant part of the judges' time. For this purpose, certain countries have appointed court administrators who manage all the administrative functions required of the courts, leaving the judges to decide only the disputes submitted to them, that is, to do the job for which they were appointed in the first place.

Improved efficiency will also be achieved through the proper institutional allocation of disputes throughout the judicial hierarchy. As already mentioned, this may be achieved through the creation or strengthening of judicial and quasi-judicial tribunals of limited or local jurisdiction,³⁴ as well as by the creation of specialist superior court divisions to deal with complex cases.

In fact, the appointment of specialized administrative officers in the judiciary with appropriate managerial qualifications and experience could also facilitate planning for future court administration and budgeting, allow for better management of personnel matters including career development and training, and improve the systems for procurement procedures, logistical requirements, physical installations and facilities, statistics and computer services, court libraries, etc.³⁵

Selection and Training of Judges and Other Judicial Officers

As "the quality of justice depends more on the quality of the men who administer the law than on the content of the law they administer,"³⁶ issues relating to the selection and training of judges become of paramount importance. The basic criteria in the selection of judges should be personal integrity, good judgment and professional legal expertise.

The selection may best be made by the judiciary itself. While countries differ in the methods followed in the selection of judges and several methods may be appropriately followed in the same country, an entrance test of the personal and legal qualifications may be advisable. Many of the skills required for the judiciary are not taught at law schools. Nor are qualities such as personal integrity or good judgment. A rigorous selection process through written and oral tests and simulation exercises could therefore be useful in this respect, especially if followed by a reasonable period (two years for example) of technical preparation in a *judiciary school* for the selected candidates.³⁷ This could constitute a good beginning for a system where a judicial career is based on comparative merit, which is itself an important factor in judicial efficiency and distinction.

The selection of able judges devoted to the promotion of justice and their education in a specialized institute do not obviate the need for continuous training throughout their career. For laws to be properly applied, judges must not only be thoroughly familiar with the substance of such laws as they emerge, but also with the manner in which they are applied in fact. In many developing countries, significant pieces of legislation have been promulgated in new areas of the law, such as banking and securities regulation, to assist in the rapid economic development pursued by governments. Even when these laws are written in accordance with the legal traditions and in language familiar to the judiciary (which is not usually the case), judges may still have difficulty in their interpretation or application. This difficulty may also be faced by legal practitioners across the country. The matter becomes more complex when, as is often the case, such laws are promulgated without taking into account the socio-economic, political and cultural milieu in which they will be implemented. The situation is further complicated in those countries which are ruled by military governments or other forms of dictatorships, which lack the benefit of a legislative branch to debate draft laws and provide the legislative background (*travaux préparatoires*).

To ensure their effectiveness, judges should thus undergo continuous training and study programs to bring them up to date with new laws, especially in the relatively complex areas of economic law such as the laws and regulations governing banking transactions and operations, capital markets and securities, bankruptcy, mining and petroleum, trade in intangibles and futures, etc. Continuing study programs are in fact a feature of the preparation of judges in several developed countries. The issue is more relevant in some developing countries where law schools have become a last resort in university education, typically attracting the least qualified applicants and admitting the largest numbers of students, with obvious negative effects on the quality of their graduates. Some judicial reform programs in developing countries have thus involved the training of the legal profession as a whole in economic and business law, including the upgrading of law schools by strengthening their curricula and orienting them to deal with practical cases and to provide students with the basic skills needed in the various aspects of the legal profession (rather than the simple lecture method followed in most of these schools at present).

Independently from the judges' qualifications and training, the efficiency of the courts also depends in part on the work of process servers, court clerks, transcribers

and executors of judgments. The effectiveness with which these individuals carry out their activities contribute to the expeditious administration of justice. As staff to the judicial branch, they are also affected by the budgetary constraints referred to above; in many countries they are underpaid and not qualified to carry out their functions. More often than not, this invites corruption at the lower level of the judicial service which seriously affects the overall performance of the judiciary. It should also be noted that this support staff is especially affected by the lack of appropriate institutional facilities, including computing systems and in many cases even modern typewriters. Thus judicial reform programs should address the upgrading of such services and training programs should equally reach such lower level officers.

These comments apply, perhaps more forcefully, to the recruitment and training of others in the judicial hierarchy who preside over courts and tribunals of limited or local jurisdiction, which are increasingly established to reduce the load on ordinary courts by handling the majority of minor civil and criminal actions.

Institutional Facilities

The budget deficits affecting all branches of government in the face of the serious economic problems confronting developing countries since the late 1970s and the need for governments to take severe measures to assist in the structural adjustment of their economies have often resulted in inadequate allocation of resources necessary for the maintenance of institutional facilities, such as offices and courts. Major difficulties are encountered in the maintenance of proper archives, acceptable storage facilities for court records and modern office equipment, such

as typewriters, computers and copying facilities. In some African countries, it is not uncommon to find equipment dating from the colonial era more than twenty or thirty years after independence. The financing of buildings and equipment for courts is therefore a typical component of judicial reform programs in developing countries.

In a period of budgetary constraints, the acquisition of books, particularly law books, and the maintenance of up to date libraries have not been found in many developing countries to merit high priority. Indeed, the publishing business in many of the least developed countries has ground to a halt and seldom includes legal publications. Few court buildings include a law library and judges typically write their decisions at home, relying on their limited personal acquisitions. This necessitates the inclusion in reform programs of the establishment and maintenance of a basic law library or libraries including the reference books and periodicals most likely to be in demand.

Legal Information Systems

In some developing countries it is not surprising to find that laws promulgated by the government are either published in very limited quantities or not published until a significant time has passed. In a few cases, laws have not been published at all for years. The problem is especially acute in some francophone African countries where Official Gazettes have not been published for two decades. This means that the substance of the law is very often known only to a few individuals. This nonexistent or reduced publication of laws and the paucity of books in law libraries for use by the legal profession and the public at large has hampered legal research activities and the development and application of laws in many countries. Without the prompt publication of judgments, both judges and legal practitioners are also hindered in the carrying out of their respective activities. Judicial reform programs must therefore assure that laws, regulations, and court decisions are regularly published in a timely manner, are efficiently indexed so as to facilitate reference to them and are made available in public places. This requires the development of modern legal information systems with adequate resources to cover their costs, and as a minimum, the regular publication of laws and judgments.

Access of Courts; Fees and Costs

Court fees and costs can be used to regulate the number of claims instituted in the court system by discouraging frivolous claims. However, these same fees and costs can act as a barrier to the access of the poor to the judicial system.

In order to ensure respect for the principle of "justice for all" while preventing the build-up of a backlog of cases by discouraging frivolous litigation, it is important for the court system to set court fees and costs at a reasonable level which necessarily will vary from one country to another. To the extent that these fees prohibit the access of poor, legitimate claimants, it is essential that society, through the judicial system or otherwise, provide financial assistance to these litigants. This could either be achieved through public and private legal aid schemes which could cover poor litigants' expenses, following a preliminary screening of the seriousness of their claims, or through a means test administered by the courts which would excuse from payment those individuals who meet certain requirements.

Availability of Arbitration and Other Alternative Facilities

Many developing countries have traditional systems of arbitration which are separate from the official dispute settlement systems. However, these traditional systems continue

are hardly suited for use in the settlement of disputes arising in the context of complex modern commercial transactions. They are particularly inadequate for dealing with disputes arising out of foreign investments in developing countries. While some countries have in their laws provisions relating to arbitration in cases of

commercial disputes, many of these laws are also archaic and difficult to implement in contemporary circumstances.

The establishment of new and modern arbitration facilities, including the promulgation of appropriate legislative frameworks and the training of arbitrators, may therefore be an important component of a comprehensive judicial reform program. The same may also be true for non-binding conflict resolution mechanisms such as mediation and conciliation which may be particularly effective in the context of certain cultures such as those in the Far East and in Arab countries. For these to be effective, however, an elaborate system should be devised for the procedures to be followed in the selection of the mediators and conciliators and the rules to be applied by them in handling the cases.

World Bank Judicial Reform Activities

According to the Articles of Agreements of both the International Bank for Reconstruction and Development (IBRD) and its affiliate, the International Development Association (IDA),³⁸ the principal mandate of these agencies (which have a common staff and governing bodies) is to promote the economic development of their member countries, primarily by providing loans (called "credits" in the case of IDA) and guarantees for the financing of specific projects, including projects of technical assistance. From its early years of operation, the World Bank has recognized that political stability and sound economic management are basic prerequisites for economic development. Its Articles of Agreement, however, prohibit the Bank from: (a) being influenced by the "political character" of its member countries; (b) interfering in the political affairs of any member; and (c) allowing political factors or events to influence its decisions. Political considerations are therefore irrelevant to the Bank's work, unless it is established that they have direct and obvious economic effects relevant to its work, in which case such economic effects may be taken into account.³⁹ In the meantime, the Bank, as an exception to its main statutory activity, may under the Articles of Agreement finance activities other than specific projects as long as these would fall under its general mandate in assisting a member country to stabilize or revive its economy and thus enhance or facilitate investment for productive purposes in its territory. Lending for other than specific projects has in fact expanded since 1980 and accounts at present for some 25% of total annual commitments, mostly in the form of structural or sectoral adjustment loans. These loans finance general, and often unspecified, imports by the borrower in the context of its implementation of reform programs agreed with the Bank.⁴⁰

Activities such as civil service reform and legal reform have been found to be relevant to the maintenance of "good order" in the management of a country's resources through the introduction and implementation of appropriate rules and institutions, and were therefore distinguished from the typical exercise of political power to manage the country's affairs generally which falls beyond the Bank's mandate. As General Counsel to the Bank, I had no difficulty in reaching the conclusion that the Bank may favorably respond to a country's request for assistance in the field of legal reform, including judicial reform, if it finds it relevant to the country's economic development and to the success of the Bank's lending strategy for the country.⁴¹ Such a response may take place in the context of a specific project loan or as part of the reform measures to be implemented under an adjustment loan. In either situation, the Bank's involvement can only take place at the request of the country concerned.

Consistent with this view and recognizing the constraints faced by several of its borrowing countries in the administration of justice and the relevance of this matter to their economic and social development, the World Bank has, in recent years, responded favorably to requests by countries for financial assistance in this field. In practice, such activities have increased considerably as several borrowing countries embarked on private sector development programs aimed at improving the enabling environment, as in many Latin American and African countries, or at transforming the very nature of their economies, as in Eastern European and former Soviet republics. In this context, the Bank's Legal Department emphasized at an early stage the importance of having a sound legal framework, properly administered and enforced, for creating an environment conducive to business development.⁴² The various activities financed by the Bank in this context in the last two years have involved many of the elements of judicial reform discussed earlier in this paper.

The *Bangladesh: Financial Sector Adjustment Credit* [43](#) financed activities to enhance the independence of the judiciary. The court system in Bangladesh used to take an average of 10 to 15 years to dispose of suits brought by financial institutions against defaulting borrowers. As a result, the transaction costs were extremely high and collection rates were very low. With the assistance of the Bank and the International Monetary Fund, Bangladesh continue

enacted a Financial Loan Courts Act in 1990 which established special commercial courts in the major economic centers of Bangladesh, whereby financial institutions could bring actions against defaulting borrowers and the loans could be adjudicated. Progress, which to date has been positive, is being monitored under the project and has involved the establishment of courts, the appointment of judges and the disposal of cases.

In the same vein, the credit made by IDA for the *Guinea Private Sector Promotion Credit* [44](#) supported the preparation and implementation of a legal reform program to strengthen the legal system, including training of members of the legal profession, and in particular members of the judiciary. In this connection, the deficient functioning of the judicial system and the legal void on commercial bank sureties were identified as major constraints for banking activity in the country. Banks were found to be unable to enforce their rights as creditors through foreclosures or other court-approved actions, due in particular to debtor-judge collusion and rampant corruption. This operation was a modest attempt at addressing these problems and is meant to be followed by training of the judiciary and other members of the legal profession in banking and commercial matters and by improvements in the material working conditions of the courts.

In addition to the above-mentioned projects, the Bank recently has made *a grant from its Institutional Development Fund (IDF)* [45](#) to Argentina to assist in the financing of a diagnostic review of the judicial system of Argentina. This review will focus on the role of the federal courts and the national courts in Buenos Aires and will deal with issues relating to the operation of these courts, including court procedures, case management, the efficacy of the procedural codes and other procedural rules as well as alternative dispute resolution methods, including arbitration, mediation, conciliation and small claims courts. On the basis of the recommendations emanating from the diagnostic review, the second phase of the program will be prepared. This will consist of a legal education program for judges, lawyers and the public and a training plan for court personnel in modern court management practices. Upon completion of these two phases, a comprehensive report will be prepared for the consideration of the Argentine Government.

Apart from these projects, the Bank has provided financing to cover the comprehensive strengthening of the judiciary, including the upgrading of institutional facilities, such as court houses and buildings, and the acquisition of equipment and improvement of libraries. A number of recent operations approved by the Bank are noteworthy in this respect. A landmark operation is the *Venezuela: Judicial Infrastructure project*, [46](#) approved by the Bank's Executive Directors on August 7, 1992, which is described below in some detail. Although it by no means covered all or most of the elements of judicial reform listed earlier in this paper, it was the first operation where the World Bank made a loan exclusively for the purpose of judicial reform.

The *objectives of this project* are: to assist Venezuela in reducing the private and social costs of the administration of justice and to improve the enabling environment for private sector development in Venezuela. This will be done by: (a) improving efficiency in the allocation of resources within the judiciary; (b) increasing courtroom productivity and efficiency; (c) strengthening the institutional capabilities of the institution in charge of the management of the judiciary, i.e., the Consejo de la Judicatura (the Consejo) to perform its functions; (d) strengthening the institutional capabilities of the Consejo's institute, known as the Escuela de la Judicatura (Escuela), to perform its functions; (e) strengthening the capabilities of the judiciary personnel to perform their respective functions; and (f) improving the physical condition of the courts.

The *components of the project* financed by the Bank include the hiring of consultants and the carrying out of studies on: (a) the necessary level of budgetary allocations required for operational supplies of the Venezuelan courts; (b) the adequacy of salaries of the judicial personnel in general, including job descriptions, classifications, salary entry levels, and recommendations on criteria for recruitment, promotion and salary increases; (c) budgeting and strengthening of financial management of the judicial system; (d) the development of court performance indicators; (e) the development of an inventory of court buildings and equipment, of standard models of courtroom design, and long-term investment plan for future physical infrastructure requirements, of a pilot court system and an analysis of training needs of the Consejo staff; (f) policy and technological changes for storing court records and current policies and regulations in respect of court fees and judicial deposits; (g) the design and installation of communication networks within the Consejo; (h) the strengthening of administrative capacity of Consejo staff in the regional offices; (i) the identification and evaluation of, and recommendation on, the existing alternative dispute resolution methods; (j) an alternative means to improve access to the courts for the poorest segment of the Venezuelan society; (k) the private costs of litigation; (l) alternative computerized data base on statutory and case law; (m) priority areas identified in procedural law related to the project objectives; and (n) other technical assistance, including studies, related to the objectives of the project.

Training will also be financed with the proceeds of this Bank loan to Venezuela, *inter alia*, for: break

(a) Directorates of the Consejo dealing with financial management and policy analysis; (b) statistics (c) administration; (d) personnel; (e) auditing; (f) record keeping; (g) the Inspectorate Directorate staff in monitoring the reliability of court statistics; and (h) court management and supervision. Financing will also be provided for the acquisition of vehicles and office equipment required for the management information system, statistical analysis, communication networks within the Consejo and for supervision of the courts by the Consejo. Technical assistance will also be provided to: (a) determine training needs of judicial personnel; (b) develop course curricula for in-service training of judicial personnel; (c) organize training programs for potential instructors among judicial personnel to improve their teaching capacity; (d) develop an evaluation methodology for in-service training courses; (e) deliver and evaluate pilot courses; (f) develop a long-term in-service training plan; (g) study tours for staff members of the Judicial Advisory Commission and potential instructors; and (h) organize regional and national conferences for judicial personnel. The judicial personnel in Venezuela will also receive training in management and selected substantive and procedural legal subjects.

The Venezuela project also includes *a program to modernize the system of court administration* consisting of (1) the design and implementation of organization models in selected courts and public defender's offices; (2) the provision of legal reference materials, (including procedural legislation and case law) and office equipment; (3) the provision of technical assistance to review all laws, decrees, Consejo's regulations and other pertinent norms regarding court administration for purposes of developing a consolidated manual to be utilized by judicial personnel; (4) the provision of training in software and hardware by court personnel.

In addition, the Venezuelan project includes *a program to improve the physical condition and availability of court buildings* consisting of: (1) physical improvements in selected courts and public defender offices; (2) the construction of two hundred and fifty courts in various states in Venezuela; and (3) the upgrading of approximately three hundred and fifty courts throughout Venezuela (primarily to enhance privacy in court operations, improve security spaces for records and equipment and upgrade electrical connections for computers).

The credit for the *Tanzania: Financial and Legal Upgrading Project* [47](#) is another recent example of the financing of judicial reform by IDA. In addition to financing activities relating to the strengthening of the Tanzanian Attorney General's Office and Tanzania's Law Reform Commission the credit will also finance activities designed to strengthen the judiciary in the area of commercial law developments and to streamline procedures to ensure the speedy disposal of cases. These activities include training of High Court judges, resident and district magistrates, registry assistants and registrars of the Court of Appeal and High Court. The proceeds of

the credit will also be used to upgrade the High Court's library including the streamlining of procedures, acquisition of books, legal journals and material and training of library assistants. In addition, typewriters and computers will be acquired for use by magistrates and the High Court registries in Dar-es-Salaam and eleven zonal centers. Funds will also be provided to assist in the publication of the Tanzania Law Reports.

As is the case with the Tanzanian project, a credit has recently been approved to provide assistance to Mozambique to support a comprehensive list of legal institutions in that country. The *Mozambique: Capacity Building, Public Sector and Legal Institutions Development Project* [48](#) includes several of the elements described in Section II of this paper, including the training of judges and court staff, provision of financing to improve institutional facilities (including legal information systems), acquisition of books for law libraries as well as support for a new Center for Judicial Studies.

A few projects which involve the establishment or the improvement of arbitration facilities have also been financed or are in the process of being prepared for financing by the Bank.

In the context of *Côte d'Ivoire's Financial Sector Adjustment Loan*, [49](#) it was agreed that the introduction of arbitration as a means to directly settle insurance claims would be another alternative for handling disputes, and contribute to an expeditious settlement of them. In view of this, the Government of the Côte d'Ivoire agreed to promulgate a law on arbitration to respond to this concern. This law, however, extends beyond insurance issues and covers all disputes arising out of general commercial transactions. The law has now been prepared, commented on by the Bank's Legal Department, approved by the Government and is about to be adopted by the Parliament. Further, at the request of the Government, a technical assistance operation is now under preparation which would include a component to provide logistical support and services in the establishment of a commercial arbitration center in Abidjan.

The IDA has also been requested to provide assistance to the judiciary in the course of the preparation of a private sector development project in Senegal. This project has a component regarding the preparation of arbitration rules and the establishment of a center in support of its existing arbitration legislation. In this connection, continue

the Bar Association and the Chamber of Commerce are jointly working on the establishment of an arbitration court in Dakar, the institutional framework of which may be supported by the proposed IDA operation.

Finally, the Government of Bolivia, with the assistance of the Bank, presently is preparing a proposed public enterprise and privatization project which will include studies on Bolivia's administrative law (*contencioso administrativo*) and enforcement of arbitration awards.

Other Relevant Bank Activities

In connection with its private sector assessments in its borrowing countries, the Bank normally carries out a review of the legal and institutional framework in areas of law relevant to that sector. These studies are being undertaken in the newly created democracies of Eastern Europe which are in the process of transforming their economies from command to market systems. A good example of this is the review carried out recently in Moldova where many of the problems indicated in Section II of this paper may be discerned. The recommendations emanating from that review indicate that, in order to ensure proper application of new laws which need to be promulgated, Moldova will have to take measures which will ensure the independence of its judiciary, provide the courts with clear and final authority to meaningfully resolve commercial disputes, provide training for its judges so that they can deal competently and efficiently with complex commercial disputes common in market economies, and institute systematic publication and wide dissemination of judicial decisions and legislative acts and regulations. Studies of this nature have also been undertaken in Armenia, Azerbaijan Republic and the Philippines.

In Guinea, the Bank has recently assisted the Government in the organization and execution of a seminar designed to review the legal system of Guinea and to determine actions which ought to be taken to improve the administration of justice in that country. This highly appreciated seminar led to a request by the President of Guinea to IDA for assistance in the design and possible financing of a legal sector development project. A similar seminar has been undertaken in the Central African Republic and a legal sector development project is at the initial stages of project preparation.

Available Instruments of Bank Support to Judicial Reform

As is clear from the examples cited above, the Bank's response to the needs of its borrowing countries to reform their judicial systems has not only had varying components but has taken place by virtue of different instruments. These included:

- (i) a free standing loan for judicial reform as a self-contained project, the only example so far being that of the loan to Venezuela;
- (ii) project loans of a broader scope (normally of an institutional development character) which include judicial reform as a component of the project, such as the credits to Guinea, Mozambique and Tanzania;
- (iii) components of the measures to be implemented under an adjustment loan, such as the sectoral adjustment credits to Bangladesh and Cote d'Ivoire;
- (iv) studies and pilot projects financed by a grant from the recently established Fund for Institutional Development, such as the recent grant to Argentina; and
- (v) other studies, seminars and conferences organized in the normal course of preparation for Bank operations such as the recent review for Moldova and the seminars in the Central African Republic and Guinea.

The choice among these instruments is normally based on practical considerations relevant to the overall Bank lending program to the country and the timeliness and convenience of the forms of support available to it.

Like in other instances of financing technical assistance and reform programs, borrowers are not advised to embark on borrowing for such purposes unless they are seriously committed to following through with the implementation of the reform programs. Adding further studies to dusty shelves is obviously a waste of scarce resources. It may also be noted that institutional reforms require for the most part the financing of local costs which may also be of a recurrent nature. External development finance agencies normally have certain limitations on the financing of such costs. Recurrent costs in particular cannot be financed in perpetuity from external sources. The Bank's readiness to be involved in the financing of judicial reform programs, whether directly or through counterpart local funds generated under adjustment loans, should not therefore be seen as a normal or permanent feature of its operations. Rather, it is a complementary measure to be considered for those countries which are keen to implement such reforms and lack the means to do so through their own resources.

It should also be noted that the Bank's readiness to assist in judicial reform and its actual involvement in this area since 1990 are limited by the Bank's mandate as defined in its Articles of Agreement. As explained earlier, such mandate is not so broad as to cover any reform in the Bank's member countries but is formulated mainly in terms of the financing of specific projects for productive purposes. Although this mandate has been interpreted to cover assistance in economic development in a broad

sense, it cannot, in the view of this writer, be stretched so as to cover broader reform issues such as those of a clearly political character or those far removed from the facilitation of investment for productive purposes such as

the efforts related to improving the conditions of prisons. The Bank therefore is not as free in the area of judicial reform as other agencies such as the United States Agency for International Development (USAID) which has actively pursued judicial reform for over ten years without necessarily limiting its activities to reforms related to economic development.⁵⁰

Disputes with Foreign Investors

An area of conflict resolution which deserves special treatment in an overall review of the judicial system in a given country is the settlement of disputes that arise between the government and a private investor who is the national of another country. Typically, foreign investors in developing countries request that this type of dispute be settled through independent arbitration, preferably outside the host country concerned. The issue seldom arises in developed countries, where governments rarely enter into contractual relationships with foreign investors and where the history of dispute resolution before national courts in this field has not been particularly controversial.

In developing countries, by contrast, the question has been fraught with problems and has often led to the espousal of the claims of many western investors by their governments. Such espousal, under the international law doctrine of diplomatic protection, has repeatedly ended in international adjudication or arbitration and, in times past, in the actual resort to force. Developments in Latin America in particular led to the evolution of a negative attitude towards international arbitration and to the emergence of the Calvo doctrine enshrined in many constitutions.

In this context, the Calvo doctrine requires that disputes between a government and foreign investors be settled by national courts according to national law. However, this principle does not deprive the governments of such investors from the right to espouse the claims of their nationals. Such espousal, which escalates the disputes to the arena of international law, is likely to remain a common practice unless the country of the investor waives it in advance, for instance in the context of an international mechanism for the settlement of disputes agreed upon by treaty.

The attitude of developing countries in general (and Latin American countries in particular) towards international arbitration is changing, however, especially as a result of the development of new mechanisms of arbitration which address the major concerns of these countries. I have in mind in particular the arbitration facilities of the International Centre for Settlement of Investment Disputes (ICSID).⁵¹

ICSID was established over 25 years ago under a multilateral Convention, prepared by the World Bank and known as the 1965 Washington Convention. In accordance with this Convention, ICSID provides facilities for the conciliation and arbitration of legal disputes arising out of an investment between a member country of ICSID and a national of another member country. The World Bank sponsored the establishment of ICSID in the belief that the availability of a dispute settlement machinery of this kind could help to promote increased flows of international investment and would thus serve the interests of its developing member countries without undermining their rights.

The jurisdiction of ICSID tribunals is based on the mutual consent of the parties to the dispute. Membership of ICSID does not by itself imply acceptance by the state of such jurisdiction. Resort to ICSID deprives the state of the investor from exercising diplomatic protection in its favor. Furthermore, ICSID tribunals apply, in the absence of agreement by the parties an applicable law, the law of the host country (complemented by such rules of international law as may be applicable). And the host state may require the foreign investor, as a condition of the state's acceptance of ICSID's jurisdiction, to exhaust local remedies. The World Bank covers the cost of ICSID's Secretariat which charges the parties to a dispute only the actual cost of the proceedings including a fixed per diem for the arbitrators. There is hardly a mechanism for international arbitration that is more favorable to developing countries desiring to establish a hospitable environment for foreign investment.

Since it was opened for signature in 1965, over 120 countries have signed the ICSID Convention. Of these 107 countries have also ratified the Convention and have thus become members of ICSID. The member countries include some 80 developing countries, few of which are Latin American countries. It is for this reason that I conclude this paper, which addresses judicial reform in developing countries, with particular emphasis on the Latin American region, by calling the ICSID system to the attention of those concerned with enhancing the attraction of their investment environment to foreign investors.

Notes

1. See generally P. Ebow Bondzi-Simpson, *The Law and Economic Development in the Third World* (1992); Marc Galanter, continue

Delivering Legality: Some Proposals for the Direction of Research (1977); *The Political Economy of Law: A Third World Reader* (Yash P. Ghai et al. eds. 1987); John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 Am. J. Comp. L. 457 (1977); Robert B. Seidman, *The State, Law and Development* (1978); David M. Trubek, *Towards a Social Theory of Law: A Essay on the Study of Law and Development*, 82 Yale L. J. 1 (1972); Roberto Unger, *The CLS [Critical Legal Studies] Movement*, 96 Harv. L. Rev. 563 (1983). For a general discussion of Law & Development Studies, see *Research Advisory Committee on Law and Development of the International Legal Center, Law and Development* (1974).

2. E.g., The Institute of International Law (ILI) in Washington, D.C. and the International Development Law Institute (IDLI) in Rome.

3. This is not to suggest, however, acceptance of Learned Hand's view that "[t]he words he [the judge] must construe are empty vessels into which he can pour nearly anything he will." Learned Hand, *Spirit of Liberty* 81 (1952). Rather, it is to acknowledge that "[t]here is no such thing as 'pure' law. The profession of the law in all its forms has never detached itself completely from the various kinds of human activity out of which it grew. It is essential that no complete detachment ever takes place." Max Radin, *Law as Logic and Experience* (1940).

4. Ibrahim F. I. Shihata, *The World Bank and Private Sector Development – A Legal Perspective*, in *The World Bank in a Changing World* 203, 227 (1991) [hereinafter *Private Sector Development*].

5. For a review of some of these problems, see, for example, *Lawyers in the Third World: Comparative and Developmental Perspectives* (C. J. Dias et al. eds., 1981) [hereinafter *Lawyers in the Third World*]. See also, Universidad Externado de Colombia, *Comparative Analysis of the Administration of Justice*, a paper submitted to the IDB Seminar on "Justice in Latin America and the Caribbean in the 1990s," San José, Costa Rica, February 1993 [hereinafter *Comparative Analysis*].

6. For example, "in 1991 the Argentine civil law courts settled only 6 percent of the suits filed in that year; in Bolivia, the average duration of a penal suit is about 5 years; and in Paraguay, out of a total of 5,492 cases (499 a month) in 1992, only 409 had been settled by November of that year." *Comparative Analysis*, *supra* note 5 at 20.

7. Clarence J. Dias and James C. N. Paul, *Observations on Lawyers in Development and Underdevelopment, in Lawyers in the Third World, supra* note 5, at 337, 348.

8. For the relevance of certain governance issues to economic development, see Ibrahim F.I. Shihata, *The World Bank and "Governance" Issues in its Borrowing Members, in Shihata supra* note 4, at 53 [hereinafter *Governance Issues*].

9. *See, e.g.* , Ibrahim F.I. Shihata, *Promotion of Foreign Direct Investment – A General Account with Particular Reference to the Role of the World Bank Group, in Shihata supra* note 4, at 23770 and *Private Sector Development, supra* note 4.

10. *See Private Sector Development, supra* note 4 at 22532.

11. *See, e.g.*, Jethrow Brown, *Law and Evolution*, 29 Yale L. J. 394 (1920); John Chipman Gray, *Nature and Sources of Law*, § 296, 366, 369 (2nd ed., 1927); Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897). Expressed in a more moderate tone, a similar view considered that "the utterances of the judges [are] the best evidence of the state of the law. . .[because]. . .in the end it is what the courts choose to say, the courts considered as an entire hierarchical system, that determines the substance of the law." Owen Dixon, *Concerning Judicial Method, in Jestig Pilate*, 154155 (1965).

12. Felix Cohen, *Ethical Systems and Legal Ideals* 12 (1933).

13. *See* Charles de Secondat, Baron de Montesquieu, *L'Esprit des Loïs*, Liv. XI., Ch. VI, at 181 (Edit. de Leyde 1749).

14. The rule against the bringing of a finding of *non liquet* prompts many, especially among civil law scholars, to claim that a legal system must be deemed to be complete as a necessity not only of logical, but also of social order. According to Kelsen, the theory of gaps in law is a fiction which enables judges to innovate new solutions when existing ones lead to inequitable results. *See* Hans Kelsen, *General Theory of Law and State*, 14649 (1945). The absence of gaps in the legal order does not mean, however, that every legislation provides complete answers to every situation. It may be more realistic therefore to concede, as Justice Cardozo suggested, that the judge "legislates only between gaps. He fills the open space in the law." Benjamin N. Cardozo, *The Nature of the Judicial Process* 113 (2nd ed. 1949).

15. While both systems of law give the judge a great latitude in devising appropriate solutions in the absence of applicable rules, the common law system seems to allow the view that the judge should have the freedom "to do all he legitimately can to avoid [any rule which impairs the doing of justice] or even to change it – so as to do justice in the instant case before him. He need not wait for the legislature to intervene because that can never be of any help in the instant case." Alfred Thompson Denning, *The Family Story* 174 (1981).

16. "Selon les règles qu'il établirait s'il avait à faire acte de législateur." Code Civil (Suisse), Art 1. The Article adds that in such a case, the judge will draw his inspiration from the solutions sanctioned by the doctrine of the

learned and the jurisprudence of the courts ("par la doctrine et la jurisprudence").

17. See II François Geny, *Methodes d'interprétation et sources en droit privé positif: essai critique* 77 (1919).

18. Cardozo, *supra* note 14, at 141. This, after all, is how the common law developed, as recognized by Lord Evershed M.R. in his observation that "[w]hat might otherwise be haphazard and dependent far too much upon the sense and susceptibility of the individual judge, is here knit together by an academic quality, nonetheless scholarly because it is founded on custom and history, and other human qualities of experience that go to make up the Judicial Process." Francis Raymond Evershed, *The Practical and Academic Aspects of English Law* 30 (1956). See also M. Golding, *Principled Decision-making in the Supreme Court, in Essays in Legal Philosophy* 208, at 218 (Robert S. Summers ed. 1970).

19. *Kiyoshi Hirabayashi v. United States*, 320 U.S. 1375, 1387 (1943) (with respect to the U.S. Constitution).

20. For a famous example of criteria to be devised by courts to limit the exercise of the government's encroachment on individual rights in a war situation, see the dissenting opinion of Justice

Justice Murphy in *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 233-42 (1944).

21. Owen Dixon, *supra* note 11, at 158.

22. Separation of powers was early advocated by Montesquieu in *L'Esprit des Lois*, *supra* note 13.

23. See, e.g., Constitution of Bolivia, Titre III, Article 117, which specifies that judges are independent in the administration of justice and are only subject to law; Constitution of Brazil, Title I, Article 2; Constitution of Turkey, Part I, Article IX; Constitution of Hungary, Chapter X, § 50; Constitution of Egypt, Part Four, Article 65; and Constitution of Burkina Faso, Titre VIII, Article 129.

24. For a detailed discussion of the "substantive" and "personal" independence of judges and their application in one country, see S. Shetreet, *Judicial Independence and Accountability in Israel*, 33 Int'l & Comp. L. Q. 979 (1984), where the author concludes that judicial independence in that country should be strengthened by restricting executive control over judicial administration and revising the method of preparation of the courts' budget. Also, for a review of the policies on the staffing of courts in the United States, Britain and France, whose practices sometimes influence those in developing countries, see Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France* (4th ed., 1980).

25. For a brief description of this case, see A.N.E. Amissah, *The Role of the Judiciary in the Governmental Process: Ghana's Experience*, 13 Afr. L. Stud. 4 (1976).

26. *Id.* at 21.

27. See Mauro Cappelletti, *Who Watches the Watchmen: A Comparative Study on Judicial Responsibility*, 31 Am. J. Comp. L. 1, 16 (1983).

28. *Id.* at 317.

29. *Id.* at 1112, and 5362, where the author concludes by suggesting a "responsive model" that combines a reasonable degree of political and societal responsibility of judges with a reasonable degree of legal responsibility without, however, either subordinating the judges to the political branches, to political parties and other societal organizations, or exposing them to the vexatious suits of irritated litigants.

30. Separate administrative justice is particularly known under the French originated system of administrative tribunals grouped under the *Conseil d'Etat* (which combines in certain countries the judicial function with that of the government's legal advisor under two separate departments). This system allows administrative tribunals not only to award compensation for damages resulting from illegal or arbitrary administrative acts but also to annul such acts with immediate, and at times, retroactive effects. This annulment power may have created, however, certain rigidities especially in personnel matters and may account for the lack of innovation in the systems where the judiciary has this power.

31. For a discussion of alternative dispute settlement mechanisms in the U.S. context, see *New Directions in the Administration of Justice: Responses to the Pound Conference*, 64 A. B. A. J. 48, 501, 535 (1978). The Pound Conference was also known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held in 1976.

32. See, The 1991 Annual Report of the Chairman of the Development Coordination Committee, *Development Issues 1991: U.S. Actions Affecting Developing Countries* 22 (1991).

33. See, Roger A. Harrison and George W. Hersey, *Appellate Court Congestion on How Do You Spell R-E-L-I-E-F?*, 1 *Governing Florida* 11 (1991).

34. See, e.g., B.J. Brown, *Justice and the Edge of the Law: Towards a "Peoples" Court*, in *Fashion of Law in New Guinea* 181215 (B.J. Brown ed. 1969).

35. For details on judicial management, see I. Lavados Montes and J.E. Vargas Viancos, *Judicial Management*, a paper submitted to the IDB Seminar on "Justice in Latin America and the Caribbean in the 1990s," San José, Costa Rica, February 1993.

36. Evan Haynes, *The Selection and Tenure of Judges* 5 (1944).

37. For a description of the specific objectives of a judicial institute, which go beyond training in the required juridical skills and reasoning to include ethical values, the role of the judge in society, etc., see G. Hermosilla Arriagada, *Training and Continuing Education for Judges*, paper submitted to IDB Seminar on "Justice in Latin

America and the Caribbean in the 1990s," San José, Costa Rica, February 1993.

38. In this paper the two institutions are together referred to as the "World Bank" or the "Bank" unless the context otherwise indicates.

39. This conclusion was reached in a paper submitted by the author to the Bank's Executive Directors in December 1990. For a detailed discussion of this subject, see *Governance Issues*, *supra* note 8.

40. See Memorandum of the Vice President and General Counsel, *Authorized Purposes of Loans Made or Guaranteed by the Bank*, dated May 10, 1988 (SecM88-517).

41. *Governance Issues*, *supra* note 8, at 89. This conclusion was reached after maintaining that "[l]egal reform requires profound knowledge of the economic and social situation in the country involved and can only be useful if it is done by the country itself in response to its own felt needs." The Bank's role in this area was thus described as *assisting* the country in its reform efforts.

42. See The World Bank, Legal Department, *The Role of Law in Private Sector Development: Implications for the Bank's PSD Action Program* (discussion paper) (1989), summarized in *Private Sector Development*, *supra* note 4 at 225230.

43. Development Credit Agreement dated June 18, 1990 (Credit No. 2152 BD).

44. Development Credit Agreement dated September 28, 1990 (Credit No. 2148 GUI).

45. The Institutional Development Fund was established by the Bank as a grant facility, effective as of July 1, 1992, designed to fill gaps in the Bank's instruments for financing technical assistance associated with policy reform measures undertaken by its borrowing countries.

46. Proposed Loan Agreement (Loan No. 3514 VE).

47. Development Credit Agreement dated September 4, 1992 (Credit No. 2413 TA).break

48. Proposed Development Credit Agreement (Credit No. 2437 MOZ).

49. Loan Agreement dated October 4, 1991 (Loan No. 3408 IVC).

50. See, Agency for International Development, Bureau for Latin America and the Caribbean, Office of Democratic Initiatives, *The Administration of Justice Program in Latin America and the Caribbean 1* (1992).

51. For an explanation of the ICSID system and its advantages over an insistence on the strict application of the Calvo doctrine see Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, in Shihata *supra* note 4, at 309 (also available as an ICSID publication in English and Spanish).break

RECENT WORLD BANK TECHNICAL PAPERS (*continued*)

- No. 242 Barnes, Openshaw, Smith, and van der Plas, *What Makes People Cook with Improved Biomass Stoves? A Comparative International Review of Stove Programs*
- No. 243 Menke and Fazzari, *Improving Electric Power Utility Efficiency: Issues and Recommendations*
- No. 244 Liebenthal, Mathur, and Wade, *Solar Energy: Lessons from the Pacific Island Experience*
- No. 245 Klein, *External Debt Management: An Introduction*
- No. 246 Plusquellec, Burt, and Wolter, *Modern Water Control in Irrigation: Concepts, Issues, and Applications*
- No. 247 Ameer, *Agricultural Extension: A Step beyond the Next Step*
- No. 248 Malhotra, Koenig, and Sinsukprasert, *A Survey of Asia's Energy Prices*
- No. 249 Le Moigne, Easter, Ochs, and Giltner, *Water Policy and Water Markets: Selected Papers and Proceedings from the World Bank's Annual Irrigation and Drainage Seminar, Annapolis, Maryland, December 8-10, 1992*
- No. 250 Rangeley, Thiam, Andersen, and Lyle, *International River Basin Organizations in Sub-Saharan Africa*
- No. 251 Sharma, Rietbergen, Heimo, and Patel, *A Strategy for the Forest Sector in Sub-Saharan Africa*
- No. 252 The World Bank/FAO/UNIDO/Industry Fertilizer Working Group, *World and Regional Supply and Demand Balances for Nitrogen, Phosphate, and Potash, 1992/93-1998/99*
- No. 253 Jensen and Malter, *Protected Agriculture: A Global Review*
- No. 254 Frischtak, *Governance Capacity and Economic Reform in Developing Countries*
- No. 255 Mohan, editor, *Bibliography of Publications: Technical Department, Africa Region, July 1987 to April 1994*
- No. 256 Campbell, *Design and Operation of Smallholder Irrigation in South Asia*
- No. 257 Malhotra, Sinsukprasert, and Eglington, *The Performance of Asia's Energy Sector*
- No. 258 De Geyndt, *Managing the Quality of Health Care in Developing Countries*
- No. 259 Chaudry, Reid, and Malik, editors, *Civil Service Reform in Latin America and the Caribbean: Proceedings of a Conference*
- No. 260 Humphrey, *Payment Systems: Principles, Practice, and Improvements*

Judicial Reform in Latin America and the Caribbean

- No. 261 Lynch, *Provision for Children with Special Educational Needs in the Asia Region*
- No. 262 Lee and Bobadilla, *Health Statistics for the Americas*
- No. 263 Le Moigne, Giltner, Subramanian, and Xie, editors, *A Guide to the Formulation of Water Resources Strategy*
- No. 264 Miller and Jones, *Organic and Compost–Based Growing Media for Tree Seedling Nurseries*
- No. 265 Viswaneth, *Building Partnerships for Poverty Reduction The Participatory Project Planning Approach of the Women's Enterprise Management Training Outreach Program (WEMTOP)*
- No. 266 Hill and Bender, *Developing the Regulatory Environment for Competitive Agricultural Markets*
- No. 267 Valdés and Schaeffer, *Surveillance of Agricultural Prices and Trade: A Handbook for the Dominican Republic*
- No. 268 Valdés and Schaeffer, *Surveillance of Agricultural Prices and Trade: A Handbook for Colombia*
- No. 269 Scheierling, *Overcoming Agricultural Pollution of Water: The Challenge of Integrating Agricultural and Environmental Policies in the European Union*
- No. 270 Banerjee, *Rehabilitation of Degraded Forests in Asia*
- No. 271 Ahmed, *Technological Development and Pollution Abatement: A Study of How Enterprises Are Finding Alternatives to Chlorofluorocarbons*
- No. 273 Grimshaw and Helfer, editors, *Vetiver Grass for Soil and Water Conservation, Land Rehabilitation, and Embankment Stabilization: A Collection of Papers and Newsletters Compiled by the Vetiver network*
- No. 274 Govindaraj, Murray, and Chellaraj, *Health Expenditures in Latin America*
- No. 275 Heggie, *Management and Financing of Roads: An Agenda for Reform*
- No. 276 Johnson, *Quality Review Schemes for Auditors: Their Potential for Sub–Saharan Africa*
- No. 277 Convery, *Applying Environmental Economics in Africa*
- No. 278 Wijetilleke and Karunaratne, *Air Quality Management: Considerations for Developing Countries*
- No. 279 Anderson and Ahmed, *The Case for Solar Energy Investments*