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THE NATURE OF JUDICIAL REFORM IN LATIN AMERICA AND SOME STRATEGIC CONSIDERATIONS

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I. BACKGROUND

The judiciary in the Latin American region is facing a mounting challenge in terms of its credibility, its functional effectiveness, its standing vis-à-vis the other powers of the state, its contribution as a bulwark for the protection of human rights in societies with vulnerable democratic institutions, its role in promoting a predictable institutional environment in the economic sphere, and its obligation to provide a forum for the fair and effective resolution of disputes. This challenge has been mounting for decades, resulting from claims of various constituencies who have not seen their demands for justice met. At this point in time, the judiciary's unresponsiveness seems to be the common denominator joining a variety of interests and forces promoting judicial reform. Among them:

- Political groups promoting human rights expressing their dissatisfaction with the passive, and sometimes submissive, role played by judiciaries in the protection of individual rights—particularly during the prolonged periods of institutional instability and non-democratic governments in the region;[1]

- Political forces promoting increased democratization of the state that perceive the judiciary as a bureaucratic enclave with very limited

1. *See* John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 FORDHAM INT'L L.J. 50, 69 (1996) (stating that activists criticize Latin American judiciaries for failing to redress human rights abuses).

sensitivity to social change and a negative disposition toward any form of accountability to society or its democratic institutions;[2]

◦ Private sector representatives' growing skepticism over the judiciary's ability to respond to conflict resolution challenges arising from increasingly integrated and competitive markets, including sectors formerly dominated by public monopolies, that demand specialized enforcement based on an understanding of prevailing business practices;[3]

◦ Increased involvement of civil groups expressing their concerns with the overall performance of the regional judiciaries—including issues such as judicial delay, the absence of a criminal justice policy that ensures adequate citizen security, docket congestion, and poor quality adjudication—and promoting growing social awareness about the judicial problem and important reform initiatives; these groups include Fundacion Paz Ciudadana in Chile and Corporacion Excelencia de la Justicia in Colombia;

◦ Increased criminal uprisings caused by the inhumane conditions prevailing in the regional prisons, directed primarily at the executive branches for assigning a limited priority to improving and expanding prison facilities, but also directed at the judiciaries for their inability to investigate and decide criminal cases in an expedient manner;[4]

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2. *See* Jorge Obando, *Reforma del Sector Justicia*, GOBERNABILIDAD Y DESARROLLO DEMOCRATICO EN AMERICA LATINA Y EL CARIBE 127. Uruguay has the highest level of citizen trust in the judiciary at 53%, which is comparable to the levels prevailing in industrialized societies. *See id.* Most Latin American democracies show low levels of confidence in their justice systems. *See id.* Costa Rica is at the high end of the spectrum with a 39% citizen trust rate. *See id.* Chile, Colombia, and El Salvador are in the mid-range at 25-27%, and Ecuador and Guatemala are at the low end of the spectrum at 15-16%. *See id.*

3. *See* Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 168 (1995) (asserting that the transition from family-run businesses, which did not rely on laws and formal mechanisms to resolve conflicts, to transactions with unknown actors created a need for formal conflict resolution); *see also* Thomas Ulen, *A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America*, 17 INT'L REV. L. & ECON. 275, 276 (1997) (stating that results of business surveys throughout Latin America indicate that the judicial system is seen as a constraint to reasonable accessibility by those in the private sector).

4. A majority of the prison population is comprised of defendants subjected to preventive prison, rather than criminally convicted individuals serving a prison term.

- Anti-corruption initiatives promoted by the political establishment against senior judicial officials who have developed corrupt or non-transparent habits in the discharge of their duties; as part of this trend, the recent impeachments of the Chief Justices of Bolivia and Chile before their respective parliaments have enjoyed a high degree of public support and contributed to further deteriorate the public standing of the judiciary in those countries;[5]

- Initiatives of the United States government aimed at strengthening the capacity of the regional judiciary, which have played a pioneering role in the Region;[6]

- The increasing role played by multilateral financial institutions in promoting judicial reform in conjunction with economic stabilization, opening, and liberalization.[7]

Most of the initiatives of this growing constituency for judicial reform reflect a strong sense of frustration with the lack of responsiveness by the judiciary to society's needs. Their demands focus primarily on short-term vindicatory actions, rather than on a longer-term vision for an independent, responsive, and politically legitimate judiciary. There appears to be a growing sense that the strong build-up of political will and social consensus in favor of judicial reform comes significantly in advance of a concrete reform agenda upon which policymakers, the academia, and, most importantly, the judicial leaders agree upon. This may generate frustration among the various constituencies because reform may not achieve the desired results. This sense of disappointment can currently be perceived in Colombia where a radical reform of the judiciary's organization under the Constitutional Reform of 1991 and a substantial increase in

5. *See Bolivian Justices Face Senate Trial*, THE INDEPENDENT, Jan. 16, 1994, at 12 (reporting that Bolivia's Chamber of Deputies impeached the Chief Justice on charges of soliciting a bribe); *see also Judicial Corruption Stimulates Reform Plan*, LAGNIAPPE LETTER, July 25, 1997, *available in* 1997 WL 9453016 (stating that the impeachment of three supreme court judges in Chile gave the government a political opportunity for judicial reform).

6. *See* Obando, *supra* note 2, at 27 (describing the evolution of the objectives and scope of the programs promoted by USAID in the region).

7. A critical element in the efforts to improve the quality of government structures in the region is judicial reform. *See* SHAHID JAVED BURKI & GUILLERMO PERRY, THE WORLD BANK, THE LONG MARCH: A REFORM AGENDA FOR LATIN AMERICA AND THE CARIBBEAN IN THE NEXT DECADE (World Bank Latin American Studies Series No. 17079, 1997).

judicial spending led to very limited improvements in the actual delivery of justice.[8]

II. OBJECTIVES OF THIS ESSAY

The academic contributions toward understanding the judicial problem have grown in number in recent years. Most contributions, however, fail to identify the judiciary as an organizational structure operating under a complex institutional framework. An approach that goes beyond the strictly legal or organizational disciplines and beyond the attribution of generalized behavioral pitfalls of the main judicial agents is required. This essay will attempt to put the judiciary's performance and development in a historical context in relation to the political and economic changes that have taken place in the region in the last decades. It will also attempt to identify a path for institutional change that recognizes the political peculiarities of the regional judiciary. It delineates strategies to be followed in trying to bring the judiciary in line with changes in the region's social, political, and economic structure. This essay pursues several specific objectives.

First, to provide an approximation of the structure of the judiciary in Latin America from an institutional economics approach.[9] This approximation is not intended to be exhaustive, fully embracing, or definitive. Rather, it is intended to open the way for a more systematic examination of the judiciary, instead of the partial, one-sided, and unhistorical approaches that have prevailed in this field.

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8. *See* David J. Pascuzzi, *International Trade and Foreign Investment in Colombia: A Sound Economic Policy Amidst Crisis*, 9 FLA. J. INT'L L. 443, 473 (1994) (claiming that a major criticism of the constitutional reforms in Colombia is that they are theoretical and have no real impact on the Colombian people). Similarly, human rights reforms have not received any better treatment under the current legal reforms. *See id.*

9. Although the essay intends to provide a regional perspective, it does not attempt to ensure full consistency with each and every aspect of the individual judiciaries in the region. The essay relies heavily on the experiences of some countries in the region, namely Bolivia, Chile, Colombia, and Uruguay, to provide an empirical basis for the analysis. It could well be that a broader empirical analysis would indicate that there are some significant deviations from the essay's proposals in countries that have not been covered in the review, even to the point that there would be no discernible regional pattern. In that sense, this essay is a first approximation to the study of judiciaries from an institutional economic perspective and definitely should, therefore, be read as a work in progress.

Second, to identify the main institutional and organizational constraints shaping the performance of the regional judicial organization, which will set the stage for a research and reform agenda that will be more conducive to effective reform of the judiciary. The application of the institutional economics concepts in studying the judicial phenomenon may provide a richer and more productive understanding of its nature and evolution.

Third, to propose strategic considerations for a more effective reform effort of the judiciary in the region, thus providing a more robust basis for policy makers and judicial officials in designing and implementing judicial reform programs.

III. METHODOLOGICAL CONSIDERATIONS

This analysis of the regional judiciary will utilize the conceptual framework developed by Douglas C. North regarding institutions, organizations, and institutional change.[10] North has made a major contribution in explaining the economic performance of societies over time based on the evolution of institutions. At the same time, the framework delves deeply into the nature of political and economic institutions, as well as the path and characteristics of institutional and organizational change over time.[11]

North's institutions are immersed in a historical context—the present and the future are connected to the past by the continuity of a society's institutions—and are referred to as all the humanly devised constraints that shape human interaction. Institutions may consist of formal rules that human beings deliberately create, such as constitutions and statutes, or informal constraints, such as conventions and codes of behavior that evolve over time.[12] There is no pre-

10. *See* DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 73-82 (1990) (explaining how the interaction of institutions and organization constitutes a crucial source of economic and political change).

11. *See id.* at 73-104 (providing a description of the incentives and constraints leading to institutional change in societies, including the opportunities for increased return to organizations in imperfect markets with significant transaction costs).

12. *See id.* at 4 (stating that institutions consist either of formal constraints, such as rules human beings devise; or informal constraints, such as conventions and codes of behavior).

determined hierarchical or controlling relationship between formal and informal constraints.[13] In many cases, informal constraints embodied in traditions are more resistant to change than deliberate policies or formal rules.[14] As discussed below, judges seem to strongly ascribe to specific traditions and mental constructs.

Institutional constraints include not only those rules prohibiting individuals from undertaking certain activities, but also those rules implicitly or explicitly permissive or those creating positive incentives to undertake activities.[15] In attempting to determine the nature of specific institutions, such as those that constrain the activities of the judiciary, the analytical effort should focus on identifying the formal and informal rules that govern and shape judicial process and organization.

Organizations, as institutions, provide a structure for human interaction. Unlike institutions, however, organizations constitute groups of individuals bound by some common purpose to achieve objectives. As such, organizations are bound to institutional structures that constrain their operation in areas such as the modeling of corporate strategies, governance structures, and skills to achieve their political, social, and economic objectives. For the purposes of this analysis, it is crucial to distinguish between the rules shaping the operation of the judicial structure and the organizational strategy of the judiciary as an association geared toward achieving common objectives.

Fundamental changes in relative prices or in ideological attitudes toward moral, social, or political issues generate institutional change.[16] The direction of institutional change hinges on the interac-

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13. *See id.* at 46 (explaining that the difference between formal and informal constraints is a matter of degree).

14. *See id.* at 6 (noting that formal rules may change overnight due to judicial or political decisions and noting that informal customs, traditions, and codes of conduct are significantly more impervious to deliberate policy solutions).

15. *See* NORTH, *supra* note 10, at 4 (establishing an analogy of institutions with the rules of the game in a competitive team sport, consisting of formally written as well as unwritten codes of conduct). An essential part of the functioning of institutions—as in the practice of a sport—is that the violation of the rules carries negative consequences for the players. *See id.*

16. *See id.* at 84-85 (establishing as an example of this that changes in the structure of the family in the twentieth century has been derived in part from changes in relative prices—i.e., on work, leisure and contraception—but also from ideological factors—i.e., moral issues and the role of women in society).

tion between organizations and their institutional framework.[17] The institutional framework fundamentally influences which organizations come into existence and how they evolve. On the other hand, institutional change derives from the perceptions of organization leaders that they may benefit from marginal or wholesale changes in the institutional framework.[18]

The path of institutional change is a complicated process because of changes in rules, informal constraints, and the methods and effectiveness of enforcement. Institutions typically change incrementally.[19] The increasing returns generated by institutional change produce lock-in of the organizations on the modified institutional framework.[20] This is independent of whether the changes are conducive to a more productive environment.[21] Diminishing returns, like those allegedly generated by the judiciary of the region, generate increasing pressure from the concerned organizations for a change in the prevailing institutional framework. In a world with perfect information and competitive markets, institutional change will always generate increased productivity. However, actors must frequently operate with incomplete information and process it through mental constructs that can result in persistently inefficient paths.[22] The

17. *See id.* at 5 (asserting that by attempting to accomplish their objectives, organizations promote institutional change).

18. *See id.* at 8 (arguing that institutional change occurs most readily when the entrepreneurs in political and economic organizations evaluate alternative strategies to achieve a more efficient institutional framework).

19. *See id.* at 6 (asserting that the imbeddedness of informal constraints in societies causes incremental institutional change).

20. *See* NORTH, *supra* note 10, at 86-87 (stating that institutional equilibrium is a situation where none of the players would find it advantageous to devote resources into changing the institutional set-up). Likewise, institutional change may derive from a situation where one or more players stand to improve their relative positions if they devote resource to restructuring the rules. *See id.*

21. *See id.* at 95-96 (linking an efficient long-run path of institutional change to the existence of competitive markets operating at low transaction costs). On the other hand, if markets are incomplete and information fragmentary, transaction costs are significant and the subjective models of the actors—shaped by imperfect feedback and ideology—will determine the path of institutional change.

22. *See id.* at 104 (stating that because institutional change opportunities reflect ideas, ideologies, and beliefs that are, at best, partially refined and improved by information feedback on the actual consequences of the enacted policies, the consequences of specific policies are not only uncertain, but to a substantial degree unpredictable).

growing misunderstandings of regional judicial leaders and their constituents regarding the role and performance of judicial organizations generate a significant potential for inefficient change. In these cases, organizations subjected to change could become even more efficient at making society even more unproductive.

The use of North's theoretical framework to analyze the nature and evolution of Latin America's judiciary generates a number of queries that will be addressed in the following sections of this essay. For example, what are the main determinants of the historical evolution of the region's judiciary? What are the essential constraints resulting in the slow evolution of the region's judiciary? Are they of an institutional nature or an organizational nature? What would seem to be a plausible and effective reform strategy in light of the institutional and organizational constraints facing the judiciary? What role can individuals external to the judiciary, but affected by its diminishing welfare, play in a far-reaching judicial reform strategy? What is an appropriate sequence for the proposed judicial reforms?

IV. HISTORICAL EVOLUTION OF THE JUDICIARY IN LATIN AMERICA

Rather than provide an overview of the institutional and organizational framework under the Spanish Empire, this essay instead provides an analytical overview of the main institutional and organizational characteristics of the judiciary during that period.[23]

A. THE COLONIAL SETTING

The origins of the Latin American judiciary's institutional structure can be traced back to the fifteenth century Spanish Crown and the colonial institutions set up in its Indies territories.[24] By that time, the Catholic monarchs Queen Isabella of Castile and King Ferdinand of Aragon had consolidated the Spanish kingdoms—Aragon, Castile,

23. *See generally* C.H. HARING, THE SPANISH EMPIRE IN AMERICA (1963) (providing a broad overview of the institutional and organizational framework in the metropolis and in the Indies territories); RICHARD KONETZKE, AMERICA LATINA II. LA EPOCA COLONIAL (Siglo XXI ed., 1995).

24. *See* ELENA MERINO-BLANCO, THE SPANISH LEGAL SYSTEM 15 (1996) (describing how the philosophical movement in colonial times led to the Spanish legal system's theoretical basis for the following centuries).

Leon, and Navarra.[25] The discovery of the Indies further strengthened the power of the monarchs because, under the prevailing judicial doctrines, they personally acquired full sovereignty over the people and land of the Indies. Their strong leadership enabled the development of a strong national state and an absolute monarchy with no counterbalances from the vestiges of the feudal structure.[26] Moreover, the monarchs empowered the emergence of a professional central bureaucracy, directly accountable to them, vested with unprecedented political and administrative powers. University-educated legal professionals, called *letrados*, played a predominant role in this bureaucracy.[27]

The judiciary in the Indies consisted of three hierarchical tiers with significant differences between the tiers in terms of their functions, jurisdiction, form of appointment, and proficiency requirements.

The *Council of the Indies*, the main advisory body to the monarchs on all matters concerning the Indies colonies, was the ultimate judicial authority. It resolved both public and private controversies. The *Council* also enjoyed ample advisory authority on all administrative and policy matters, including the issuance of special regulations applicable to the Indies territories. After the *Council of Castile*, the *Council of the Indies* was the second ranking administrative body of the Empire. Designated by the King, its members were mostly *letrados*.

Established at the level of viceroyalty and provincial governors in thirteen Indies territories between the years 1511 (when the *Audiencia* of Santo Domingo was established) and 1787 (the year of establishment of the *Audiencia* of Cuzco), the *Audiencias* improved access to judicial services for the Indies population. These courts played a crucial role in checking the virtually absolute powers of viceroys and governors in the Indies territories. Initially, the *Audiencias* were comprised only of peninsular *letrados*, although in the latter stages there were also judges born in the territories who had been educated on the peninsula.

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25. *See id.* at 13-14.
26. *See* KONETZKE, *supra* note 23, at 99-100
27. *See id.* at 136.

The *Alcaldes* were municipal lay judges designated through combined systems of popular election and appointment of the government or municipal authorities. The functions and performance of these judges have not been as well documented as for other courts. It is clear, however, that the *Alcaldes* exercised regular civil and criminal jurisdictions within their municipal boundaries and that their decisions were subject to review by the *Audiencias*. In municipalities with a predominantly indigenous population, there were some indigenous judges elected in order to introduce the aborigines to the Spanish municipal institutions.

Both the *Council of the Indies* and the *Audiencias* had extensive powers beyond purely judicial functions. Thus, the *Council* and the *Audiencias* had a mix of legislative, administrative, and judicial functions, as well as some specific ecclesiastical and military functions. In their broad-ranging jurisdiction, the *Council* played mostly an advisory role because final decisionmaking authority ultimately lay with the Crown. The *Council* did, however, play an effective policymaking role, reflected in its intensive legislative and judicial functions. The *Audiencias* counterbalanced the political and administrative authorities and had the distinct responsibility of promoting the protection of the indigenous population's rights and ensuring compliance with the *Council's* regulations.[28] The *Alcaldes*' responsibilities seem to have been mostly of a judicial nature with a more limited involvement in their political counterparts' responsibilities.

A different pattern of relationships emerged between the *Council* and the Crown than between the *Audiencias* and the Viceroys or Captain Generals. While the relationship between the *Council* and the Crown was seemingly one of collaboration and centralization of power, the pattern that prevailed in the territories derived from a deep distrust by the Crown of colonial officials. An overlap of powers existed among executive and judicial colonial bodies that "was

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28. *See* HARING, *supra* note 23, at 120.

> The principal check upon the arbitrary exercise of power by a viceroy or captain-generally in the royal audiencias . . . . These American audiencias, like many other institutions in the Spanish Indies, were a faithful reflection of a similar institution in the peninsula. The audiencias and chancelleries of Spain, however, were purely judicial tribunals. In America they performed a two fold function, judicial, and political or administrative.

Id.

deliberately fostered to prevent officials from unduly building up personal prestige or engaging in corrupt or fraudulent practices."[29]

A basic colonization principle of the Indies was to apply the laws and institutions of Castile, modified only to meet local needs and characteristics.[30] Erudite in nature, Spanish legislation consisted of highly elaborate codes of substantive and procedural law derived from Roman and Canonical Law.[31] Created by scholars with limited, if any, roots in the community, this body of laws replaced the feudal judge-made, custom-based forms of adjudication and eventually eliminated most judicial customs of the Indies' aborigines.[32] Despite the prevalence of the metropolis legal institutionality, the *Council of the Indies* developed an abundant body of legislation specifically applicable to the Indies territories. Some of it dealt with minor details,[33] the most fundamental one being the protection of the indigenous and local populations.

Most of the shortcomings of the colonial legislation lay in its lack of observance by the colonial population. In part, this was because the legislation was unsuitable to the prevailing conditions in the Indies. For instance, colonial legislation frequently conflicted with the

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29. *Id.* at 113.

30. *See id.* at 5. This principle was included in a code of ordinances issued by Phillip II to the Council of Indies in September 1571:

> And because the kingdoms of Castile and the Indies belong to one crown and their laws and manner of government ought therefore to be as alike as possible, the members of the council shall try, in the laws and institutions which they may establish for those states, to reduce the form and manner of their government to the style and order by which are ruled the realms of Castile and Leon so far as may be permitted by the diversity and difference of the lands and people.

Id.

31. *See* NORTH, *supra* note 10, at 113-14 (discussing the background and institutional framework of the Spanish government at the beginning of the sixteenth century).

32. *See id.* at 114 (noting the centralized bureaucracy in Castile).

33. *See* HARING, *supra* note 23, at 102 (citing Niceto Alcala Zamora, Impresion General de las Leyes de Indias, 1942).

> [A]s a consequence of the concentration of power in the absolute monarchy, a constant confusion between the fundamental laws and the details which in the modern age have been entrusted to the regulatory power . . . laws which provide that there be a clock in the Casa de Contratacion of Seville and that the doorkeeper of its Sala de Gobierno receive appropriate gratuities; that powder should not be wasted in salutes . . . the Laws of the Indies constitute an unequal system, with assertions of high ideals surrounded by a network of distrust.

Id.

legitimate interests of local businesses. Additionally, the legislation often lacked a realistic understanding of the living conditions of the indigenous population. Even in the case of colonial authorities, regulations "that were impossible or inconvenient to execute were shelved with the famous Spanish formula, *I obey but do not execute*, and were referred back to Spain again for further consideration."[34]

Despite the intended centralization of legislative and judicial powers, the authorities of the Indies seem to have had, in practice, a significant level of independence in carrying out their judicial and policymaking responsibilities.

> A surprising amount of autonomy was often permitted to colonial authorities. There likewise grew jurisprudentially a substantial amount of customary law in the overseas dominions, derived from the practices of the times, which had a recognized legal force if accepted by the crown and if no written legislation was applicable.[35]

Varying from the peninsular ordinances, the "[C]rown tried to incorporate into its American legislation some of the juridical customs of the aborigines—especially of those, such as the Incas and the Aztecs, who had developed a strong political and economic organization."[36]

The declared spiritual objectives of the Spanish Crown were mainly the assimilation of the indigenous population into Christianity and their protection from the abuses of the powerful colonists. An underlying objective of the colonization effort, however, was the appropriation of the significant revenues generated by the Indies to meet the Crown's fiscal needs. By the seventeenth century, Spain, like England, faced a severe fiscal crisis derived from the rising cost of warfare, the requirements of new military technologies, and the inability to finance the mounting costs of expansionist policies.[37] The two countries undertook dissimilar political and institutional strate-

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34. *Id.* at 114.
35. *Id.* at 101.
36. *Id.*
37. *See* NORTH, *supra* note 10, at 113 (describing how the revenue from the King's estate and feudal dues was insufficient to finance the new technology needed to effectively develop the crossbow, longbow, pike, and gunpowder); *cf.* MERINO-BLANCO, *supra* note 24, at 13 (explaining that during the seventeenth century, the power of the King and the volume of legislation increased dramatically, thus leading to confusion among judges and lawyers as to which laws were applicable).

gies to deal with the crisis, strategies that would have serious repercussions in their subsequent institutional development and the development of their respective colonies.[38]

In the case of Spain, the fiscal imbalance was addressed mostly by reinforcing the monarchy's absolute powers and by further centralizing decisionmaking in the central bureaucracy.[39] There was also an accentuation of the exceedingly regulated management of the economy and polity.[40] This institutional framework did not encourage fiscal soundness in the end, nor did it create an environment conducive to increased productivity and wealth creation.[41] After the revolt of the Netherlands and the decline in the inflow of revenues from the Indies, this framework generated a vicious cycle of chronic fiscal imbalance, bankruptcy, and insecure property rights (resulting from the increasing need for confiscation and the arbitrary and ubiquitous role of the central bureaucracy). Another result was a fragile judiciary, which continued its ultimate dependence on the monarch's authority and was perceived mostly as an enforcer of an ever-growing body of statutory and administrative directives.[42]

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38. *See* NORTH, *supra* note 10, at 113-16 (explaining that the different paths England and Spain undertook resulted from the divergent institutional characteristics of the two societies). *See generally* FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 131-45 (James F. Colby ed., 1915) (describing the development of the law in England during the seventeenth century).

39. *See* NORTH, *supra* note 10, at 114 (describing the structure of Spain's centralized bureaucracy); *see also* MERINO-BLANCO, *supra* note 24, at 13-14 (discussing how the King's power became progressively more absolute during the sixteenth and seventeenth centuries). The expansionist policy, which extended the political institutions of Castile, led to a decrease in democratic institutions. *See id.* at 14.

40. *See* NORTH, *supra* note 10, at 114 (explaining that Spain's objective was to create the most powerful empire since Rome); *see also* MERINO-BLANCO, *supra* note 24, at 16 (stating that power rested upon the ownership of land, and nobles and the church controlled the ownership of all land). "The King was the only person who could create law." *Id.*

41. *See* NORTH, *supra* note 10, at 115-16 (describing how Spain went from a powerful nation to a second-rate power). *See generally* MERINO-BLANCO, *supra* note 24, at 16 (noting that Spain's ideological notions of capitalism needed a new legal framework).

42. *See* NORTH, *supra* note 10, at 114 (noting that the creation of Spain's institutional framework was to further the imperialistic interests of the crown).

In contrast, the English Crown sought political compromise with the most influential groups, mainly by delegating part of the Crown's political powers to representative bodies in return for increased fiscal revenues.[43] In doing so, England successfully generated a virtuous circle in which the political arrangement enabled the resolution of the fiscal crisis and the development of a solid economic position. This arrangement also contributed to a change in the country's political institutional framework, creating opportunities for the development of important organizations and institutions. For instance, a strong and more representative parliament[44] provided greater popular access to the political decisionmaking process and a check on the monarch's powers. Additionally, property rights became more secure[45] as clear limits were set on the capricious capacity of the ruler to confiscate wealth. Finally, an impartial judicial system developed, built as a separate and independent organization with the role of resolving disputes based on common law.[46]

Thus, the English judicial system consolidated its autonomy by developing its own set of conflict resolution principles derived from the communities' own experiences and traditions.[47] In contrast, the Spanish judiciary was given almost no autonomy and continued to depend on the Crown's scholarly-inspired statutes with limited re-

43. *See id.* at 113 (explaining that fiscal crises forced rulers to bargain with citizens). After the Hundred Years War, Edward I and Edward III received significant amounts of money from Parliament in exchange for the right to legislate and the opportunity to take part in shaping national policy. *See id.*

44. *See id.* at 114 (explaining how the increase in Parliament's power led to a more representative government); *see also* ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 258-62 (1966) (explaining the role Parliament played in defining and restricting the King's power).

45. *See* NORTH, *supra* note 10, at 144 (describing the benefits of England's decentralized polity); *see also* C.H.S. FIFOOT, ENGLISH LAW AND ITS BACKGROUND 55-56 (1932) (explaining the development of Parliament's rise to power).

46. *See* NORTH, *supra* note 10, at 114. *See generally* FIFOOT, *supra* note 45, at 238-74 (describing the evolution of England's judicial system); WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 194-264 (A.L. Goodhart & H.G. Hanbury eds., 1996) (discussing England's system of common law jurisdiction).

47. *See* NORTH, *supra* note 10, at 113 (drawing parallels between the religious and political struggles in England and its colonies).

flection of the principles, customs, and values arising from Spain's diverse regions.[48]

B. THE POST COLONIAL SETTING

The wars of independence in the Spanish colonies, although imbued with ideological overtones stemming from the American and French Revolutions, were mostly a result of the collapse of the Bourbon dynasty in the early 1800s.[49] The resulting civil uprising and political instability in Spain led the Creoles in the Indies to take control of the bureaucracy created by the empire, despite their lack of a deliberate agenda for social and political change.[50] Constitutional texts of the newly created independent states in Latin America, which largely followed the Spanish Constitution of 1812, proclaimed moderate liberal regimes. In these newly formed states, the executive branch limited the scope of individual liberties by taking a dominant role over the legislature, judiciary, and the official state religion, Catholicism.[51]

In Latin America, the forces for change did not generate the type of institutional transformation effectively brought about in post-revolution North America. No revalorization of the individual vis-à-vis the State took place, there was no development of effective checks and balances among the branches of government,[52] and popular participation in the political decisionmaking and judicial

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48. *See id.* at 114 (noting how the Spanish conquerors imposed a rigid system of religious and bureaucratic uniformity on an already existing agricultural society).

49. *See id.* at 103 (drawing a contrast between the ideological overtones of other revolutions and the stark reality of the wars of independence, which appeared to be a struggle for control of local bureaucracy).

50. *See id.* (noting that the efforts of the Creoles to take control of the local bureaucracy compounded existing problems with the control of agents).

51. *See* Alejandro M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. U.P.R. 462 (1995) (noting that while the Napoleonic Code was the main source of inspiration for the major codification movements in the Nineteenth Century, Spain's influence can be seen in the codification of commercial laws and the rules of civil and criminal procedure).

52. *See* NORTH, *supra* note 10, at 116 (commenting that a system of checks and balances is important to United States economic history and encouraged the growth of capital markets and the economic market).

processes was not encouraged.[53] Instead, after achieving independence, Latin American countries maintained the authoritarian institutional structure of colonial times. Kinship networks, political influence, and family prestige prevailed over clear and stable rules.[54] These highly personalized power relationships,[55] coupled with a highly arbitrary and intrusive bureaucracy, operated to generate insecure property rights.

In the judicial sphere, however, most Latin American countries rigorously adopted the prescriptions of the separation of powers doctrine, aimed at protecting both the executive and legislative branches from immoderate judicial interference.[56] As a result, post revolutionary governments "whose histories had included nothing resembling the French *parlements* thus embraced a powerful doctrine that was the product of specific conditions in pre-Revolutionary France,"[57] a phenomenon which has been designated the "French Deviation."[58] Judges, in contrast to their colonial experience with

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53. *See* Elliot E. Slotnick, *The Place of Judicial Review in the American Tradition: The Emergence of an Eclectic Power*, 71 JUDICATURE 77 (1987) (stating that the "ultimate arbiter is the people of the Union").

54. *See* NORTH, *supra* note 10, at 116 (noting that the institutionalized environment was not only pervasively arbitrary but also interventionist in nature).

55. *See id.* (stating that the enterprises of the locality were forced to operate in a highly politicized manner, focusing on personal networks and influence to gain access to subsidized credit).

56. *Cf.* Slotnick, *supra* note 53, at 77 (discussing judicial review and the development of the United States judiciary). There is a significant contrast with the evolution in the case of the United States judiciary after its independence from England. *See id.* In the United States, the judiciary made a clear departure from the English tradition and the doctrine of separation of powers emerging from the French Revolution in terms of the role of the Supreme Court vis-à-vis the other branches of government. *See id.*

57. John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996). The author writes:

> [I]n pre-Revolutionary France the regional parliaments became centers of conservative power. The judges, conscious members of an aristocracy of the robe, identified and sympathized with the landed aristocracy against the royal authority in Paris. They "interpreted" royal legislation to deprive it of its intended effects, refused to register royal edicts and hindered royal officials in the performance of their functions. Critics of the Old regime condemned the *parlements* and developed the theory that the fault lay with the judges, qua judges; there was a natural tendency to judicial excess that could only be controlled by rigorously protecting the legislative and executive powers of government from any form of judicial control.

Id. at 109-10.

58. *See id.* at 111.

broad administrative and executive powers "could not issue regulations, question the legality of administrative rules, orders or other executive action, examine the legality of the conduct of public officials or compel reluctant officials to perform their legal duties."[59] Likewise, similar restrictions were established to prevent judicial interference in the legislature's sphere: "judges could not legislate or otherwise make rules applicable to future cases . . . [and] could not question the validity or alter the meaning of legislation. The judicial function was to apply the law to the facts and pronounce the result . . . ."[60] In deciding cases, judges were thus restricted exclusively to the provisions of the existing legislation and, in some exceptional circumstances, to custom. This effectively eliminated the possibility of invoking judicial precedents.

The most lasting consequence of the separation of powers doctrine on the regional judiciaries has been the demeaning of the judicial function "as something narrow, mechanical and uncreative."[61] Judges were portrayed simply as unprestigious clerks at the bottom of the legal profession.[62] From an organizational viewpoint, this perception has converted the typical regional judiciary into a highly centralized bureaucracy with no accountability to, and virtually no linkages with, social or political forces external to the judiciary. This is in stark contrast to the central role played by the colonial judiciary in managing governmental affairs.[63] The highly creative tension between the autocratic/technocratic Hamiltonians and the populist/equity-oriented Jeffersonians, which helped shape the United States judiciary, was completely lacking in Latin America. As a result, the autocratic model's domination in the region went completely unchecked and the model has reproduced itself over the years with a high level of autonomy from social, economic, and political developments.

During the nineteenth century, most European judiciaries undertook substantial reforms of their organizations and judicial proc-

59. *Id.*
60. *Id.*
61. *Id.* at 116.
62. *See id.*
63. *See* MARK BURKHOLDER, BUREAUCRATS IN CITIES AND SOCIETY IN COLONIAL LATIN AMERICA 77, 81, 84 (Louise Schell Hoberman & Susan Migden Socolow eds., 1986).

esses.[64] These reforms occurred both as a reaction to the demeaning role derived from the separation of powers doctrine and as a measure to ensure the judiciaries' responsiveness to liberal and democratic principles. On the other hand, the regional judiciaries remained remarkably anchored in the French version of separation of powers. Basic principles such as providing an appropriate balance between the state's investigative powers and individual freedoms, which led European states to abandon the inquisitorial criminal process, have not generated equivalent changes in the prevailing criminal procedures in Latin America.

The combination of highly formalistic legal systems and the demeaning role of judiciaries generated an enclave-style judicial bureaucracy, which was detached from the historical changes and the institutional evolution of those societies in the social, political, and economic spheres. Political instability and institutional crises over time have subjected regional judiciaries to intense political influence, including their virtual subordination to the prevailing political forces.[65] Even under those extreme circumstances, however, the core bureaucratic culture of the judiciary—expressed mainly in highly formal judicial processes, a judicial philosophy devoid of historical and substantive policy considerations, and a rigid organization unyielding to changing social demands and conditions—remains virtually unaltered.

V. THE REGIONAL JUDICIARY'S INSTITUTIONAL SETTING

This section examines the institutional characteristics of the regional judiciaries that have led, in the last decades, to a deepening crisis of illegitimacy and unresponsiveness to growing social demands. An understanding of these institutional elements, together with a review of the organizational structure to be undertaken thereafter, should provide the basis to develop the path and strategic priorities for effective reform of the regional judiciary.

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64. *See* T.D. FERGUS ET AL., EUROPEAN LEGAL HISTORY 278-80 (1995) (describing the trends that developed in the law as a result of the concepts of nationalism, citizenship, liberalism, and democracy).

65. *See* Linarelli, *supra* note 1, at 75 (noting the influence that de facto unconstitutional governments have had upon the judiciary).

A. JUDICIAL INDEPENDENCE

The need for judicial independence, understood as the judiciaries' relative autonomy from majoritarian rule, is derived from the prudential role assigned to the judiciary of safeguarding the rule of law. While the legislative and executive branches are directly accountable to the majorities that define their agenda and evaluate their performance through the electoral process,[66] the judiciary is counter-majoritarian. In addition to protecting individual and social rights and carrying out its judicial adjudication function,[67] the judiciary is entrusted with the prudential role of "maintaining constitutional boundaries on majoritarian rule."[68] The special treatment afforded to the judiciary, and its relative isolation from the majoritarian influence, permits as a *quid pro quo* the diligent discharge of its constitutional functions.

The level of judicial independence is a function of the degree of judicial autonomy with respect to the other branches of government in the discharge of its prudential constitutional and adjudication duties.[69] Judicial independence, in turn, is derived from the patterns of association the judiciary has developed with the political and social actors and their deference to the judiciary's authority.[70] There are numerous factors determining the judiciary's independence, such as the checks and balances among branches of government, financial and administrative autonomy, and the selection and accountability system. The following section addresses those factors that have been critical in defining the degree of independence of the regional judiciary.

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66. *See* J. Clifford Wallace, *Constitution: The Case for Judicial Restraint*, 71 JUDICATURE 81, 82 (1987) (discussing the United States Constitution framers' intent to create three branches of government controlled by democratically elected representatives).

67. *See* Jeffrey M. Shaman, *Interpreting the Constitution: The Supreme Court's Proper and Historic Function*, 71 JUDICATURE 83-84 (1987).

68. *Id.* at 87.

69. *See* Dakolias, *supra* note 3, at 172 (1995) (describing the scope and measure of judicial independence).

70. *See* JUSTICE ANTONIN SCALIA, A MATTER OF INTERPRETATION 46-47 (1997) (discussing the degree to which the United States Supreme Court can act independently).

B. SEPARATION OF POWERS

As discussed above, the constitutions of all newly born Latin American republics established a rigorous Montesquiean principle of separation of powers.[71] Thus, the judiciary was assigned a more restricted role than in colonial times. The distribution of power among branches of government was asymmetric, however, owing mainly to the personalized power relationships and a strong administrative bureaucracy. The executive branch assumed a prevalent role vis-à-vis the legislative and judicial branches. During the following decades, the main issues related to the appropriate equilibrium among the branches focused on the balance of power between the parliament and the executive, such as the debate over the prevalence of parliamentary or presidential democracies. The judiciary played a lesser role in defining the appropriate balance of power, reflecting the true power balance within the newly created states.

This unassertive attitude of the regional judiciaries had a particularly negative impact in two areas: (1) the protection of individual and social rights, and (2) the conservation of the constitutional boundaries defined for the majoritarian branches of government. In these two areas, the prevailing spirit of the regional judiciaries was one of self-restraint. They sought to minimize the checks over the majoritarian branches with the expectation that those branches would allow the judiciaries an acceptable degree of autonomy in return. In contrast to the doctrine of judicial review established by the United States Supreme Court in 1803,[72] the Latin American judiciary restricted its constitutional review to formal statutory interpretations. By self-restricting the scope of review to issues of formal compliance with constitutional provisions (i.e. errors in the process of approvals of statutes), the judiciary limited its prudential reach over the other branches. Thus, the judiciary in the region assumed a defensive role compared to major political actors such as the military and political establishments.

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71. *See supra* pt. V.B (discussing Latin America's reliance on the doctrine of separation of powers).

72. *See* Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803) (stating that the duty of the judicial branch is to review implementation of the law); *see also* Billups P. Perry, *The Judicial Power: The Cement That Holds the Republic Together*, 71 JUDICATURE 66 (1987) (addressing the power of the American judiciary to review all acts of the government).

Contributing to this defensive posture was the predominant political instability that plagued the region after its emancipation from the Spanish Crown.[73] Until recently, the strong influence of the separation of powers doctrine and the inherent imbalance of powers inherited from Spain[74] were also important factors to regional judiciaries' protection of the constitutional framework.[75] This posture enabled the continuity of the formal judicial order despite its chronic violation of democratic principles and individual rights. This generated a sense of frailty and unresponsiveness about the judiciary in the discharge of some of its more revered constitutional responsibilities. Issues related to the legitimacy of governments empowered through corrupt electoral processes or de facto regimes, or the constitutionality of government actions, have been dealt with by the judiciary mostly as matters of institutional survival and political expediency. This has seriously compromised the judiciaries' legitimacy and standing before the public in the region.

The defensive posture assumed by the regional judiciaries is a significant contributor to the despotic trends that have limited democratic development in Latin America. The failure to counterbalance the majoritarian powers leads one to query the degree of independence of the region's judiciaries and the use that regional judiciaries have made of this independence.

C. JUDICIAL RESTRAINT

In addition to the separation of powers doctrine, the dominant judicial philosophy constitutes a crucial contributing factor to the regional judiciary's failure to assume an assertive role in the discharge of its constitutional protection function. The Roman and Canonical

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73. *See* POLITICS AND SOCIAL CHANGE IN LATIN AMERICA: STILL A DISTINCT TRADITION? 329 (Howard J. Wirada ed., 1992).

74. *See* HELEN L. CLAGETT, ADMINISTRATION OF JUSTICE IN LATIN AMERICA 11-12 (1952) (explaining the unstable economic and political history Latin America inherited from Spain and Portugal); *see also* ARPAD VON LAZAR, LATIN AMERICAN POLITICS: A PRIMER 29 (1971) (discussing the fact that although Latin American countries profess to have governments based on the balance of powers, in actuality, the executive branch is the dominant force).

75. Bolivia has been one of the extreme cases of judicial instability. The political and military establishments there periodically subjected the judiciary to overt intervention, causing the removal of Supreme Court members seventeen times during the period from 1950-1982.

Law traditions inherited from Spain embraced a formalistic and abstract tradition of judicial philosophy that conceives the legal system "as containing only rules attaching closely defined legal consequences to closely defined, detailed factual situations and enabling decisions to be reached and justified by simple subsumption of particular cases under those rules."[76] Within this tradition, the possibility for justices to go beyond the literal text of the constitution or the original intent of its authors would put the judiciary beyond their legitimate mandate.

The question of how to deal with modern constitutional issues, which may not or could not have been foreseen by the constitution's drafters, has been decided in favor of maintaining the status quo—i.e. the verbatim constitutional text—with no reference to the systems of rules, principles, and values underlying the constitution. If consistently applied, this system may provide a more reasonable answer to modern constitutional issues. The role of the judiciary within the prevailing adjudicatory philosophy is not to use discretion and judgment, but to abide by the legal text irrespective of the social, political, or ethical consequences.[77] This unassertive approach by the regional judiciaries may have prevented judicial arbitrariness and the potential for judicial dictatorships, as was the precise aim of the separation of powers doctrine. On the other hand, it has generated substantial costs in terms of lost legitimacy of the judiciary in the eyes of society, which perceives the judiciary as immersed in an irrelevant and abstract discourse. This lost legitimacy has contributed to the failure, until recently, of constitutional regimes in the region.

The Latin American experience in the handling of constitutional matters is again in sharp contrast with the experience of the United States. "The overwhelming evidence of history shows that the meaning of the Constitution has undergone constant change and evolution at the hands of the Supreme Court."[78] Despite the intense debate between the advocates of strict judicial restraint and the proponents of liberal judicial review, the United States Supreme Court

76. H.L.A. HART, *American Jurisprudence through English Eyes: the Nightmare and the Noble Dream*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 134 (1983).

77. *See* SCALIA, *supra* note 70, at 23 (stating that the duty of the United States Supreme Court is to interpret the law as it is written).

78. Shaman, *supra* note 67, at 87.

has largely undertaken an open approach to the interpretation of constitutional texts. Going beyond mere linguistic analysis or the original intention of the Framers, this approach has enabled the Constitution to evolve in response to changing social conditions since its enactment over two hundred years ago. The assertive role played by the Supreme Court in this field has been a source of strong popular legitimacy and support to the judiciary.

Unlike the experience of the United States, where a lively debate continues over the proper scope of constitutional interpretation, strict-constructionist notions prevailed unopposed in Latin America until recently. The advent of new democratic regimes and the increased frustration with the defensive posture assumed by regional judiciaries over the issue of constitutional supremacy has led to the establishment of constitutional tribunals in the region.[79]

In terms of a more principle-driven judicial philosophy and a more assertive role by the tribunals in the protection of constitutional boundaries, the experience in the region can be considered mixed. An area for future research is the impact of these tribunals on the improvement in democratic and individual rights protection. In countries such as Colombia, the Constitutional Tribunal has implied a welcome departure from the traditional formalistic adjudication philosophies. A more principled and substantive interpretation of the Constitution has narrowed the gap between society's concept of fairness and justice and that of the judiciary. On the other hand, the potential for conflict among the various heads of the judiciary has increased, reflecting diverse corporate philosophical or ideological views with respect to the law, the judiciary's social and political role, and individual rights. The potential for increased incongruity among the judicial authorities may further deteriorate the effectiveness and prestige of the judiciary.

D. SELECTION SYSTEM

A crucial element defining the governance structure of the judiciary, both in terms of its degree of independence and its accountability, is the selection system for judicial leadership, especially the jus-

79. *See Staff Appraisal Report, Bolivia: Judicial Reform Project*, at 3, World Bank Rep. No. 13052-Bo (March 24, 1995) (discussing the evolving nature of the judicial organization in Bolivia) [hereinafter *Bolivia Report*].

tices of the supreme court. The level of transparency afforded in the selection process, the length of the appointments, and the influence exerted by political forces, society, and the judicial bureaucracy constitute the critical factors in defining the types of judicial selection prevalent in Latin America.

An overview of the judicial selection processes operating in the region allows us to distinguish two prevalent "ideal types" of judicial selection systems. First, an autocratic type, driven mostly by the inward forces within the judicial bureaucracy; and second, a political patronage type, driven by the influence exerted over the judiciary by the political establishment. The autocratic type affords elected officials a very low level of influence in the selection process. The selection is usually limited exclusively to career officials and provides long-term or life appointments. This system ponders heavily the autonomy of the judicial branch, promoting the inbreeding of the judicial leadership and the reproduction of the prevailing corporate culture with very limited accountability to exogenous forces. The Chilean judicial selection process, which allows a limited role for the executive in the selection of justices, falls within these basic characteristics.

The political patronage type affords inordinate influence to elected officials in the selection process, usually enabling law professionals outside of the judicial career to seek senior judicial appointments. This selection process provides for shorter-term appointments, making appointees relatively accountable for the opinions they issue. This system tends to compromise the level of judicial independence by introducing strong influence from the political establishment. Thus, the judicial bureaucracy is unduly accountable to the political establishment in their day-to-day judicial decisions. The Bolivian judicial selection process closely resembles this type.[80]

Despite the significant differences and consequences pertaining to these judicial selection types, Latin American countries share two critical characteristics in their selection processes.

First, there is very limited transparency in the procedures and decisionmaking processes leading to the selection of Supreme Court

80. *See id.* at 4 (summarizing the appointment process of judges in Bolivia and the negative influences this process places on the judiciary of Bolivia).

justices. A reflection of this limited transparency is the lack of public knowledge or discussion regarding the selection criteria for individual candidates. Similarly, there is no form of public inquiry as to the judicial philosophy of a candidate or the judicial process for which he may be accountable.

Second, the selection process assigns no role to society in the form of a direct electoral process or in the participation of intermediate social organizations having a special interest in the administration of justice. The selection systems prevalent in Latin America alternate between autocratic schemes, which have very low accountability, to exogenous forces and politicized schemes, which are highly vulnerable to partisan politics.

The lack of balance in the level of independence from the political establishment and of accountability to social and political groups derived from the prevailing judicial selection systems has generated significant flaws in judicial corporate governance. In the first case, it has tilted the incentives for corporate decisionmaking inwards, a direction that seriously limits the degree of responsiveness of the judiciary to the state and society's justice demands. In the second place, it has made the judiciary considerably vulnerable to the political process and its short-term partisan agenda. In both cases, the standing of the judiciary as an independent branch of government trusted with crucial constitutional responsibilities has been seriously eroded in the eyes of the people who constitute the ultimate providers of legitimacy.

VI. THE JUDICIARY'S SOCIAL FUNCTIONS

At the macro level,[81] the essential issues defining the Latin American judiciary's institutional nature revolve around the appropriate balance between judicial independence and accountability to political majoritarian forces and society. At the micro level, the important issues revolve around the incentives and social utility functions underpinning the rules, conventions, and practices followed by the judici-

81. The macro level can be defined as the rules, conventions, and practices related to the terms of association of the branches of government and the discharge by the judiciary of its primary constitutional responsibilities. *See* NORTH, *supra* note 10, at 5.

ary in its judicial adjudication function, i.e., the impartial resolution of disputes and the penalization of criminal actions.[82]

Modern societies are built upon innumerable complex, impersonal, cooperative interactions among individuals operating on incomplete information and pursuing self-seeking objectives. In these societies, institutional frameworks reduce uncertainty from incomplete information, with respect to the behavior of other actors, in the process of human and organizational interaction. "The institutions necessary to accomplish economic [and social] exchange vary in their complexity, from those that solve simple exchange problems to one that extends across space, time, and numerous individuals."[83] As part of his theory of institutions, North assigns a critical role to effective third party enforcement mechanisms to realize the gains from trade inherent in the specialization and interdependence prevailing in modern economies.[84] The greater the complexity and specialization of human interaction, the greater the reliance individuals and organizations will place on rules and enforcement mechanisms that diminish the degree of uncertainty about whether cooperation will effectively take place.

Modern societies assign a premium to judicial adjudication[85] in comparison with more primitive societies that relied heavily on per-

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82. *See id.* at 96-97 (explaining how the common law, as one of the main schools in judicial adjudication, promotes institutional change as one of its social utility functions).

83. *Id.* at 34. North writes:

> [As] the world's economy grew and division of labor became ever more specific, the number of exchanges involved in the performance of economies expanded . . . the size of transaction costs that go through the market (such as costs associated with banking, insurance, finance, wholesale, and retail trade; or in terms of occupations, with lawyers, accountants, etc.) in the U.S. economy found that more than 45 percent of national income was devoted to transacting and, moreover, that this percentage had increased from approximately 25 percent a century earlier.

Id. at 27-28.

84. *See id.* at 27-28. North indicates:

> The structure of enforcement mechanisms and the frequency and severity of imperfection play a major role in the costs of transacting and in the forms contracts take . . . . Parties to an exchange must be able to enforce compliance at a cost such that the exchange is worthwhile to them . . . . Inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.

Id at 54.

85. *See id.* at 58-59 (describing the importance and characteristics of "third party enforcement" in developed and Third World countries).

sonalized interchange, repeat dealings, cultural homogeneity, and self-enforcing mechanisms derived from dense social interaction networks. Judiciaries in modern societies play a critical role in assuring individuals and organizations that there is ultimately a cost-effective, impartial, and neutral third party in charge of resolving disputes according to generally predictable rules and principles that are publicly available.[86] In doing so, modern judiciaries reduce the level of uncertainty individuals face in their day-to-day interactions and enable cooperation to prevail over the type of non-productive, anarchic interaction that could predominate if self-enforcement and arbitrariness were the rule.

This section reviews the fundamental social functions—economy, neutrality, predictability, and political legitimacy—demanded from the judiciary in a modern democratic society. Additionally, this section explores the extent to which the institutional framework governing the judicial processes in the region is consistent with these social functions.

A. ECONOMY OF TRANSACTION COSTS

The need for third party enforcement at low transaction costs has become a crucial element of the institutional structure of modern societies, and therefore:

> Enforcement poses no problem when it is in the interest of the other party to live up to the agreement. But without institutional constraints, self-interested behavior will foreclose complex exchange, because of the uncertainty that the other party will find it in his or her interest to live up to the agreement . . . .[87]

Furthermore, it appears that, "in principle, third-party enforcement would involve a neutral party with the ability, costlessly . . . to enforce agreements such that the offending party always had to compensate the injured party to a degree that made it costly to violate the contracts."[88]

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86. *See* NORTH, *supra* note 10, at 57 (depicting an ideal judicial structure in which parties have perfect knowledge of rules governing their transaction and a neutral enforcement body to ensure compliance with these rules).

87. *Id.* at 33.

88. *Id.* at 58.

The cost of judicial enforcement closely relates to the time and resources a diligent party invests in obtaining a judicial decision. As an instrument, the judicial process should not require a party to spend more resources on the adjudication than the value of the goods in controversy.[89] The experience in Latin America, however, seems to point in a different direction. A time-flow study conducted in the civil courts of La Paz, Bolivia, shows that the average duration of a collection procedure was ten times longer than originally envisaged under the Civil Procedure Code (519 days vs. 42 days).[90] According to the same study, an ordinary procedure lasted a total of 2,616 days, or 7.2 years.[91] An indication of the high level of frustration of Bolivian claimants seeking to enforce legal rights through the judiciary is the fact that only a very small percentage of the judicial procedures initiated ever reach a final judicial decision.[92] The same types of results arise in similar studies from Ecuador and Argentina,[93] and this problem is currently compounded by the increasing case backlog in most Latin American countries.[94] The significant delays in reaching judicial decisions increasingly prevent the judiciary from performing the key social utility function of encouraging individuals and organizations to self-adhere to contracts under the premise that because of effective enforcement mechanisms the breaching party will not benefit from default.[95] In economic terms, the failure to enforce contracts has the adverse effect of increasing transaction costs in the regional economies. It may also be contributing to the breakdown of civilized cooperation in many territories in the region where violence has reached epidemic proportions.

89. *See* ENRIQUE COUTURE, FUNDAMENTOS DEL DERECHO PROCESAL CIVIL (1990).

90. *See Bolivia Report*, *supra* note 79, at 9.

91. *See id.*

92. *See id.* at 10 (noting that the high level of frustration the Bolivian people have with delays in court proceedings leads to rampant abandonment of claims by litigants).

93. *See* Edgardo Buscaglia & Maria Dakolias, *Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador* at 9 (World Bank Tech. Rep. No. 350, 1996).

94. *See* Ulen, *supra* note 3, at 276 (reporting widespread dissatisfaction with many Latin American judicial systems due to huge backlogs).

95. *See Bolivia Report*, *supra* note 79, at 3 (explaining the reluctance of the Bolivian people to pursue legitimate civil claims because their confidence in the judiciary is very low).

B. NEUTRALITY OF CASE MANAGEMENT

In the case of the Latin American judiciary, the civil and criminal spheres present totally distinct roles for the judge in managing the judicial process. In the criminal process, the judge has been assigned an inquisitorial role in the stages of investigation and criminal indictment, which concentrates the process initiative and leaves very limited room for due process guarantees for the defendant.[96] This matter is reviewed below. In contrast, in the civil procedure, the neutrality in managing the judicial process has the following three consequences.

First, the judge subordinates his role to the interests and initiative of the litigants. Thus, he foregoes a more active direction of the judicial process in pursuance of public interest objectives, such as ensuring swiftness in case management and equality of opportunity among litigants.[97] The prevailing procedural rules generate strong incentives for the judge to refrain from taking a proactive role in the direction of the case, until the final stages when the substantive dispute must be resolved.[98] In the interim, the judge is not encouraged to mold his personal convictions as to the evidence, rules, or legal principles surrounding the case, but to follow the rituals prescribed in the procedural statutes.

Second, a strong dose of formalism in the regulation of the judicial process is reflected in detailed and highly regulated procedural provisions. Judges are afforded very limited discretion in interpreting and applying those provisions. Procedural rules must be applied even in cases in which verbatim interpretation may defeat the objectives

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96. *See* Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 FORDHAM INT'L L.J. 578, 582 (1993) (describing the inquisitorial model of judicial behavior in Chile and the risks of judicial abuse in Chile's criminal process). *But see* Arturo Hoyos, *Due Process in the Americas*, 40 ST. LOUIS U. L.J. 1013, 1028-29 (1996) (describing the due process guarantees that exist in Argentina focusing on arbitrary judgments, procedural excess, and effective denial of justice).

97. *See* Hoyos, *supra* note 96, at 1022-25 (1996) (stating that the United States judicial system is comprised of independent judges who have a duty to hear litigants with due process claims as quickly as possible).

98. *See* Arthur R. Miller, *The Adversarial System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 8-9 (1984) (illustrating the emphasis that the United States Federal Rules of Civil Procedure place upon litigants developing the issues in causes of action with little judicial oversight until the litigation nears trial).

pursued through the process—arriving at the truth in an efficient and impartial manner.

Third, judicial restraint does nothing to ensure the litigants' adherence to principles of good faith in achieving the process objectives. Consequently, the offending party has ample room and opportunity to promote delaying strategies and to seek the most sinuous and cumbersome ways of arriving at the decision stage. This substantially increases the enforcement costs to the diligent party. An indication of the strong manipulation of regional judicial procedures is that a substantial portion of time in a judicial proceeding is devoted to formal or procedural discussions, rather than an exploration of the facts and legal issues in controversy. In the case of the Bolivian time-flow study, at least sixty percent of the time in a judicial proceeding was invested in dealing with matters not directly related to the substantive dispute.[99]

The parties' ability to manipulate the judicial process for their own benefit creates strong incentives for self-interest rather than the cooperative behavior that the institutional framework should be intent on promoting. The abstract concept of neutrality prevailing in the region, with its strong inclination to condone the manipulation of procedures for the sake of delaying contract enforcement, is highly dysfunctional with respect to the expected role of judiciaries as third party enforcers in a modern society.

Judicial neutrality in the modern context should seek a better balance between the objective of economy and efficiency in the resolution of controversies and the adequate protection of due process rights of the parties. The procedural rules in the region, with their emphasis on written and ritualistic forms, and a passive role for the judge, are far from successful in generating the adequate incentives for this balancing to take place. Overcoming the colonial inheritance in this field has proven extremely difficult because there are strong cultural factors enabling the reproduction of neutral case management. These factors include the formalistic and abstract judicial philosophy discussed below, as well as the methodologies and content of legal education. Uruguay, however, is a clear leader in the region

99. *See Bolivia Report*, *supra* note 79, at 10 (emphasizing that time-consuming incidental matters are used by judges to postpone judicial decisionmaking).

because it has been able to move to active, hearing-based judicial management with impressive results.

C. PREDICTABILITY OF INSTITUTIONS

The judiciary plays a major role in modern societies by reducing uncertainties related to the rules governing human interaction. Adjudication provides an authoritative definition of the meaning, breadth, and reach of the relevant institutions involved in a specific dispute.[100] The consequences of adjudication go beyond the particular controversy and enable society to reduce uncertainties regarding the intent and understanding of institutions. Uncertainties related to the institutional framework may be derived from concerns of individuals and organizations regarding: (i) the relevant statutory provisions applicable to a specific factual situation; (ii) statutory provisions that may be indeterminate in providing a clear and non-controversial rule for the resolution of specific factual situations; (iii) technological, economic, or social changes that may have made an institutional framework obsolete or irrelevant, increasing the potential for conflict and inefficient interaction; or (iv) formal and informal rules developed in dealing with a specific trade or human interaction failing to foresee certain developments or situations.

The contribution of the judiciary regarding these uncertainties is to provide an authoritative, impartial, third party judgment based on its interpretation of the rules and principles that are relevant to the case. While the first form of uncertainty limits the role of the judge to applying narrowly written legal principles to fact-specific situations,[101] the other three uncertainties assume a higher degree of judicial discretion. In fact, in the latter cases, the judge could, in all likelihood, be endorsing or promoting some form of institutional change derived from judicially recognized changes in the institutional structure. This change would result from interaction between the institutional framework and the individuals and organizations operating under it. "This form of change originates from entrepreneurs making self-interested decisions, rightly or wrongly, to improve their marginal

100. *See* HART, *supra* note 76, at 125-26 (describing how American courts have power to resolve disputes and impact the scope of the law's influence).

101. *See id.* at 134.

returns."[102] Despite the strong potential to act as an authoritative channel to legitimize and regulate social and economic change, the judiciary has completely discarded this role in Latin American jurisprudence.[103]

With its strong colonial inheritance, the regional judiciary has adopted a deductive, abstract, and backward-looking school of judicial reasoning, thus, "particular decisions in particular cases owed their legal justification exclusively to their relation to the predetermined meaning of existing legal rules."[104] Judicial reasoning is undertaken with complete abstraction of the social and political context and substantive principles of a judicial, political, or philosophical nature that may be involved in deciding specific factual situations. Since the legal system is conceived as a self-contained, gap-less, and exclusive source of law, judicial reasoning affords little, if any, weight to informal institutional elements, such as social values, conventions, and codes of behavior.

Ascribing to the judiciary an active role in dealing with these other forms of uncertainty is in keeping with the common law tradition. It is also similar to the nature of the judicial process in the United States: "[T]hat is, what courts do and should do, how judges reason and should reason in deciding particular cases."[105] Under American jurisprudence, a permanent and extremely lively debate has ensued over the degree of the judge's autonomy in relation to the statutory provisions and the additional criteria and constraints that judges should take into account in deciding cases.[106] This beneficial and highly inspiring debate stems from a refusal to view judicial decisions simply as the logical unfolding of the consequences contained in formal statutes.[107] Different shades of judicial realism have kept this debate alive. While some virtually equate the law with judicial

102. NORTH, *supra* note 10, at 100.

103. *See id.* at 8-9 (comparing the effects of institutions, such as the judiciary, upon the economies and societies of the United States and the Third World).

104. HART, *supra* note 76, at 131.

105. *Id.* at 123.

106. *See id.* at 124-25 (reporting the dismay expressed by English scholars over the power of federal judges in the United States to interpret and strike down even the best written and overwhelmingly supported legislation).

107. *See id.* at 125 (stating that United States federal judges may place their own value judgments on legislation instead of making "the impartial application of determinate existing rules of law in the settlement of disputes").

decisions and consider the judge a sovereign decisionmaker, others more moderately recognize constraints to judicial reasoning derived from systemic judicial principles. The debate has had a stimulating and constructive effect in the North American judicial culture and a profound impact on the role of the judiciary, which, at some points in history, has become an active promoter of social change.[108] In Latin America, where the submission to positivist and formalistic views has gone unchallenged since the imposition of the Spanish legal tradition, this debate would be unthinkable.

In the Latin American region, the highest speculative exercise on judicial reasoning seeks a metaphysical foundation for the law. Most legal philosophers have attempted to present the positivist legal system as a reflection and consequence of a superior natural law discoverable by human reason. These conceptual constructs have not transcended the academia and have had no perceptible effect on the regional judicial reasoning and the judicial decisionmaking process.

The prevailing judicial reasoning in the region confines the judiciaries' role to a declaration of the meaning of the existing formal rules. This generates the potential for a growing alienation of the formal institutional framework from the dynamics of institutional and social change prevailing in modern democratic societies. By doing so, it anchors market exchanges and social interaction to the literal prescriptions of statutory rules. While the relevant institutional structure may have evolved, in practice, toward a more productive and efficient equilibrium by virtue of conventional and other informal institutional means. We expect the modern judiciary to grasp and legitimize institutional change, provided it takes place within the overarching principles induced or derived from the overall legal system. Otherwise, the judiciary may be neglecting to signal to the social actors the legitimate evolution of the rules of the game. By doing so, the judiciary may cause the formal legislation to become obsolete or unproductive as it fails to adapt to the demands of individuals and organizations seeking to adjust the institutional framework to enable increasing returns.[109]

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108. *See id.* (surveying the United States Supreme Court's development of the substantive due process doctrine at the turn of the twentieth century).

109. *See* NORTH, *supra* notes 10, at 73-82, 86-87.

D. POLITICAL LEGITIMACY

As a branch of government in a democratic society, the judiciary's adjudicatory function must comport with the overall principles and values prevalent in the polity and the decisions trusted and respected by the commonalty. The special treatment afforded to the judiciary in Latin America—its isolation from the electoral process and autonomy from the majoritarian branches of government—should balance with its responsiveness in providing the effective delivery of justice. The judiciary's degree of accountability may stretch from highly autocratic, which accentuates its lack of direct accountability to society, to highly populist, which stresses the social accountability and ultimate political nature of judicial structures.

VII. THE INSTITUTIONAL AND ORGANIZATIONAL ELEMENTS DETERMINING THE POLITICAL LEGITIMACY OF THE JUDICIAL PROCESS

This section reviews the institutional and organizational elements that define the type of political legitimacy embodied in the regional judicial procedures. Further, this section seeks to determine the extent to which those elements are consistent with the expected social functions of a judiciary in a modern democratic society. In order to make this determination, it is necessary to focus on those elements identified as crucial in determining the political legitimacy of the regional judicial process, such as equality before the law, due process considerations, accessibility of judicial procedures to the public, and citizen participation in the judicial process.

A. EQUALITY AND DUE PROCESS CONSIDERATIONS

The civil and criminal judicial spheres diverge widely in an analysis of their equality and due process elements. In the civil sphere, the regional judiciaries have failed to take any positive steps that would provide the disadvantaged with equal access and treatment in the judicial process. This inaction reflects the very limited awareness by the judiciary of de facto social inequality and its impact on access to justice by various social groups. In practice, the judge's passivity and formalism in managing civil cases provide ample opportunity for increasing transaction costs and delaying the resolution of disputes,

generating advantages for the party in a better position to withstand those costs. The lack of personal contact between judges and parties through hearings, or at various stages of the process, is a key factor upsetting the balance that is expected to ensure fair judicial treatment of the disadvantaged in civil matters. Direct contact would provide the court first-hand knowledge about the real circumstances of the case and the persons involved, rather than the artificial reality that emerges from written presentations. Finally, the limited resources and scope of legal aid institutions in Latin America constitute another factor conspiring against ensuring equal legal treatment for the poor.[110] Unfortunately, there are no empirical studies indicating the degree of access to justice in the region. The high transaction costs,[111] however, and the absence of simple judicial procedures[112] stripped from ritualistic elements, point toward a civil judicial system that is severely biased against the poor.[113]

The legislature has established some special civil jurisdictions and procedures in fields where the special interests involved merit an affirmative and proactive judicial role. Thus, in areas such as family, labor, and child legislation, special tribunals and procedures have been established to expedite judgments based on a more direct, less formally regulated understanding of the socioeconomic conditions related to the disputes.[114]

In the criminal sphere, the regional judiciaries have become major contributors to the systematic breach of civil liberties and individual rights through the continuance of the inquisitorial criminal system. The repressive aims of this system, which is prevalent in the region,

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110. *See* Michael A. Samway, *Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile,* 6 DUKE J. COMP. & INT'L L. 347, 348 (1996) (asserting that the lack of financial resources devoted to legal aid problems in Chile is one of the largest obstacles for the poor in seeking justice).

111. *See* Dakolias, *supra* note 3, at 206 (highlighting the incidental costs incurred by litigants like attorney, notary, and court fees).

112. *See* Hoyos, *supra* note 96, at 1029 (citing GERMAN J. BIDART CAMPOS, LA CORTE SUPREMA 141 (1982)) (highlighting steps taken by various Latin American countries to streamline court procedures).

113. *See id.* (identifying a case wherein an Argentinean Supreme Court reversed a lower court ruling that denied redress for the parents of the victim because the parents failed to present a properly notarized birth certificate).

114. *See* Dakolias, *supra* note 3, at 202 (noting that various Latin American countries established alternative judicial proceedings, like mediation, which increased the success rate in solving cases).

provide very limited channels for defendants and victims to control the powers of the judge, who combines the roles of investigator, prosecutor, and adjudicator.[115] Information and possibilities of defense are restricted for the defendant during the investigative phase, and there is no direct confrontation of the evidence and the legal issues subject to controversy until the very last stages of the criminal process. Thus, there is a strong imbalance between the rights of the prosecution and those of the defendant and victim during the litigation.[116] The judge's lack of direct involvement in the criminal process and his ultimate reliance on poorly trained law clerks and police forces with meager criminology skills amplify the vulnerability of individual rights under the inquisitorial system.[117]

The high level of discretion in the management of the criminal process, the lack of a public forum during the proceedings to carry out a candid discussion of the evidence and legal issues, and the failure to subject the final decision to an impartial third party severely compromise the due process guarantees prevalent in modern democratic societies. Regional judiciaries have taken very few steps aimed at overcoming the criminal justice status quo, either in the form of proposing a comprehensive overhaul of the criminal system or strengthening the defendants' individual guarantees. In fact, the apparent inertia in confronting this state of affairs may constitute one of the crucial issues affecting the judiciaries' legitimacy before public opinion.

B. ACCESSIBILITY OF JUDICIAL PROCEDURES TO THE PUBLIC

Transparency and adequate dissemination of information to the public on the activities and decisions of the government branches contribute largely to their political legitimacy. First, they provide an effective form of popular oversight for judges and judicial agents, deterring the judiciary from violating due process and individual rights. Second, by bringing the community closer to judicial activi-

115. *See* Michael R. Pahl, *Wanted: Criminal Justice – Colombia's Adoption of a Prosecutorial System of Criminal Procedure*, 16 FORDHAM INT'L L.J. 608, 614 (1993) (discussing the characteristics of the Colombian inquisitorial system).

116. *See id.* at 617 (noting that Colombian police often refuse to hand exculpatory evidence over to the courts).

117. *See id.* at 618 (asserting that the lack of an expert law enforcement agency cripples the investigative process underlying the inquisitorial system).

ties, they contribute to the promotion of trust between the community and its judicial branch. Third, they discredit the use of delay and censurable tactics by the parties in the handling of judicial processes. Fourth, they promote the education of the population about judicial procedures and philosophies, enabling educated feedback by the population on the performance of the bench, thereby removing the assessment of judicial decisionmaking from the exclusive domain of specialists.[118] Society will adopt a more sympathetic view toward the judiciary if it is able to oversee its performance and comprehend the policy and ethical values that the judiciary intends to promote in the discharge of its duties. Unfortunately, the autocratic patterns governing the regional judicial structure and the closed nature of most judicial proceedings place most judicial activities and decisionmaking processes off limits to the public, contributing to a growing chasm between society and the judiciary.

Judicial governance practices provide virtually no opportunity for the public to monitor the performance of the judiciary or influence its corporate decisions. Regional judiciaries have limited reporting duties compared to other government branches or the public at large. In the cases requiring some form of reporting, the lack of political or social consequences attached to the reports renders these duties mostly rhetorical. The absence of effective reporting requirements renders the judiciary virtually unaccountable to the political establishment and the community.[119]

The "desperately" written and ritualistic judicial procedures leave no room for societal participation to oversee of the integrity and quality of the judicial process. These procedures leave virtually no space for an open and direct confrontation among interested parties over the merits of the disputes. Instead, discussion is conducted in highly abstract and scholarly terms through lengthy written documentation that offers little, if any, real meaning to the ordinary citizen.[120] An indecipherable debate stripped from the values and methods of controversy prevalent in other spheres of society replaces,

118. *See* Enrique Vescobi et al., *Codigo General del Proceso*, Editorial Abaco.

119. *See* Garro, *supra* note 51, at 475 (asserting that the availability of judicial opinions correlates to the degree that lawyers and judges follow precedents set forth by the courts).

120. *See id.* (noting the lack of punctuation, improper tenses, and the "non-communicative" style common in Latin American judicial opinions).

before public opinion, the search for the truth and the application of justice.

The highly erudite concepts utilized in judicial decisionmaking bear little resemblance to the ethical and value considerations that ordinary citizens would have in analyzing the merits of a case. Judges reject any form of reasoning that does not utilize the abstract characteristics of judicial logic. In fact, forms of public participation, such as the jury trial and public debate, are dismissed as irrelevant and extraneous to the judicial realm. The academic and theoretical nature of judicial decisionmaking eliminates any educational benefits the public might derive from an adjudication that is closely tied to the public's ethics and values.

C. CIVIL SOCIETY PARTICIPATION IN THE JUDICIAL PROCESS

The imposition of the Spanish judicial structures and legal proceedings on the Ibero-American colonies interrupted and eventually washed out the community-based dispute resolution system developed by the indigenous population. The highly autocratic patterns of the regional judicial corporate structure and the closed nature of most judicial proceedings discouraged the participation of society in judicial matters. Contrary to experiences in other countries, no form of civil society participation is conceived in the judiciary's governance or judicial process.

There is no role for public representatives in the selection of justices or judges, or in the evaluation of their performance.[121] Civil society organizations play an increasingly active role in these areas in the United States' judicial system.[122] As a reaction to the abuses derived from directly elected judges, most states have established permanent, non-partisan commissions composed of lawyers and nonlawyers who actively recruit and screen prospective judicial candi-

121. *See* Juan F. Torruella & Michael M. Mihm, *Foreword: To Promote and Strengthen Judicial Independence and the Rule of Law in the Hemisphere*, 40 ST. LOUIS U. L.J. 969, 980 (1996) (discussing various methods for judicial selection).

122. *See* David W. Case, *In Search of Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 23 (1992) (discussing nominations of commissions as offering several advantages over the popular election of judges).

dates.[123] The screened candidates are proposed to the respective official authority that is ultimately responsible for the appointment.[124]

The system lacks the possibility of including juries of lay citizens charged with declaring the truth in matters of fact in a trial. The institution of the jury reflects society's ultimate reliance on the common sense notions of justice held by the ordinary citizen and constitutes a crucial connection between the judiciary and society in common law countries.[125] It ensures the judicial branch of the constant nurturing of the values and the perceptiveness that citizens bring in deciding issues of fact. The autocratic and formalistic approaches prevalent in the Latin American judiciaries completely preclude this approach to justice.

The system does not promote community-based judicial procedures when dealing with lesser violations or minor disputes. The judiciary has been particularly unresponsive in dealing with the high demand for justice services coming from the urban poor living in low-income neighborhoods.[126] Consequently, the degrees of violence and judicial uncertainty in these neighborhoods are extremely high and cannot be dealt with through the type of courts and judicial processes prevalent in the region. An aggressive response to this serious problem, which dramatically affects the quality of life of the urban poor, should be grounded in community-based forms of justice. The regional judiciary has neglected and discouraged the development of community forms of justice that would ensure more effective access to justice services for the poor.[127]

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123. *See id.* at 23 (describing the procedures of the commission selection system).

124. *See* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 177-78 (1980).

125. *See generally* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997) (outlining the merits of the jury system).

126. *See* Dakolias, *supra* note 3, at 198 (noting that the experience in Chile indicates a direct relationship between exposure to the judicial system and confidence in the courts); *see also* Samway, *supra* note 110, at 347 (providing a descriptive study of legal aid programs in Chile).

127. An incipient form of community justice in Colombia consists of the Houses of Justice Program. The basic idea is to bring into the community the most essential justice services such as conciliators, family dispute settlement, police inspection, and prosecuting services for criminal offenses. Although the program is relatively new and is only properly working in the neighborhood of Aguablanca in

The current governance structure and judicial process completely preclude any form of public participation in the various areas referred to above. It appears, however, that any initiatives aimed at overcoming the serious shortcomings of the regional justice system will need to envisage a significantly broader role for public representatives in the various facets of justice administration. This would go a long way toward providing the necessary linkages between the judiciary and society and would strengthen the political legitimacy of the judiciary. It also would improve the quality and quantity of judicial services currently being provided to the community.

VIII. THE REGIONAL JUDICIARIES' ORGANIZATIONAL SETTING

Organizations provide a structure to human interaction similar to institutions.[128] Organizations, however, constitute the dynamic element of the historical process and the promoters of institutional change whenever changes in economic, social, or political conditions generate incentives for adjusting the rules of the game.[129] This section explores the nature of the regional judiciaries' organizations and the extent their corporate strategies, governance structure, and policies may be contributing to the lack of responsiveness and lost legitimacy in Latin America.

A. PREVAILING CORPORATE CULTURE

A number of traits make up the prevalent corporate culture of the regional judiciaries, including the deductive, abstract, and backward-looking reasoning applied in adjudication. This section, however, refers to two traits, which mold the regional judiciaries' culture and are critical to explaining its present difficulties, namely, its defensive and reactive patterns.

Cali, it has shown tremendous potential in responding to a high level of demand for all types of justice services that were formerly repressed and unattended, including helping to lower an extremely high assassination rate and dealing with intra-family violence.

128. *See* NORTH, *supra* note 10, at 4 (comparing institutions and organizations).

129. *See id.* at 5 (noting that what organizations come into existence in a given historical period and how they evolve are fundamentally influenced by the institutional framework).

Most regional judiciaries operate as defenders of their jurisdiction or sphere of activities, instead of as prospectors of new opportunities. The typical judiciary in Latin America has cast aside the demands for change arising from the poor in the rural and urban areas and the increased specialization of the private agents. Judiciaries typically consider such demands for change threats to the organization, rather than opportunities for growth and development. The basic judicial corporate attitude has been to insulate its sphere of activities from exogenous forces and emerging constituencies to maintain a stable domain that does not lead to significant institutional changes. A consequence of this attitude has been the enclave-type setting characterizing the judiciaries' governance structure and its lack of relationship with emerging social and political actors.

This corporate orientation constitutes a clear reflection of the organizational patterns inherited from the post-colonial period and the overall political and institutional instability that has prevailed in the region. The judiciaries have deliberately opted for an introspective corporate approach to protect their distinctiveness and, by doing so, are losing sight of their legitimacy base and social utility function.

A direct consequence of this position is the passive role that judiciaries have played in driving change from within the judicial organization to respond to changing conditions derived from political, economic, or social factors. This inability to endogenously generate change has led to an increase in exogenous pressures for judicial change. In fact, the most significant changes to the judicial institution in the last decades have resulted from exogenous promotions by the political establishment. Judicial leaders have largely remained highly skeptical and reticent about introducing changes to their institutional and organizational structure. Moreover, changes such as the introduction of constitutional tribunals and administrative reforms have had limited impact in terms of modifying the overall judicial corporate culture. In some respects, these changes have even reinforced the defensive traits of the judiciary vis-à-vis exogenous pressure groups.

A rapidly expanding change in the structure of regional judiciaries has been the establishment of separate constitutional jurisdictions in the form of constitutional tribunals, which have taken over the protection of constitutional supremacy from supreme courts. The composition of constitutional tribunals, generally considered to be of su-

perior hierarchy to supreme courts in their special jurisdiction, continue to have representation from the judiciary; however, it has incorporated members appointed by the majoritarian branches of government with the objective of ensuring greater responsiveness to the political establishment. The regional trend toward establishing separate constitutional jurisdictions has principally derived from the failure of regional judiciaries to subject the acts of the executive and legislative branches to an ultimate review of substantive constitutionality. Most regional supreme courts adopted a highly formalistic and accommodating approach in deciding the constitutionality of government actions. This approach limits the review of constitutionality to compliance with formal requirements instead of a review of the disputed action's substantive consistency with constitutional provisions and principles. The onset of democratic regimes and the need to reinforce the democratic institutions in the region have led to an increased role for this separate constitutional jurisdiction.

Additional changes imposed by the political establishment to the regional judiciaries' corporate structure include the establishment of separate administrative councils that have taken over personnel functions from supreme courts (i.e. performance evaluation, recruitment, and promotions) and budgetary responsibilities. The composition of these councils has expanded to include judicial officials and representatives from the legislative and the executive branch. The establishment of these councils introduced technical expertise in the management of critical organizational functions and mitigated the ill usage of judicial appointments to preserve internal discipline, or as outright nepotism.[130]

The gradual divestiture of significant jurisdictional and organizational functions from the regional judiciaries, with the objective of mitigating the prevailing defensive corporate culture, needs to be carefully evaluated. There are indications that this divestiture may have generated some undesirable consequences instead of leading to an increase in judicial responsiveness. First, divestiture may have reinforced the enclave traits of the judicial culture by generating a siege mentality within the judiciary that intrinsically rejects any exogenous change. This puts reform-minded groups within the judici-

130. *See id.* (noting that nepotism has been pervasive in the judiciaries of the region).

ary in an increasingly feeble position because they perceive reforms to their status as a threat to their stability and well-being. Second, it may have increased the potential for conflict between the newly established constitutional jurisdictions and the supreme courts because the former reflects diverse philosophical and ideological views respecting the law and the judiciary's sociopolitical role. A conflict within the judicial branch may further deteriorate the effectiveness and prestige of the judiciary before society at large.[131] Finally, the divestiture of administrative functions may not have generated the expected improvements in the judiciaries' performance. The introduction of exogenous bodies to manage functions, which are intrinsic components of the judicial organization, may fail to improve efficiency and transparency and, in many cases, contribute to a further breakdown of the organizations' objectives and managerial priorities. In some Latin American countries, rather than inducing administrative efficiency, administrative councils have brought about political patronage as an additional disruptive component of an already weak judicial administrative function.

An important innovation in the regional judicial field has been the introduction of universal, versatile, and expedient constitutional actions. For example, the *Tutela* in Colombia and the *Recurso de Proteccion* in Chile enabled public access to the judiciary in order to redress abuses or arbitrary actions by the authorities. The public has responded positively to these new forms of constitutional protection, which have improved the public's image of judicial effectiveness. On the negative side, however, these new forms of protection have generated an avalanche of new cases brought before the courts and exacerbated judicial congestion.

Most Latin American judiciaries, having reluctantly undertaken changes in response to external forces, continue to face increased pressures for reform and a deteriorating reputation. Policymakers have attempted these reforms and, in some cases, significantly increased public expenditures in justice administration, but still have little to show in terms of results. The political establishment is looking for increasingly radical ways to catalyze real change within the

131. This form of potential conflict is already taking place in Colombia where an activist Constitutional Tribunal has generated increased demands on the ordinary judiciary in terms of individual rights protection.

judiciary including term limits for justices and far reaching judicial process reforms. Will the political establishment be more successful in generating the type of reforms that will result in a real improvement of the judiciary's performance? Results will only be encouraging if the proposed reforms are able to mitigate the strong defensive culture that continues to predominate in the regional judiciary.

Most judiciaries react to their sociopolitical environment and therefore do not develop conscious strategies to carry out deliberate corporate objectives. The prevailing culture is to continue performing the tasks traditionally assigned to the organization, without a corporate mission providing the relative priority among corporate objectives or a parameter to measure its effectiveness in achieving specific strategic objectives. It would seem that the implicit corporate strategy pursued by the regional judiciaries has been the perpetuation of the existing institutional framework irrespective of its efficiency in helping the judicial organizations to deliver prompt justice. Under an efficient pattern of institutional development, organizations are the dynamic forces promoting institutional change. In contrast, regional judiciaries have remained anchored to the institutional framework long after those institutions have shown their inability to provide effective third party enforcement to an increasingly complex and modern society.

One of the dimensions of the inability of the regional judicial organizations to cope with the growth and complexity of justice demands in these modernizing societies is the very primitive managerial systems that they exhibit. For instance, the allocation of resources for most regional judiciaries is static and not linked to real demands for justice. There is also an absence of adequate information systems that would enable effective monitoring of judicial performance. The solution to this reactive pattern of organizational culture is critical to initiating processes of judicial reform that have reasonable opportunities of success. Otherwise, initiatives will continue to be too little and too late for the magnitude of the challenge faced by the judiciaries in leading the transformation of their organization and its relevant institutional framework.

B. PREVAILING GOVERNANCE STRUCTURE

The regional judiciaries' traditional organizational structure is highly centralized, hierarchical, and autocratic. It is a structure in which most of the decisions related to both adjudication and human resource matters are concentrated in the supreme courts as ultimate decisionmakers. The courts also enjoy a wide range of discretion, particularly in issues related to human resource development.

In the area of adjudication, the concentration of power in the supreme courts has led to a process in which supreme courts review cases with virtually the same latitude and freedom as lower courts.[132] This practice has resulted in supreme courts neglecting their jurisprudential role, unduly restricting the level of autonomy expected for the lower echelons of the judiciary and significantly contributing to delays in adjudication.[133] In other cases, the concentration of powers in the supreme courts has led to confusion of the supreme courts' disciplinary and legal precedent setting functions, thus reinforcing the discretional elements of the hierarchical governance structure. In Chile, the supreme court has utilized disciplinary appeals, grounded in lower court abuses of their jurisdictional powers, as the primary recourse for reviewing lower court decisions.[134] This has led to a rather capricious process for setting judicial policy since the decision on the relevance of the cases brought before the court is defined by the interested parties, rather than by the policy priorities of the courts.

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132. *See Bolivia Report*, *supra* note 79, at 2-3 (noting that the Bolivian Supreme Court invests a substantial amount of time reviewing routine lower court decisions).

133. In the case of the Bolivian time flow study, the Supreme Court contributed almost 22% of the total time, about 576 days, to reach a final decision on an ordinary civil procedure. *See id.* at 9.

134. Eugenio Valenzuela Somarriva, Comision de Estudios del Sistema Judicial Chileno, *Proposiciones para la Reforma Judicial, in* LABOR JURISDICCIONAL DE LA CORTE SUPREMA (1991). The "Casaciones en el Fondo" (corresponding to the exercise of the pure jurisprudence setting function) admitted by the Supreme Court of Chile during the period 1969-89 ranged from 18 to 19% of the total cases decided by the Court, while the "Recursos de Queja" (disciplinary actions against the lower courts for abuses in the discharge of their duties, which enables the revision of lower court decisions) represented a majority of the total cases reviewed by the Chilean Supreme Court. *See id.*

The actions undertaken by supreme courts in the human resource field have reinforced the hierarchical and autocratic governance structure of the judiciary. The discharge of critical functions, such as personnel selection, performance evaluation, and career development, are undertaken by the supreme courts, with limited transparency in terms of policies, systems, criteria, or technical standards to be followed. In most judicial governance structures, the supreme courts have retained a high level of discretion in these functional areas.[135] The courts have largely maintained this discretion despite the establishment of administrative councils in some countries. In these situations, the supreme courts may need to share some of their discretionary powers with the councils.

The ultimate concentration of all human resource functions in the discretionary authority of supreme courts resulted in two ideal types of judicial personnel. These ideal types derive mainly from the level of autonomy of the supreme courts from exogenous forces such as the political establishment.[136]

First, corresponding to an autocratic judicial structure, one ideal type is comprised of judicial staff with a high level of professionalism and a strong allegiance to the corporate culture and authorities. These individuals would have long-term career prospects. The lack of clarity in the rules for performance evaluation and career advancement, however, combined with the strong verticality of power, would create weak incentives for innovation and entrepreneurial spirit by those in the lower echelons of the judicial structure.[137] The Chilean judiciary closely resembles this type.[138]

Corresponding to a judicial structure with low autonomy from political patronage, the second ideal type is comprised of personnel with low levels of professionalism and allegiance to the prevailing

135. *See Bolivia Report, supra* note 79, at 5 (noting that prior to the new policies, Bolivian Justices had discretion in recruitment and career advancement decisions).

136. *See* Vaughn, *supra* note 96, at 594 (suggesting that reducing the authority of the Chilean Supreme Court may transform the judiciary into a less hierarchical bureaucracy). These ideal types closely resemble the ones discussed above related to the selection systems for supreme court justices. *See supra* pt. V.D (providing an overview of judicial selection processes in Latin America).

137. *See* Vaughn, *supra* note 96, at 593 (noting that the resulting bureaucracy "emphasizes seniority and appears isolated from society").

138. *See id.*

corporate structure and authorities. Short to medium-term career prospects would generate limited incentives for individuals to excel professionally.[139] Moreover, because these individuals do not perceive career advancement as related to performance, there are limited incentives for training, innovation, and entrepreneurship in the discharge of judicial functions. The Bolivian judiciary most closely resembles this ideal type of judicial personnel.[140]

The review of the prevalent governance structure within the judiciary confirms the trend toward preservation of the status quo that seems to prevail among judicial leaders. The hierarchical and autocratic structures generate strong aversion toward innovation. Even where there are strong inducements toward professional excellence and diligent performance, the system's incentives are for performance within the judicial philosophies and administrative parameters prevalent at the higher ranks of the judicial hierarchy. Thus, the governance structure of the regional judiciaries constitutes a reinforcing element of the reactive and defensive corporate culture described above.

Most of the changes proposed as part of the process of judicial reform in Latin America have had limited impact on the prevalent government structure. Supreme courts have agreed to share some of their powers, as concessions to the political establishment, but ultimately have been reluctant to allow a change in the discretionary nature of those powers through the introduction of more transparent policies. The result has been a higher exposure of the judiciary to political patronage, but very limited, if any, progress in contributing to the improvement of judicial administration and the professional improvement of its agents.[141]

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139. *See Bolivia Report, supra* note 79, at 6 (noting that the introduction of competitive recruitment and promotion practices will improve the judicial organizational structure).

140. *See id.*

141. Nestor Humberto Martinez, Corporacion Excelencia de la Justicia, *Diez Pecados Capitales de la Reforma Judicial en America Latina, in* SERIE CRITERIOS DE JUSTICIA (1997) (starting to dispel the myth of the contribution of administrative councils). Although more analytical work needs to be done on the real contribution of these councils in solving the judicial problem in the region, a preliminary estimation indicates that it has been more a source of increasing distortions than one of progress. *See id.*

IX. STRATEGIC OBJECTIVES OF A JUDICIAL REFORM PROCESS

The decreasing social utility and political legitimacy of Latin American judiciaries derive from the growing disharmony between the current judicial institutional and organizational paradigms and the demands and needs for justice arising from increasingly modern and democratic societies. The highly defensive and reactive culture prevailing in regional judiciaries only compounds this growing disharmony. The possibilities for change within the judiciary are also dim, resulting from its highly centralized and hierarchical structure.

Current judicial reform strategies emphasize initiatives aimed at dealing with the direct effects of this mismatch. Some of these effects include increases in transaction costs derived from process delays, mounting caseloads, and obsolete managerial techniques that demand a strong investment of the judges' time in administrative matters.[142] Overall, these initiatives have not accomplished much in improving judicial performance. Judicial reform initiatives have enjoyed very limited support from judicial organizations, thereby limiting the ability of those reforms to introduce significant changes in the organizations' culture and corporate objectives.

For a judicial reform program to effectively overcome the current justice crisis, it should focus on bringing about changes conducive to two overarching objectives. The first objective is to ensure greater responsiveness of the judiciary as an organization to the demands of society, particularly in the performance of its prudential constitutional roles, and greater openness to prevailing social values and pri-

142. The myth that the problems facing the Latin American judiciary are mostly "quantitative" and managerial derives from shallow evaluations carried out by experts not familiar with the systems pitfalls. *See* Steven Flanders, "*Court Administration in Colombia: an American Visitor's Perspective*, 71 JUDICATURE 36 (1987). Mr. Flanders, in describing judicial activities, indicates that "they operate [at the level of original jurisdiction] in tiny and self-contained operations called juzgados in which a great deal of time is preempted by matters involving minimal exercise of judicial discretion or none." *Id.* Mr. Flanders did not consider that those matters involving "minimal exercise of judicial discretion" constitute the thrust of the jurisdictional activity currently performed by regional judges. Unfortunately, based on these types of assessments, many judicial reforms in the region have predicated the need to reduce the inordinate administrative burden of judges rather than focusing on the institutional grounds of the judicial process, such as neutrality and formality. *See id.* at 37.

orities. A second objective is to ensure improved effectiveness of the judiciary in the discharge of its principal functions, namely, dispute resolution and institutional enforcement.

The pursuit of these objectives translates into a specific reform agenda aimed at changing those institutional and organizational structures that are preventing the judiciaries from performing their political and social responsibilities. The following items constitute vital components of a more specific reform agenda:

- Changes to the judiciary's structure and operational policies to ensure an adequate balance between the degree of autonomy required by the judiciary and the level of accountability to the political establishment and civil society. The reforms should seek to mitigate the high level of autocracy enjoyed by regional judiciaries, a major contributor to their substantial loss of legitimacy, and ensure their accountability and sensitivity to democratic processes and social needs. It is crucial, however, to ensure that these adjustments to the judicial structure do not reach a level of interference by extra-judiciary forces that would compromise the independent nature of the judicial function.

- Closing the gap between the current judicial institutional and organizational framework and the dispute resolution and institutional enforcement needs of Latin American societies. Actions in this field would focus on two areas. First, judicial process reforms[143] would ensure expediency in the enforcement of rights, a quality review process providing a reasonable balance between formal due process requirements and substantive due process objectives, and a judicial decision founded on predictable and sound norms. A second focus is the introduction of alternative dispute mechanisms to effectively manage vast areas of social conflict currently handled by the judiciary. This would minimize judicial congestion and process delay.

- Broaden access to justice for significant sectors of society currently cut off from dispute resolution services. This objective would not only contribute substantially to the social legitimacy of the judiciary, but also to the fulfillment of the judiciary's social function of

143. *See infra* pt. X (discussing the variety of possible judicial reforms, including increased judicial activism, procedural transparency, and oral argument).

providing adequate incentives for efficient and broad cooperation among economic, political, and social agents.

- The introduction of modern planning and management techniques that would ensure an efficient allocation and use of judicial resources, including the establishment of corporate performance targets susceptible to review and monitoring by external actors.[144] Contrary to some of the current judicial reform experiences, the introduction of modern managerial techniques should be subordinated and viewed as instruments to ensure the implementation of the overarching objectives, rather than as reform objectives unto themselves. These changes will need to coordinate with the institutional and organizational reforms they underpin. Many judicial reform initiatives have substantially distorted the need for reform by merely promoting managerial reforms as a substitute for the needed institutional and organizational changes. This phenomenon, described by a highly regarded Uruguayan Justice as equivalent to installing an outboard motor in a caravel,[145] may generate either marginal benefits or, in some cases, further intricate an already abstruse and tortuous process.

- Ensuring a workable fiscal scenario for the introduction of a comprehensive reform process. The expected fiscal demands should derive from a micro-economic analysis of the costs of introducing the proposed reforms. While some efficiency improvements can be expected, at least in the medium-term, reforms could entail significant incremental outlays of fiscal resources. The commitment of additional fiscal resources should evolve from a clear understanding by the relevant authorities of the scope and extent of the proposed reforms. The recent Colombian experience in this field should provide a clear lesson of how not to handle the incremental commitment of fiscal resources without sufficient clarity of the reform objectives

144. *See* Edgardo Buscaglia, *A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America*, 17 INT'L REV. L. & ECON. 275, 284-85 (1997) (citing case management as a factor directly related to the efficiency of Latin American courts); *see also* A. Leo Lewin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 878-79 (1993) (stating that many experts assessed the significance of the Civil Justice Reform Act in terms of case management techniques and ignored the larger implications of the Act).

145. A "caravel" is a small Spanish sailing vessel from the fifteenth century.

and their scope. Public expenditures on the Colombian judiciary increased from 0.65 percent of GDP in 1990 to 1.14 percent of GDP in 1996, reflecting an average real annual increase in justice expenditures of seventeen percent during the last five years.[146] Salary increases and hiring of personnel largely reflect this increased spending. Investment expenditures represent about ten percent of the total sector budget, which is heavily concentrated in physical infrastructure, thus, leaving no room for investments that would promote the type of institutional and organizational changes required by the sector. The corollary of this last five years of significant fiscal effort to improve justice administration in Colombia is that there has been no appreciable improvement in the prompt delivery of justice.

X. THE POLITICAL ECONOMY OF JUDICIAL REFORM

The political economy underlying a judicial reform process blends many intricate elements, presenting some remarkable peculiarities as compared to other reforms that have been undertaken in Latin America, such as macroeconomic stabilization, trade, or social security reforms. This section reviews the political economy constraints derived from the peculiar nature of the institutional and organizational structures governing the regional judiciaries and describes some of the conditions for the development of a successful judicial reform strategy.

A. POLITICAL ECONOMY CONSTRAINTS

The first consideration in determining the judiciary's performance is the multi-tier institutional system shaping the governance structure and operations of judiciaries, and the type of relationships—controlling, complementary, autonomous or hierarchical—that may exist among those different tiers.[147] Institutional elements range from formal constitutional provisions defining the attributes of the judicial

146. *See* COMISION DE RACIONALIZACION DEL GASTO Y DE LAS FINANZAS PUBLICAS, INFORME FINAL, TEMA V, JUSTICIA Y DERECHOS CIVILES (1997).

147. *See generally* James March & Johan Olson, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984) (describing the new institutionalism as a multi-tier perspective on studying political institutions).

branch and statutory provisions regulating civil procedures, to more informal elements, such as the prevailing judicial reasoning and management of civil and criminal cases.[148] A direct consequence of this multi-tiered structure is the need to define comprehensive reform agendas that would deal in a synchronous manner with all the institutional and organizational elements that may be determining a specific judicial performance. For example, a reform of formal statutory rules must be in tandem with relevant changes in the informal institutions and organizational arrangements that will ensure the effectiveness of the intended change.[149] A generalized postulate in judicial reform initiatives is that the informal institutional elements largely have a controlling and determinant effect over formal institutional changes. Moreover, the multi-tiered institutional structure requires close coordination and cooperation among the various stakeholders that control the various institutional elements, such as the political establishment, the judiciary and, in some cases, society as a whole.

A typical example of an aborted reform effort is the Bolivian attempt in the early 1970s to introduce civil procedure reforms emphasizing the judges' primary responsibility for concluding cases within legally mandated deadlines.[150] This reform provided judges with powerful procedural instruments to carry out their responsibilities. Under the new legislation, for instance, judges had the authority to cut off any incidental proceedings deemed dilatory, and they played an active role in fact gathering and weighing evidence, as well as promoting conciliation.[151] Unfortunately, the necessary corresponding initiatives did not follow this ambitious legislative reform. At the organizational level, there were no incentives created to promote

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148. *See, e.g.*, Perry, *supra* note 72, at 65 (explaining the formal constitutional provisions affecting the U.S. judiciary); Wallace, *supra* note 66, at 81 (explaining interpretivism, one of the prevalent schools of judicial reasoning in the United States); Shaman, *supra* note 67, at 80 (advocating non-interpretivism, a competing school of judicial reasoning in the United States).

149. *See* Daniel P. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 22 (1994) (stating that institutions are the principal arenas for critical political decisionmaking). The author explains that "[i]nstitutional constraints include the variety of structures and procedures that limit the ability of individual lawmakers and collections of lawmakers from implementing their preferences though the regulatory statute." *Id.* at 106.

150. *See Bolivia Report*, *supra* note 79, at 8-13 (providing background and a performance evaluation of the Bolivian Code of Civil Procedure).

151. *See id.* at 8.

compliance with the new statute. Additionally, at the mental construct level, no training was available to judges for the new role they would discharge or the prevailing corporate culture under which they would labor. In fact, judicial leaders were either reluctant or opposed to these reforms. The result was de facto abandonment of the legislative reform and the continued prevalence of informal institutional elements and organizational incentives over the legislative mandate.[152]

Another intricate element is the determinant role that the judiciary plays in ultimately bringing about the necessary reforms, irrespective of the exogenous pressures. This determinant role is a result of the judiciary's independent nature and the necessary role played in the overall reform process by those institutional and organizational changes endogenously controlled by the judiciary. Any judicial reform strategy, therefore, must seek a delicate balance between preserving the integrity and autonomy of the judicial organization, to enable its continuing impartial functioning, and increasing the judiciary's responsiveness and accountability to society.

This peculiarity of the judicial organizational reforms precludes the type of organizational changes that have been customary in other reform scenarios, such as the privatization, liquidation or, exogenously-driven restructuring of other organizations. Hence, judicial reformers face a dilemma: on the one hand, the judiciaries' reactive and defensive corporate culture and, on the other hand, the ultimate dependence of any reform effort on the judiciary's willingness to reform itself.

Although some stakeholders, like the legislative branch, may have authority in bringing about some critical institutional changes, the judiciary plays the decisive role of providing the leadership to bring about the necessary organizational changes. Thus, the possibility of a comprehensive and effective change of the judiciaries' role and operations without the deliberate concurrence of judicial leadership to those changes seems practically unattainable.

A reflection of this constraint is that the few experiences of successful change within the judiciary have relied on the initiatives or active participation of the judicial leadership. Historically, this has

152. *See id.* at 11.

been the case of the United States judiciary. In the United States, judicial leadership has played an indispensable role in successfully overcoming the various challenges to the judicial functions from more than two centuries of dramatic social and economic change. In Latin America, an isolated case where the judiciary has taken a clear leadership role has been in the civil procedure reforms implemented in Uruguay since the early 1990s.[153] In the Uruguay case, the judicial leadership promoted the legislative, informal institutional, and organizational changes necessary to make the reforms take shape.[154] On the other hand, the possibilities of deepening the strategy of divesting the judiciary of some of its core roles and the establishment of parallel bodies, such as the administrative council, seem exhausted.

A major peculiarity of judicial reform processes in Latin America is that change will require a combination and synchronization of exogenous changes, coming mainly from the political establishment and from within the judiciary's institutional and organizational structure. The counter-reform attitude prevailing in regional judiciaries would probably frustrate significant reform initiatives unless changes in the judiciaries' governance structure and corporate culture would make them more responsive to the judicial needs of modern, democratic societies. Thus, there is strong potential for the continued reproduction of the prevailing confrontational pattern between the pro-reform groups and the reactive regional judiciaries, unless some change occurs from within the judiciaries' institutional and organizational foundations. Are there alternative reform strategies that would be able to overcome this virtually insurmountable impasse that has frustrated many judicial reform initiatives in the region?

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153. *See* LINN A. HAMMERGREN, THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA 271 (1997) (discussing Uruguay's civil procedure code).

154. *See* Luis Torello, Corporacion de Promocion Universitaria, *Lineamientos Generales de la Reforma Procesal Civil y el Caso Concreto de la Reforma en el Uruguay*, *in* REFORMAS PROCESALES EN AMERICA LATINA (1993) (providing a detailed account of the Uruguayan experience, including the political economy aspects).

B. ELEMENTS FOR THE DESIGN OF A PRODUCTIVE JUDICIAL REFORM STRATEGY

A starting point for the development of a productive judicial reform strategy is the development of a consensus with regard to the specific reform agenda and the constituents that would uphold or oppose its implementation. This is an area revealing a lack of clarity in the past.[155] This essay has identified a specific approach centered on two overarching objectives. These objectives, which seem to have the ability to mobilize widespread support from the elements of society affected by the current judicial structure and performance, may be perceived as a losing proposition by the members of the judicial establishment.

The potential opposition by the incumbent judicial leadership may require the promotion of a phased reform process. The first phase of the process would focus on changes aimed at increasing the degree of responsiveness and accountability of the judicial governance structure to the needs of the increasingly modern and democratic regional societies. This would imply reducing the enclave and autocratic nature of current governance structures and, in some cases, their inordinate dependence on the political establishment. This process could involve the introduction of changes to the mechanisms and criteria for appointing senior judicial positions that would mitigate the prevailing inbreeding within the judicial bureaucracy and the discretionary nature of the appointment process. To improve the overall quality of the regional judicial leadership, serious consideration should be given to the selection of supreme court justices exclusively on the basis of merit. For example, the criteria could include the candidate's caliber and experience for assuming a judicial leadership role and the type of vision, in terms of judicial philosophy and judicial corporate strategy that he would bring into office. Moreover, the selection process should occur in a public forum, which would help to improve the public's knowledge about their judicial leaders and increase the latter's accountability in the discharge of their duties.

155. *See* Dakolias, *supra* note 3, at 226 (stating that "[t]o develop and implement a program, consensus is needed . . . . Any program of judicial reform must consider the vested interests in the judiciary, the bar associations and other branches of government. These vested interests can impede consensus.").

The recent constitutional reform in Chile—establishing that five of the twenty-one members of the Supreme Court would come from outside the judicial career stream and limiting the tenure of justices—constitutes a step in the right direction.[156] This change, however, may be too modest, as it would apply to a very limited portion of the Supreme Court appointments, fail to introduce substantive merit selection criteria, and refrain from conducting the selection process in a context of transparency.

It is possible to replicate the changes in the selection criteria and procedures for judicial leaders, with the necessary adjustments, at the lower echelons of the judicial organization. One of those adjustments is the possibility of participation in the selection of judges by civil organizations with an interest in the fair and expedient delivery of justice. Increasing public access to the operations and performance results would be another method of increasing the accountability of judiciaries to society and generating a momentum for reform within the judicial organizations.[157]

Another element of the preliminary reform efforts should be to increase the quality of the judicial reform debate at the academic, judicial, and political levels. There is a critical need to look beyond the region for successful experiences in all areas of judicial reform described above. Moreover, there should be a substantial increase in the level of analytical work conducted to diagnose the performance and effects of the prevailing judicial structure.

The second phase of the reform process could only be initiated once there is some critical mass momentum for judicial reform within the judiciary leadership and its rank and file. By the time that level is achieved and a consensus is formed between the political establishment and society, far reaching changes in the judicial process and organizational elements of the judiciary could be promoted. The design of specific reform initiatives should take into consideration

156. *See* ALEXANDRA BARAHONA DE BRITO, HUMAN RIGHTS & DEMOCRATIZATION IN LATIN AMERICA 153 (1997) (discussing Chile's attempt to reform the judiciary); *see also* Vaughn, *supra* note 96, at 598-99 (discussing the Chilean judicial reform legislation passed in 1991).

157. *See* Dakolias, *supra* note 3, at 176 (proposing that "an evaluation system must be in place to allow the profession and the public to monitor judicial activity").

the multi-tier institutional nature and related organizational issues involved in the reform of judicial processes.

Careful and comprehensive design of those reform initiatives and the dialogue and agreement among all the stakeholders involved, including the judicial leadership, constitutes a crucial element for the successful implementation and strengthening of the reform movement. The sequencing and phasing of reforms should take into account a realistic assessment of the potential for change in these highly stagnant and rigid organizations. The attempt to carry out partial reforms that do not aim at dealing with the real institutional or organizational constraints, or that fail to enlist and mobilize the relevant actors, will be predestined to failure and further frustrate the social expectations for universal, fair, and expedient judicial services in Latin America.

XI. CONCLUSIONS

This essay attempted to contribute to the continuing discussion on the need for regional judiciaries to respond more effectively to the justice demands arising from societies subjected to a rapid pace of social, political, and economic change. In doing so, it recognized that those judicial reforms present some peculiarities as compared to other reforms, such as macroeconomic stabilization, trade, and social security, that have been undertaken in Latin America. This makes it more difficult to define the reform agenda and to deal with issues of political economy.

The institutional framework constraining the judiciary's governance structure and operations is highly diversified and multi-tiered. Judicial institutions range from the constitutional provisions governing the independent role vis-à-vis the other branches of government to issues on the traditions and practices surrounding the handling of dispute resolution matters. A remarkable peculiarity of judicial institutional structures is the substantial weight of informal institutions, such as the judiciary's corporate culture, and the prevailing judicial philosophies.

The nature of the judiciary as an organization, in terms of its corporate strategies and governance structure, does not facilitate the task of diagnosis and strategy formulation. The strong dependence of the success of any judicial reform strategy on ensuring the integrity and

autonomy of the judicial organization, precludes any form of organizational change like those customary in other reform scenarios—i.e., the privatization or the liquidation of the organization. In the case of judicial reforms, a *sine qua non* is the strengthening and conservation of the judicial organization while, at the same time, increasing its responsiveness and accountability to society.

These institutional and organizational peculiarities make the political economy issues particularly difficult, especially in light of the highly reactive and defensive cultures that have prevailed among the regional judiciaries. This essay has provided some basic political economy considerations that should be taken into account in the design of judicial reform programs in the region. Those considerations are derived directly from the very special institutional and organizational peculiarities of regional judiciaries.

The introduction of analytical tools of institutional economics in the diagnosis of the regional judiciaries may constitute a significant contribution in improving the depth of judicial reform analyses. This essay attempts to provide an initial view following this approach. This may prove particularly useful in attempting to make more productive and systematic progress in such a critical and socially relevant field.

A major portion of this essay attempted to identify and describe the major historic, institutional, and organizational constraints governing the regional judiciaries' structure and operations. The purpose of this exercise was to identify the real constraints preventing judicial change as opposed to the consequences generated by those constraints, namely, court delay and congestion. As a result of this analysis, this essay proposed the main strategic objectives that should be pursued in judicial reform programs in the region. With very limited exceptions, this essay argues that most reform programs in the region have failed to uncover and address these real elements.