

**JUSTICE FOR PERUVIAN CONSUMERS?
INDECOPI AND CONSUMER PROTECTION**

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Abstract

The criteria for the existence of the rule of law include abstract, universal legal norms; limited government that itself is subject to law; constitutionally guaranteed rights; and an independent judiciary with powers of constitutional review. Owing to the region's particular development path, no Latin American country has fully institutionalized the rule of law. Recent efforts at reforming legal and judicial systems have failed because they take no account of the corporative nature of Latin American social structures, particularly as regards the magistracy and the bar (as well as the other learned professions). Judges, like other professionals, are bound together, and separated from the rest of the society, by particular affective and value-based solidarities that play a major role in their social identification, interest definitions, and forms of action; all these have been institutionalized in the form of a "judicial culture" that highly values the magistracy's corporate autonomy (not the same thing as judicial independence) and resists any "external interference" even when its objectives seem favorable to judges' own self-interest. This implies that reform will be an incremental process; that it may depend on the arrival of new people with "mentalities" unaffected by membership in the existing corporative solidarity networks; and that it may register more advances more quickly in new judicial institutions than in existing ones. I examine these propositions in the light of the experience of INDECOPI, Peru's quasi-judicial administrative agency responsible for market regulation. I consider the implications of its experiences for broader judicial reform in Peru.

However bad the condition of law and justice in most of Latin America, it is widely agreed that Peru's situation is worse than most. Many former high court justices, along with attorneys old enough to have been in practice since the 1960s, have claimed to witness an across-the-board decline in the quality of the judiciary since then. Obviously, ex-president Alberto Fujimori further worsened the situation when, in the wake of his 1992 *autogolpe*, he purged the judiciary of about 70 percent of its magistrates and appellate judges on grounds of corruption or complicity with the Sendero Luminoso and MRTA terrorists who were then plaguing the country. Those who replaced the dismissed judges were not merely chosen with explicit reference to their partisan affiliations and loyalties—a common enough practice in the U.S. Federal judiciary (one that, for a variety of reasons, has not compromised its institutional independence) but one that, as we will see, seriously violated the norms and practices of Peru's civil law tradition. Fujimori then compounded the damage by using the subservient courts, in several well-publicized cases, as clubs to beat several of his political enemies; and, ultimately, by manipulating the makeup of the Supreme Court and the Constitutional Tribunal until they finally approved his campaign for a plainly unconstitutional third term of office. There are also the routine violations or neglect of citizens' rights and the inability of the system to resolve private disputes quickly enough to do the disputants any good. The Peruvian system of law and justice simply fails to give citizens the guidance they need if they are to use their constitutionally specified freedoms to pursue their interests in ways that do not run afoul of legal strictures and the society's moral norms.

From a narrowly institutional perspective there is little more to be said: Peru needs to update its legal codes, overhaul its judicial institutions, and set up procedures for the selection, promotion, and discipline of judges that will remove partisan criteria from consideration, investigate and severely punish bribery and corruption, and ensure that advancement in the judicial career depends, as it is supposed to,

on merit and seniority alone. My ongoing research on the rule of law in Latin America has revealed, however, that institutional redesign is unlikely to be sufficient . . . or even effective. Not that institutions are unimportant: the “new institutionalism” in political science has taught us otherwise. The difficulty is that the rule of law is also an idea about culture—that is, about behavioral customs and habits that stress rule observance and promote rule-bound relations among strangers who may share a mutual interest in transacting (relating socially) with one another but are not linked by affective bonds of the sort that convey interpersonal trust.

The judicial reform literature argues that successful reform depends on a broad societal consensus. That in turn demands that some social force, or coalition of social forces, with a direct interest in systemic reform play a societal leadership role. Lawyers and judges have, in fact, played such a role in the evolution of the rule of law in Western Europe¹—but never, insofar as I have been able to determine, in Latin America. I submit that the reason for their near-absence from the political debate over reform is that in Latin America the judicial corps and private bar have developed, in the absence of a legal environment capable of regulating relations among different social forces and thus rendering them secure, solidaristic ties of affection and trust among their members. A comparably solidaristic network of social and economic relations links the family groups that control the largest industrial establishments in most Latin American countries, with the result that the business sector, too, is not well positioned to exert societal leadership in behalf of reforms which, if enacted, would benefit it enormously.

There are two conceivable routes by which a Latin American transformation from a corporative, solidaristic form of social organization to the more abstract, impersonal form implied by the rule of law might nonetheless take place. One is through the gradual adoption of new values along with new ways of defining and pursuing interests. Generational shifts could bring that about if, e.g., a significant proportion of new entrants to the bar and judiciary are young people whose professional formation has been

1. Terence C. Halliday and Lucien Karpik, eds., *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*, Oxford Socio-Legal Studies (Oxford: Oxford University Press, Clarendon, 1997).

influenced by European or American practices. The other is through changes in economic structure that induce large numbers of citizens to redefine their interests in legalized terms, that is, in terms of rights and obligations secured by contract. For most citizens that would mean their rights and obligations as consumers. Consumer protection is relevant here because it implies arm's-length, abstract market relations between sellers and buyers of goods and services: in Peru, as in many other countries of the region, people are dealing more than ever before with supermarkets, department stores, credit card issuers, and the like, and less than before with neighborhood merchants and moneylenders. If citizens' disputes with large-scale, impersonal providers of goods and services lead to the increasing "judicialization" of private contractual disputes, that would represent a significant advance for the rule of law.

In this paper I develop the idea of corporative social structure and relate it to recent Peruvian developments in the area of consumer protection. I first discuss in theoretical terms how and why this kind of social structure evolves and then demonstrate how Latin America's particular sequence of path-dependent development has created such a social structure. I conclude the theoretical discussion by pointing out the corporative nature of the Peruvian judiciary and detailing the implications of the analysis for legal and judicial reform. Next I turn to the institution known as INDECOPI (National Institute for the Defense of Competition and the Protection of Intellectual Property), which since 1993 has exercised formal responsibility for market regulation in all its aspects, including that of consumer protection, and which also adjudicates disputes among contracting parties that arise within its areas of responsibility. Here I show how and why it was possible for such a government institution to be created and to function quite well even under an elected executive whose attitude toward the rule of law could be accurately described, at least to the extent that it impeded the realization of his political objectives, as contemptuous. In the concluding section I consider what these developments may imply for the eventual deepening of the rule of law in Peru and elsewhere in the region.

RULE OF LAW VS. CORPORATIVE SOCIETY

The rule of law can be said to exist in a country to the degree that the following standards are met. (1) Legal norms are abstract and universal in form and applicability and reasonably stable so that private citizens can foresee what the law requires and plan their actions accordingly. All citizens are juridical equals. (2) Government officials are bound by law just like private citizens. (3) Supreme law (the constitution) endows citizens with rights that may not be violated by governmental or private action. (4) An independent judiciary exists to resolve private disputes fairly, enable aggrieved citizens to vindicate their rights, and hold other branches of government accountable if they fail to behave as the law requires. It may be stated as a fifth criterion that the constitution must also include a public “rule of recognition,” the procedures and standards that instruct citizens when a command issued in the name of the state qualifies as law and, therefore, creates an obligation of obedience.² The burgeoning literature on judicial reform in Latin America attests to the growing recognition that law and justice are two aspects of liberal democratic institutionalization that, as compared, say, with electoral mechanisms the organization of national legislatures, or executive-legislative relations, are only now being seriously addressed.³ Peru, like most (perhaps all) of the countries of the region, is governed through legal formalisms, in that policy output primarily takes the form of statutes and regulations issued pursuant to statutory authority. Its legal and judicial orders, however, do not meet the standards for the rule of law.

2. For a formal statement of existence criteria for the rule of law, see Lawrence B. Solum, “Equity and the Rule of Law,” in *Nomos XXXVI: The Rule of Law*, edited by Ian Shapiro, Yearbook of the American Society for Political and Legal Philosophy (New York: New York University Press, 1994), 122. The idea of a “rule of recognition” is due to H.L.A. Hart, *The Concept of Law*, Clarendon Law Series (Oxford: Oxford University Press, Clarendon, 1961); for discussion see, e.g., Lon L. Fuller, *The Morality of Law*, rev. ed., Storrs Lectures on Jurisprudence, Yale Law School, 1963 (New Haven: Yale University Press, 1969), 192-93; Jean Hampton, “Democracy and the Rule of Law,” in *Nomos XXXVI: The Rule of Law*, edited by Ian Shapiro, Yearbook of the American Society for Political and Legal Philosophy (New York: New York University Press, 1994), 24-29.

3. I have commented on the importance of the legal-judicial order to liberal democratic development in David G. Becker, “Latin America: Beyond ‘Democratic Consolidation’,” *Journal of Democracy* 10, no. 2 (April 1999): 138-51.

To some extent Peru's difficulties are worsened by institutional features of the civil law tradition it shares with Continental Europe,⁴ and I see no likelihood of that tradition being exchanged for another no matter what analysts may advise.⁵ These problems include a separation-of-powers doctrine that is hostile to the idea of constitutional review on the ground that judges should not "make" law;⁶ the institutionalization of the judiciary as a bureaucratic corps, which deprives judges (except at the highest levels of the system) of the public visibility and prestige that common law judges often enjoy and which, in the process, conduces toward timid decisions framed so as not to displease the judge's hierarchical superiors; excessive reliance in decision-making and in justificatory writings on deduction from first principles of "legal science," with relative inattention to social or economic consequences; and trial modalities that, whatever their usefulness for determining the facts of a case, totally lack the drama—and, thus, the public educative value—of the common law trial.⁷ Yet Continental judicial practice and jurisprudence have adapted nicely to the exigencies of modern liberal democracy and market capitalism: in Western Europe constitutional review is now practiced, courts do hold governments accountable (in addition to being themselves reasonably honest and efficient), and the judiciary does construct new doctrines that take account of changes in the "real world" of society and economy.⁸ And if perceptions of corruption are taken to be inversely proportional, and the rate of public approval directly proportional, to

4. John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2d ed., reprint, 1969 (Stanford, California: Stanford University Press, 1985); Kenneth L. Karst and Keith S. Rosenn, *Law and Development in Latin America: A Case Book*, UCLA Latin American Studies Series, vol. 28 (Berkeley and Los Angeles: University of California Press, 1975).

5. Legal-institutional traditions of this comprehensiveness, just like political-institutional traditions such as presidentialism versus parliamentarism, embed themselves very deeply in national political cultures.

6. Merryman, *Civil Law Tradition*, 22.

7. Especially in Latin America, where post-1960s Western European institutional innovations are just beginning to be discussed, the trial features written rather than oral testimony, frequent meetings between judges and parties (or just one of them) to discuss details of the case, episodic meetings that stretch out over months or years in place of a time-concentrated process, and, thanks to control of the proceedings by judges rather than advocates, a written record that is almost always legalistic and dull.

8. Actually, European judges have done this for many years. See, e.g., Doris Marie Provine, "Courts and the Political Process in France," in *Courts, Law, and Politics in Comparative Perspective*, Herbert Jacob, et al. (New Haven: Yale University Press, 1996), 232; Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), 137-38.

the quality and efficiency of the judiciary's handling of "real world" concerns, Continental judiciaries score about as highly as the respected common law judiciaries of the United States, Britain, and most Commonwealth countries. Civil law institutions may well impede the usual solutions that have been advanced for improving judicial performance, but we evidently need to look elsewhere for the sources of Peru's difficulties.

A better place to begin is with two observations. One is that in place of the standard, "one law for everyone, everyone equal under the law," Peru and other Latin American countries are host to numbers of "special law communities" whose operative behavioral rules and norms are specific to the communal group itself.⁹ The other is that Peruvian social organization and structure, as revealed by observations of political discourse and action over time, are neither pluralist in Dahl's sense of crosscutting interest definitions that do not much affect actors' construction of identities, nor class-polarized in the sense of class identities being fundamental facts of social life. Instead, Peruvian society is *corporative*.

The Nature of Corporative Social Organization and Structure

Corporatism is a form of interest representation in which the interests of the principal business and labor sectors are represented by formal organizations ("peak associations") that enjoy official recognition or license as the authorized agents of their member groups: business firms in the case of the organizations representative of capital, and local unions or subnational federations in the case of those representative of workers. Key economic policies are worked out in negotiations involving leaders of the "peak associations" and government technocrats who act as mediators and "facilitators" (though they often enough twist arms to obtain agreements along lines preferred by the government); the role of the legislature is not so much to make policy through open debate and a public clash of interests ("politics")

9. Anthony T. Kronman, *Max Weber, Jurists: Profiles in Legal Theory* (Stanford, California: Stanford University Press, 1983), 108-9.

as to ratify these backdoor negotiated agreements (“management”) and translate them into legal form.¹⁰

The corporatism literature, however, did not consider how this mode of interest representation might relate to social structure or culture.

Corporative Solidarities and Uncertain Legal Environments.

If the rule of law is weak or nonexistent and if no other effective means of social control replaces it as a guarantee of rule-observing and promise-keeping behaviors, the theory of collective action predicts, and experience verifies, that cooperation will be limited and social relations of exchange severely constrained. Institutions—initially, customary, habitual “rules of the game”—constrain behavior, thereby making it more predictable, and inculcate values such as trustworthiness and promise-keeping, that lend some security to exchange relations extending over time (as do, e.g., all contracted exchanges of goods that are not strictly “cash and carry”). In short, institutions are, and their existence and forms can be explained as, answers to collective action problems.¹¹

Initially, trust provides a basis for collective action within solidaristic social groups. Affective bonds and knowledge born of direct, face-to-face acquaintanceship over time make it possible for people to have a good idea of how other members of the group will act in a variety of circumstances. In addition, a sense of common interest or enterprise, together with the distinction from the society at large that every subnational solidarity implies, lower the likelihood of free-riding, defection, and other forms of exploitation. Eventually the solidaristic group works out internally “formal and informal rules governing

10. Philippe C. Schmitter, “Still the Century of Corporatism?” *Review of Politics* 36 (1974): 85-131; Philippe Schmitter and Gerhard Lembruch, eds., *Trends Toward Corporatist Intermediation*, Contemporary Political Sociology (Beverly Hills, California: Sage Publications, 1979). For a critical view see, e.g., Leo Panitch, “The Development of Corporatism in Liberal Democracies,” *Comparative Political Studies* 10, no. 1 (1977): 21-43.

11. J.G. March and J.P. Olsen, “The New Institutionalism: Organizational Factors in Political Life,” *American Political Science Review* 78, no. 3 (1984): 734-49; Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984); Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge, England: Cambridge University Press, 1990).

economic and social behaviour” among its members, and these “sets of rules . . . reflect individual countries’ histories and cultures”¹² as well as those of the specific group.

In medieval Europe, professions and trades gave rise to solidarities and thence to institutionalization along the lines I have been describing. These were incorporated in the organization and practices of the guilds, which, then as now, linked their members through bonds of friendship and common outlook as well as common interests. A guild’s institutional rules would govern members’ behavior with respect to the organization’s internal workings, the relationship of members to one another (usually based on a hierarchy of skill or professional expertise), the offer prices and terms to the general public of the guild’s goods and services, and, if powerful enough, the conditions of entry into and advancement within the trade or profession.¹³

Group solidarities seem to arise quickest among social groups whose members are few in numbers and sharply differentiated from society at large. That is why minority ethnic groups such as Jews in much of the West, South Asians in eastern and southern Africa, overseas Chinese almost everywhere, etc., have prospered in manufacturing and trade even where legal guarantees of transactions have been weak or undeveloped.¹⁴ Trades and professions meet these criteria not only by their possession of particular skills and expertise but also, indeed even more so, by their members’ dedication to a particular set of professional ethics and practices.¹⁵

The observed political behavior of solidaristic corporative groups in Latin America and elsewhere supports the generalization that they expend their power resources mainly in defending their boundaries

12. Carol Graham and Moisés Naím, “The Political Economy of Institutional Reform in Latin America,” paper presented at a MacArthur Foundation/IDB conference on Efficiency and Equity Enhancing Reforms in Latin America, revised version (Washington, DC, 1997), 4, Mimeo. Their analysis derives from North, *Institutions*, 4-6.

13. Fernand Braudel, *The Wheels of Commerce*, Vol. 1 of *Civilization and Capitalism, 15th–18th Century*, translated by Siân Reynolds (New York: Harper & Row, 1982), 314-16.

14. Janet T. Landa, “Underground Economies: Generic or *Sui Generis*?” in *Beyond the Informal Sector: Including the Excluded in Developing Countries*, edited by Jerry Jenkins, A Sequoia Seminar (San Francisco: ICS Press, 1988), 75-103.

15. Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley and Los Angeles: University of California Press, 1977).

(keeping themselves closed to untrustworthy outsiders), protecting their autonomy, and pursuing their collective self-interests. They expend little if any resources on societal leadership, that is, on projecting their interests as shared by a large number of other social forces and as promoting widely held values. To be sure, their exclusiveness makes this strategy of questionable worth in any event.

In societies where weak legal orders make social and economic relations between strangers insecure, the solidarities that underlie group-based institutionalization are strengthened still more. They become cultural facts, central to the group members' identity formation, social status, and characteristic forms of collective action. Capitalist development tends, it is true, to erode them over time. This erosion is just what is meant when we describe the legal order as having evolved, as part of the transition to capitalism, "from status to contract."¹⁶ Yet corporative elements persisted in the social structures of European societies well into the twentieth century.¹⁷ We should anticipate that corporative structures and organizations will be more prominent in Latin America, where neither capitalist development nor the rule of law has advanced as far.

The presence of corporative groups and the corresponding absence of the rule of law are deleterious for democracy. For democracy, in today's complex societies containing a multitude of organized groups of all sorts, requires that such groups be "accountable to one another in accordance with settled rules of interactive conduct" as well as their leaders being "accountable to followers by whom they are chosen."¹⁸

Corporative Structures as Products of Historical Development

16. Henry Maine, *Popular Government: Four Essays* (London: Murray, 1885). See also Kronman, *Max Weber*, 108-11; Ernest Gellner, *Conditions of Liberty: Civil Society and Its Rivals* (Harmondsworth, England: Penguin Press, Allen Lane, 1994), 100-101.

17. Arnold Mayer, *The Persistence of the Old Regimes: Europe to the Great War* (New York: Pantheon, 1981), 135.

18. Richard L. Sklar, "Towards a Theory of Developmental Democracy," in *Democracy and Development: Theory and Practice*, edited by Adrian Leftwich (Cambridge, England: Polity Press, 1996), 35.

The persistence of highly corporative forms of social organization in Peru and other Latin American countries is a product of their historical development that can be understood in terms of path dependence. In this paper I can do no more than sketch the developmental sequence briefly.

The Spanish-Austrian Hapsburg empire that colonized Latin America was administratively (i.e., bureaucratically) quite advanced for its time, but it was far from modern in the legal sense. Corporative groups were sufficiently strong at the local level that the legal system embraced “ the principle that officials could selectively ignore royal edicts that would cause too much damage to local interests,”¹⁹ thereby giving rise to the curious but well-known expression about officials’ attitude toward rule observance, *obedezco pero no cumplo* (“I obey [the law] but I do not fulfill its expectations”). The laws of general applicability did not regulate the internal workings of corporative groups or their relations with one another; instead they “served as a constant venue of negotiation” between them.²⁰ Indeed, the imperial legal order formally recognized the *fueros*, traditional (medieval) autonomous legal regimes applying to, and largely administered by, various corporative occupational and geographical groups. Later on, when control of the empire was assumed by the Bourbons, they instituted a series of administrative reforms intended to tighten centralized control and cut back corporative prerogatives. Further, and deeper, legal-institutional reforms took place, of course, during and after the Napoleonic upheaval. However,

Latin America . . . did not fully participate in this revolutionary wave. Spanish America adopted constitutions and [Napoleonic] civil codes but these new institutions did not transform society. Law regulated neither public nor private behavior because formal rights were trumped by social norms. . . . [C]ontract did not replace status and it was status that determined where power lay. The legal foundations

19. Miguel Schor, “The Rule of Law and Democratic Consolidation in Latin America,” paper downloaded from the website of the Law and Society Section, Latin American Studies Association: <http://darkwing.uoregon.edu/~A~caguirre/lawandsociety.htm> (2000), 5. He draws on J.H. Elliot, “Spain and America Before 1700,” in *Colonial Spanish America*, edited by Leslie Bethell (Cambridge, England: Cambridge University Press, 1987), 64-69.

20. Schor, “Rule of Law and Democratic Consolidation,” 5; Charles R. Cutter, *The Legal Culture of New Spain* (Albuquerque: University of New Mexico Press, 1995), 31.

of the post-independence state were subordinated to the social bonds between powerful families [and within other high-status corporative groups,] which were the real basis of power. . . .²¹

One effect was to strengthen the corporative character of the upper bourgeoisie that dominated the heights of the economy: the “oligarchy.” Oligarchs, being well educated for the most part, might have seen the value of institutional modernization in the abstract, and some may even have believed they would prosper as well or better in a more open market economy²² ; but they, like other bourgeoisies, could not by themselves create the legal underpinnings of a market society where none existed. In the absence of the generalized rule of law and abolition of corporative privilege that free markets require,²³ dealings with business owners who did not participate in oligarchic solidarities (family relationships, friendships, membership in the same exclusive clubs and associations, etc.) and were thus not *dignos de confianza* were ruled out as too risky.²⁴ Hence, upward mobility on the basis of effort or innovation was blocked, and institutional change was retarded; the system became self-reproducing and remained that way even though some openings for “new people” to rise in the economy were eventually created. Another, in these highly unequal societies, was to intensify still further the solidarities and corporative identities of non-oligarchic groups that nonetheless enjoyed some social status. Among them were the learned professions (law, medicine, architecture, and the academy), which had been formally organized into *colegios* since colonial times. These professional *colegios* functioned as guilds: their statutes, ratified by the general law, extended to such matters as fee structures, discipline, retirement programs, and the like.

21.Schor, “Rule of Law and Democratic Consolidation,” 5.

22.Porfirian Mexico provides illustrative examples; see, e.g., Arturo Grunstein, “From Imperialism to Postimperialism: An Early Mexican Response to Transnational Capitalism,” in *Postimperialism and World Politics*, edited by David G. Becker and Richard L. Sklar (Westport, Connecticut: Praeger Publishers, 1999), 253-82; Keith A. Haynes, “The Mexican Revolution as a Province of Postimperialism,” in *Postimperialism and World Politics*, edited by David G. Becker and Richard L. Sklar (Westport, Connecticut: Praeger Publishers, 1999), 283-315.

23.As even Adam Smith knew and emphasized; on his hostility to corporative privilege, see Alan Ryan, “A New Vision of Liberty,” review of Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment*, *New York Review of Books*, 5 July 2001, 43-44.

24.Unless they were foreign, meaning that their behavior was to some extent guaranteed by the more modern legal orders of their home countries.

The Corporative Nature of the Judiciary

Although judges, being bureaucratic *servidores del Estado*, did not enjoy such formal organizational prerogatives, their esprit de corps and dedication to their particular values (including the management, in association with academic legal scholars, of “legal scientific” doctrine), were more than enough to preserve their corporative identities and culture. Indeed, the corporative character of the Peruvian judiciary appears to have survived the large turnover of its personnel brought about by the purges and appointment of large numbers of “provisional” judges (lacking bureaucratic tenure) by ex-president Alberto Fujimori. The best evidence of this is the judiciary’s angry resistance to the serious attempt at reforming judicial institutions that the government launched in 1995 in cooperation with the World Bank. The Decree-Law establishing the reform process, D.L. 26,546, placed the task of updating the institutions in the control of an executive commission comprised of three justices of the Supreme Court; but real power within the commission lay in the hands of its administrative director, a former naval officer named José Dellepiane.

Now Dellepiane may have spent most of his professional career in the Navy, but like many of today’s military officers his real professional expertise lay not with arms but with management. At the time of his appointment he had been retired from the Navy for some years and was running his own management consultancy. Many of the judicial sector’s problems had to do with case management and other aspects of court administration that plainly lay more in the province of managerial and economic expertise than that of legal analysis;²⁵ given that civil law judges become such immediately out of law school and are much less likely to have acquired expertise in other fields than common law judges, it seems entirely reasonable that a management expert should play a leading role in the design and administration of the reform. Yet my interviews with Peruvian judges and lawyers sympathetic to the

25. Linn Hamberg, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* (Boulder, Colorado: Westview Press, 1998).

aims of the reform project revealed a near-unanimous contempt among them for the “*comandante*,” whom they insisted on characterizing as a *militar* despite his extensive civilian credentials in the field, and a steely determination to resist his proposals as much as possible. Of course, this dislike was hidden behind high principles—in this case, the judiciary’s corporative principle of professional and institutional autonomy. Yet few of them had demonstrated such autonomy on the bench by ruling against the government in cases to which it was a party, or against its preferences in cases where it had expressed them publicly.

Implications for Reform

The establishment of the rule of law in Peru would be advantageous for the interests of many social groups and forces. The gainers would certainly include the business sector, including the “oligarchy,” which would find it easier to raise capital for expansion and to make use of the ideas and energies of rising “new people”; the judiciary, which would become much more central to everyone’s lives if a larger number of mundane social interactions were to become legalized (i.e., recast into legal formulae) or mediated by law, and if, as happens when the rule of law is firm, policy choices became significantly “judicialized”²⁶; the private bar, which would receive a much higher volume of business; and the law professorate, which would be kept busy developing new doctrines as new kinds of cases started entering the courts. Furthermore, it is inconceivable that legal and judicial reforms could be instituted without the cooperation of these key system “insiders.” But such cooperation has been notable by its absence. Plainly, corporative identities and habits remain so strong among the “insiders” that, as I have predicted, they focus only on defending their collective autonomy against *any* process of change steered, shaped, or significantly directed by outsiders.

26. As has occurred in Europe since the creation of constitutional review; see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).

What is more, the rule of law itself is to a major extent an idea about culturally ingrained patterns of behavior. It implies that a vast majority of the population regards statutes and administrative regulations as legitimate and obeys them voluntarily because they were adopted pursuant to well-known “rules of recognition” and because they respect the private rights and prerogatives specified in the constitution—or can be derogated or modified via constitutional review if they do not. We should not expect ordinary citizens to adopt rule-observing behaviors just because authorities inform them that henceforth things will be different.

Richard L. Sklar has attacked what he describes as a search for “whole-system democracies,” that is, the urge to classify whole polities as democratic or not. Although he does not specifically address the question of culture as a repository of social identities, behavioral routines, and justificatory discourses, he approaches it obliquely by recognizing the central importance of actual social and political practices: the whole-system viewpoint “minimizes the extent of democratic practice in many countries where historic forms of popular control coexist with regimes that are otherwise largely autocratic.” Therefore he insists that “[m]etaphorically speaking, democracy is constructed in parts, or fragments, which complement one another” and that “increments of democratic change are likely to produce positive developmental effects. . . .”²⁷ Exactly the same should hold true with regard to the rule of law, and for the same reason—the necessity of culturally institutionalizing new patterns of social action—albeit with an important caveat. Our discussion implies that building the rule of law “in parts” risks creating still more corporative solidarity groups if those involved in the endeavor come to see themselves, thanks to their unique dedication to legal values, as distinct from the rest of society. (Something of the sort may have affected some of the human rights NGOs operating in Peru, with negative consequences for their ability to wield wide influence.) One of the advantages of using the area of consumer protection as a place to inculcate legalized, rule-observant behavior and greater reliance on legal remedies in case of dispute is that

27.Sklar, “Towards a Theory,” 27-29.

consumption is not, and cannot be, a basis of social solidarity. On the contrary, all social actors are consumers; consumer interests are universally shared.

INDECOPI AND THE PERUVIAN CONSUMER

The Peruvian National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI) was created by Decree-Law 25868, issued in November 1992, and went into operation in March 1993. It has formal regulatory and adjudicative responsibilities in the following issue areas, all of which are involved with the maintenance and regulation of an open market economy: consumer protection, unfair business practices, antitrust, bureaucratic barriers to market entry, bankruptcy,²⁸ dumping and subsidies, technical and commercial norms,²⁹ and the registration and enforcement of intellectual property rights (patents, trademarks, and copyrights).³⁰ Combining the functions of rulemaking, rule enforcement, and adjudication in a single administrative entity, INDECOPI's organizational structure is based upon the civil law tradition, which countenances administrative assumption of adjudicatory responsibilities far more than does the common law tradition, and more or less follows French models of state administration. There is one significant difference, however: INDECOPI, though an instance of "pure administration" in that it is not a direct provider of goods or services, is organized as a public corporation, which exempts it from civil service personnel rules. Its status as a public corporation also insulates it from the day-to-day managerial control of the

28. INDECOPI assumed responsibility for business bankruptcies because they can and do affect market concentration. Existing Peruvian law provided no alternative to liquidation once a business found itself unable to pay its debts; but that "solution," besides producing greater market concentration by definition, was invariably a lengthy, drawn-out legal process that left the failed entrepreneur with no assets and her creditors with but a fraction of what they were owed. INDECOPI's rules have modernized this outmoded legal regime by providing, for the first time, for reorganization of the failed business with arrangements for equitable repayment of most of its outstanding debt over time, as is often done in the United States under Chapter 11 bankruptcy proceedings.

29. I.e., weights and measures (metrology), motor fuel octane ratings, etc.

30. Beatriz Boza, "The Role of INDECOPI in Peru: The First Five Years," in *Peru's Experience in Market Regulatory Reform, 1993-1998*, edited by Beatriz Boza (Lima: INDECOPI, 1998), 3-37.

executive branch and provides it with some of the autonomy possessed by independent U.S. governmental agencies such as the Federal Trade Commission.

As is evident from its list of functions and responsibilities, INDECOPI is not, and was not intended to be, primarily a vehicle of governmental accountability to “coordinate authorities” comparable to the role of an independent regular judiciary in constitutional governance.³¹ The fact that it is an administrative agency is not in itself the problem; we have seen that regular civil law judiciaries are just as bureaucratic, and in Peru the judiciary is assuredly not any more independent! Rather, the problem lies with an uncertain constitutionalism that tempts governments to ignore their own laws when necessary to enact their policies. While INDECOPI has gotten away with decisions that were strongly opposed by municipal governments,³² it was never faced with having to overrule an action of the central state administration during the Fujimori presidency. It remains to be seen whether the Toledo government will confront it with such a situation and, if that happens, what the outcome will be. However, the agency’s response to the closest thing approaching such a crisis under Fujimori is encouraging.³³

Institutional Origins and Development

31. Richard L. Sklar, “Developmental Democracy,” *Comparative Studies in Society and History* 29, no. 4 (1987): 694; Sklar, “Towards a Theory,” 26-27. Guillermo O’Donnell, “Delegative Democracy,” *Journal of Democracy* 5, no. 1 (1994): 55-69, uses the term “horizontal accountability.”

32. David G. Becker, “Is the Good the Enemy of the Better? Peru’s INDECOPI and Judicial Reform,” paper presented at the XXII International Congress of the Latin American Studies Assn. (Miami, 2000), Mimeo.

33. Briefly, during the 2000 electoral process INDECOPI attempted to set up a press center to encourage open, uncensored reporting of the campaign and the accompanying legal battles over Fujimori’s efforts to win a third term despite a constitutional prohibition. When Beatriz Boza, the agency’s president, would not accept his demand that she drop the initiative, he dismissed her. Much of the staff wanted to resign in protest, but Boza urged them to stay on and continue the agency’s work. Under its current president, Carlos Seminario, it appears that INDECOPI has been doing just that.

In mid-1992, Jorge Camet, the Minister of Industries, appointed a three-member commission to study the reorganization of the country's backward, inefficient administration of weights and measures.³⁴ The decision to create instead an entirely new agency to assume that and additional functions was taken pursuant to the recommendations of the commission. INDECOPI started out as a small, select agency with a three-member Board of Directors that met biweekly and functioned by consensus; the president of the Board, who is the institution's real CEO and supreme authority, was appointed by President Fujimori. Though the "peak associations" of the business sector registered objections to several provisions of the enabling legislation, notably those empowering the new institution to levy fines, business chose not to prioritize the issue and its opposition bore no fruit.³⁵

Over the next few years INDECOPI took over functions and responsibilities entailed by elements of market norm-creation and -enforcement, such as antitrust and intellectual property, which at the time had no established administrative "homes"—and, so, no other agencies with vested interests in hanging on to those functions. In 1996 Fujimori appointed Beatriz Boza Dibós, a distinguished associate of a New York law firm and the respected chair of the Committee on Inter-American Affairs of the Association of the Bar of the City of New York, to the presidency of INDECOPI's Board of Directors. Boza set to work enhancing INDECOPI's budget, which was and is financed largely from fines. The original enabling legislation tried to constrain the agency by imposing a low ceiling on the fines it was authorized to levy: under \$50,000 for antitrust violations and under \$4,000 for others. Boza, however, persuaded Fujimori to issue a 1996 presidential decree that raised these figures to about \$6 million and \$100,000, respectively. She also recruited a staff of mostly young, modernizing economists and lawyers like herself, many of them with some foreign education and some with work experience abroad.

34. Its members included a lawyer in private practice with solid technocratic credentials and a textile manufacturer who currently serves on INDECOPI's Board of Directors.

35. Interview with Jorge Camet, former Minister of Industries and a member of the INDECOPI Board of Directors, Lima, 10 August 1998. Camet added that, contrary to views that have occasionally been expressed by some outside observers, the U.S. Federal Trade Commission was not a model for INDECOPI and did not figure in the deliberations of the study commission. He also stated that although neither the IMF nor the WTO played any role at all in the foundation of

The institution would not have survived without Fujimori's support. To illustrate: Not long after assuming the INDECOPI presidency, Boza found herself in the middle of a dispute between the Ministries of Agriculture and Economy-Finances, which had put forward conflicting proposals for the regulation of agricultural imports. INDECOPI's staff worked quietly to get the less protectionist Economy-Finances version approved; but the political stakes were high and the Council of Ministers reserved the right of final decision. Its decision came down as a draft of a Supreme Decree instituting the trade barriers that Agriculture had proposed. During a private meeting for an ostensibly different purpose, Fujimori showed Boza a copy of the draft and asked her opinion. In reply she warned that if he signed it, she and most of the INDECOPI staff would resign in protest. Fujimori did not respond to her directly, but he dropped planned references to the draft from the text of a speech he delivered later that day to a group of vicuña farmers and did not sign it.

We see from this episode that Fujimori's attitude toward the whole issue of legal and judicial reform was more complex than it often seemed. His government did make a serious effort at reforming some aspects of the system (under Dellepiane's guidance); it did commit its own funds to the endeavor (to the tune of about \$40 million) and enter into serious negotiations with the World Bank for supplementary funding (although the negotiations collapsed as a result of the blatant manipulation of the Constitutional Tribunal by which Fujimori won authorization to run for a third term). It did not object to the inclusion in the reform program of means for regularizing the appointments of the many "provisional" judges and greatly enhancing its independence. Apparently, Fujimori understood at some level that if he were sincerely interested in modernizing Peru along the lines of free-market capitalism (as he apparently was), and if he truly wanted to enhance social peace and order (as he undoubtedly did), he would have to advance the rule of law. But he evidently did not understand, or did not care, that his simultaneous efforts to cow his political opponents and extend his personal control of events by bringing blatantly political

INDECOPI, the World Bank expressed support that proved useful in overcoming the resistance of the business sector.

cases into the courts, and then inducing the courts to rule as he wanted, sabotaged his own modernizing efforts and put his goals out of reach.

Maintaining Institutional Autonomy.

INDECOPI was from the outset and remains unusually independent from political forces and organized interest groups. Most of those who staff its tribunals are part-time employees—typically, attorneys in private practice who earn enough that they do not have to depend on the salaries it pays them (which in most cases they turn over to their firms). They do this work because it is prestigious and exposes them to interesting cases in law, thereby expanding their knowledge base.³⁶ The full-time legal staff is also well compensated by local standards. Although the pay does not compare with what can be earned in a good private law firm,³⁷ the country's supply of young attorneys, many with good foreign educations, exceeds the private sector's demand; full-time employment with INDECOPI, which at least conforms with their values and professional ethics, is their next-best alternative. Note, however, that these salary levels have been made possible by aid from the World Bank and the IDB.

INDECOPI is also aided in securing a high-quality staff by a law that requires anyone wishing to enter the practice of law to first serve a year on the staff of a government agency. Its prestige and reputation for political independence enable INDECOPI to attract the best young legal minds to these mandatory internships, thereby providing itself a constantly renewable source of young talent: as of 1998 the average age of the staff was 31 years and the average time of service in the institution was 1 year. All of the staff members I interviewed agreed that few of the older attorneys they knew in private practice had as much comprehension of economics as themselves, or as good an understanding of what “free

36. Interview with José Balta, an attorney in private practice and part-time *vocal* (member) of INDECOPI's antitrust tribunal, Lima, 9 August 1998. Balta receives \$2,400 per month for this work (all of which is paid not to him but to his firm as a compensation for the loss of his services), to which he devotes four hours per week.

37. José Balta (*ibid.*) reported that in his first year of private legal practice, he earned considerably more than the chief justice of the Supreme Court.

competition” really signifies. Once again we see the dependence of these perceptions on culture, that is, ways of thinking that have become habituated through education and life experience.

What is more, about 70 percent of INDECOPI’s annual expenditures is covered by fines and the fees it earns from trademark registration³⁸; only 30 percent comes from state tax revenues. Its fiscal independence insulates INDECOPI’s staff from many of the pressures to engage in rent-seeking behavior and constitutes a reward for staff members’ dedication to legal ethics. Under Boza’s leadership, INDECOPI further protected itself against bureaucratic bloat and political corruption by developing and propagating an institutional culture in which small staff size and a transparent decision-making style were points of pride. The culture also incorporated strong moral norms that compel part-time staff to recuse themselves from any case with which their private law firms may be involved. Admittedly, we need more time before we can be sure that the culture is self-reproducing—without conducting in the process to an unhealthy degree of corporative solidarity.

Institutional Philosophy and Functions

INDECOPI can be regarded as a response to political concerns about the society’s acceptance of market-oriented economic reform. Peruvian economic reformers of the early 1990s understood that the dynamic, modernizing capitalism they hoped to promote depended not just on new policies with accompanying statutes and regulations but ultimately on the internalization and reduction to habitual practice, on the part of millions of ordinary producers and consumers, of the new values and modes of behavior that the laws and regulations contemplated. In general terms, people accept the market’s determination (as opposed to government fiat) of prices, wages, and employment levels because, and insofar as, they perceive the market as a set of abstract social practices that have not been manipulated by someone’s particular interests to the latter’s advantage. If they have not been, market processes and

outcomes are regarded as fairer and more just than would be the case if allocations were determined by identifiable individuals, groups, or organizations with distinctive interests. But if the legitimacy of markets depends on their perceived fairness, abusive business practices directly threaten the legitimacy of the market system. The threat does not have to take the form of spectacular abuses like product adulteration or monopoly pricing. More mundane abuses such as short-weighting, false advertising, “bait-and-switch,” and the like, if sufficiently widespread, can subject the people’s belief in market fairness to a “death of a thousand cuts.” Market competition, however, creates powerful incentives for hard-pressed or greedy businesses to engage in just such behavior. The situation they face is a classic Prisoner’s Dilemma: although “cooperation”—universal observance of norms of fair dealing—offers the optimum payoff to all players by legitimizing the market system and protecting it against challenges, the potential payoff for “defection”—nonobservance of the rules—greatly exceeds the “sucker’s payoff” that a player receives by cooperating while others defect. It is rational for the individual business owner to cheat his customers if such conduct is common and the probability of being caught is low.

No government can hope to police economic activity so thoroughly as to remove the payoff to cheating by this means alone. All advanced capitalist societies therefore rely heavily on self-policing: government establishes and enforces rules and standards, but enforcement comes into play, for the most part, only after an aggrieved member of the public has suffered an abuse and complained to the authorities. This is not much of a problem in business-to-business dealings, where buyers tend to be well informed of their rights, knowledgeable about contracts, and, often, confident in their ability to gain the attention of the courts or appropriate administrative agencies. It is a problem where buyers are unsophisticated consumers who have little idea of their rights in the transaction and little faith, in view of past experience, that government will interest itself in their plight.

38. Trademark registration fees are high by local standards, but the lion’s share of registrants are large firms that can easily afford them. The effect is that the large firms finance the bulk of INDECOPI’s services to the general population.

A further complicating factor in a newly developing society like Peru's is that development itself drastically alters patterns of purchasing and consumption, especially in urban areas where people, many of whom are relatively recent migrants from the very different economic environment of the countryside, cannot be self-sufficient but must buy most of the necessities of daily life. The modernization of consumption entails a shift from face-to-face dealings carried on in accordance with customary norms and solidarities to impersonal dealings with corporate suppliers—department stores, retail chains, supermarkets—governed in principle by abstract, universalistic legal norms. The visitor who walks the streets of Lima today is struck, if she remembers the city twenty years ago, by the proliferation of supermarkets and chain stores, many of them newly founded by enterprising Peruvians in response to the economic reforms. Whereas a consumer who has been short-weighted by an *ambulante* (street vendor) or small neighborhood merchant might resolve the dispute (if at all by arguing with the seller and bringing in neighbors for support, what is he to do when he tries to return a broken toy he has bought for his child's birthday to a large department store and finds that it will not honor its warranty?

Two other recent developments also bring consumers into economic contact with large corporate suppliers. One is the privatization of public utilities and other public services. Their privatization was justified politically with assertions that in addition to offering better service at lower rates, private owners would be far more responsive to consumer complaints about service and billing than were the government agencies or parastatals they replaced—and the unsurprising result has been that both the number of complaints and the intensity of the complainants' demands for satisfaction have increased dramatically. The other is the expansion of consumer credit brought about by modernization of the banking system³⁹ and by the appearance of small-scale mortgage lending in response to land titling programs that have

39. Under the aegis of new entrants from Spain and other European and Latin American countries. These banks, unlike the bank affiliates of "oligarchic" *grupos* that not long ago monopolized the sector, are very experienced in the various consumer credit lines.

legalized the property rights of (some) urban squatters.⁴⁰ With the proliferation of consumer credit comes an enormous potential for disputes over terms, repayment, foreclosure, etc.

In countries at Peru's stage of development, we are reminded, successful marketizing reform is not only an inherently political question but a cultural one as well. Success demands more than that businesses be goaded by the law as well as competitive pressures and principled belief to deal fairly and honestly, more than that government be responsive to consumer complaints and have effective remedies at hand. It also demands that consumers, most of them poor people whose past dealings with government and with private economic power have been marked by domination or unresponsiveness, become active subjects fully aware of their rights and determined to have them enforced.⁴¹

Protecting and Vindicating Consumers' Rights

By "consumer protection" I understand functions such as ensuring that buyers of goods and services are fully aware of the price they will pay and the value they will receive in return before entering into a transaction; that the goods and services they acquire are as represented and meet reasonable standards of merchantability; that their contractual and legal rights are honored; and that the seller fully honors any after-market obligations he has assumed with regard to returns and refunds, warranties, or service. INDECOPI, however, understands consumer protection as entailing consumer education as much as law enforcement. It therefore devotes much effort on data collection and mass-media publication of comparative prices and other quality-of-service indicators, such as the on-time performance and accident rates of public transport firms, to facilitate comparison shopping.

INDECOPI also involves itself proactively in high-visibility enforcement activities designed to enhance consumer awareness. For example, its officials periodically appear at public markets with

40. David G. Becker, "Citizenship, Equality, and Urban Property Rights in Latin America: The Peruvian Case," *Studies in Comparative International Development* 31, no. 1 (1996): 65-95.

certified portable scales and offer free re-weighing of produce that consumers have just bought. If short-weighting is detected, the officials and the victimized consumer go directly to the stall that sold the goods and complain loudly. Knowing that competitive sellers of undifferentiated goods like raw vegetables or cuts of meat depend heavily on repeat business and thus on reputation, agency officials deduced that raising complaints openly, in the presence of customers and the offender's competitors, would usually be enough. Their experience has proven them correct: not only do the victims almost always receive just compensation, but the bad publicity has turned out to have real deterrent value for at least a moderate period of time.

INDECOPI's responsibility for technical and commercial standards embraces metrology ("weights and measures"), product composition and performance standards such as gasoline octane ratings, and the control of harmful or dangerous product constituents or design features. Although the establishment of the relevant standards is a technical function, consumers rely on them and expect them to be enforced. It is not just an issue of accurate weights and measures; equally important in terms of the agency's larger mission is promoting comparison shopping by assuring that the standard of comparison (e.g., a particular grade of gasoline that an engine requires) is uniform and that competing products all meet the standard.

Antitrust regulation, still another of INDECOPI's responsibilities, affects ordinary people chiefly through its impact on consumer prices. Peru's business sector has long been anticompetitive in organization and behavior and is accustomed to earning monopoly rents. We have already seen how this pattern of business organization and behavior is largely explained by rationalist theories of collective action without the rule of law. Problems of monopoly pricing are especially severe with domestically produced consumer goods and services where the industries have low per-unit profit margins and, for that reason, little competition from imports or local TNC subsidiaries. Examples include ground

41. The INDECOPI staff members I interviewed frequently cited Douglass North as the source of these concepts. North has visited Peru several times in the last few years and served as a consultant

transportation and the poultry industry—which, together with the fishing industry, supplies households with the bulk of their animal protein).

Since consumer prices are the focus of the agency's concern, it focuses narrowly on the *observed effects* of anticompetitive behavior such as price-fixing; it is little concerned with industrial concentration per se, which in some cases enables consumers to benefit from increased economies of scale. Hence, just as was true of INDECOPI's approach to short-weighting in public markets, price monitoring by informed, alert consumers is an essential first step in enforcement. Recent antitrust targets include consumer banking and automotive parts, both resolved by voluntary agreements by sellers to refrain from anticompetitive practices, and the poultry industry, which has been one of the very few to challenge INDECOPI in the regular courts.

Illustrative Actions.

Despite the fact that an overwhelming majority of citizens are of ethnic Native American background and *cholo* (mestizo) culture, until 1968 Peruvian society was entirely dominated by a Caucasian, European-oriented “oligarchy”; ethnocultural discrimination was blatant in all facets of political, economic, and social life. The military “revolution” of 1968-75 put an end to oligarchic domination and “nationalized” many Native American cultural symbols and artifacts, just as the Mexican Revolution had done some fifty years earlier. Today Peruvians of Caucasian descent visit the archaeological treasures in the National Museum, listen to the music of *zampoñas* (panpipes) and *queñas* (wooden flutes), and eat *cuy* (guinea pig) or *anticuchos* (marinated beef heart) in *restaurantes típicos*. Even so, discrimination against those with dark skins—and, especially, traditional native clothing—is pervasive; it is Peru's “dirty little secret.”

to INDECOPI's management.

INDECOPI reviewed the problem in 1998-99 and concluded that ethnocultural and racial discrimination in the provision of goods and services was undermining the public's appreciation of free markets. Preliminary soundings revealed considerable public interest in, and potential support for, anti-discrimination measures, and INDECOPI therefore decided to attempt to stimulate a major government campaign against this social evil. The institution drew up a set of rules prohibiting discrimination and met with owners of the largest restaurants and nightclubs to negotiate their voluntary compliance. Most have gone along willingly. One owner, however, decided to fight with the tools of the law: he obtained a writ of *amparo*⁴² against INDECOPI and Beatriz Boza personally on the ground that antidiscrimination rules of any sort infringe the constitution's guarantees of freedom of association and of contractual and property rights. At this writing the case remains mired in the courts.

A second case involved norms governing product advertising. Procter & Gamble filed a complaint with INDECOPI alleging that its Peruvian business was being unfairly harmed by negative advertising placed by a small local competitor. The complaint protested a television advertisement in which a young woman was seen telling a friend that a certain kind of sanitary napkin—the brand was not mentioned, but only Procter & Gamble sold that kind locally—had caused irritation. Procter & Gamble lobbied INDECOPI intensively in hopes of getting a blanket ban on negative advertising. It argued that comparative advertising based on subjective criteria or “mere opinion” was an intrinsically unfair business practice and therefore illegal under INDECOPI rules. Had the agency ruled in Procter & Gamble's favor, the ramifications would have gone far beyond the case at issue: comparative advertising per se would have been hedged about with so many possibilities for legal objection that no one would have attempted it. Thus INDECOPI resisted Procter & Gamble's demands because, if approved, the effect would have been anticompetitive. Its position is that in general it should not interfere with

42. A petition to overturn the application of a statute or regulation to the petitioner *in that specific instance*. The writ of *amparo* has long been recognized in Latin American (and Spanish) jurisprudence because it is *not* a form of constitutional review. That is, the court relieves the petitioner from the obligation to observe the rule under the specified circumstances, but the law or regulation remains in force.

producers' rights to publicize their products however they wish, so long as they do not commit fraud or misrepresentation and their publicity does not increase market concentration. In this instance it was evident that the threat of market concentration resided in the predominance of Procter & Gamble, not in the efforts of the local firm to find a niche for its product.⁴³ Interestingly, before the advent of INDECOPI a case of this sort involving a major foreign investor might well have been handled entirely through "back channels" out of fears that the outcome might discourage other foreign investment.

Besides processing cases like those described, INDECOPI provides a great deal of "consumer-friendly" information designed to foster better purchase decisions and comparison shopping. It conducts educational programs that teach about consumers' rights. It resolves complaints, by mediation where possible. It also engages in a measure of routine oversight of business practices that may affect competitive pricing or consumers' rights. Finally, it conducts consumer surveys and publishes comparative ratings of product quality and purchaser satisfaction, much as Consumers Union does in the United States.

Consumer services are free. Complaints are accepted by telephone, mail, and e-mail as well as in person and need not be in writing. INDECOPI is empowered to initiate administrative proceedings against sellers who have been alleged to have grossly violated the rights of consumers. About eight or nine such cases are initiated weekly, on average, and about three hundred in total were initiated during the last six months of 1998, during which period about 4,500 complaints were received. Of these, the lines of business most frequently involved were, in descending order, banking, automobile sales, home appliance sales, and, interestingly, municipal taxation. Although INDECOPI can levy stiff fines and has an

43. In another case, INDECOPI supported a complaint brought by Coca-Cola on grounds of trademark infringement: it enjoined a group of women in a small northern town from selling a soft drink they had concocted and were bottling, for lack of an affordable alternative, in used Coke bottles. However, Coca-Cola does not dominate the Peruvian soft drink market; a local product, Inca Kola, has outsold it for years and is now being exported to the United States. Thus, there was no concern this time that supporting a large TNC's legal rights would harm competition. The evidence of the two cases refutes claims that rulings discriminate against foreign investors. For discussion of the Coca-Cola case see J. Welby Leaman, "Coke Bottles, Candy Bars and Combis: Building an

incentive to do so in its dependence on the income, it prefers conciliated solutions that do more to meet the substance of the complaint and provide rapid satisfaction.⁴⁴ Mediation, conciliation, and consumer education bring the agency into close, supportive contact with groups in civil society. Many of these are women's groups, since Peruvian women often control household budgets and make key purchasing decisions for their families.

Public education is an important INDECOPI activity and is regarded as an implementation of Douglass North's injunction that it should strive to make Peruvians into "rational consumers." It has used radio and newspaper advertisements to diffuse its pricing comparisons. It works closely with local NGOs, universities, and chambers of commerce. It runs consumer education programs for public school teachers and encourages them to incorporate the lessons into their classroom work. The INDECOPI staff members with whom I discussed these activities were quite conversant with recent disciplinary writings on the nature of civil society and its place in a democratic order. Acknowledging the lack of organization that everywhere tends to vitiate the potential clout that well-organized consumers could exert, they regard themselves as working to actualize this potential by acting as "midwives" to the formation of a national consumers' movement.

Institution," in *Peru's Experience in Market Regulatory Reform, 1993-1998*, edited by Beatriz Boza (Lima: INDECOPI, 1998), 123-32.

44. For example, travelers and their families had long complained about the layout of roads entering and exiting Lima's Jorge Chávez International Airport: the location of the automatic gates and payment booths forced people driving to the airport to drop off or pick up family members at curbside to pay the parking tariff just for access to the dropoff and pickup points. In the past it would have been exceedingly difficult even to gain the attention of the cognizant authority (CORPAC, the parastatal that then administered national airports), let alone obtain a satisfactory solution. A good outcome for consumers would almost certainly have required protest demonstrations and the use of political influence. INDECOPI, however, intervened with CORPAC on behalf of consumer interests and brokered a mediated solution in which CORPAC revised the airport's access roads and traffic patterns to eliminate the problem. According to INDECOPI data for 1997, 76 percent of that year's consumer complaints were settled to the complainants' satisfaction by conciliation, only 3 percent led to formal administrative action, and 21 percent were dismissed for lack of merit. See Romano Paredes, "INDECOPI by the Numbers," in *Peru's*

CONCLUDING OBSERVATIONS

It would be foolish to posit INDECOPI's consumer protection activities, or even the sum total of all of its activities, as an answer to the many problems that Peruvian society confronts in its efforts to institutionalize the rule of law. The number of consumers who have made use of the agency's facilities to vindicate their rights or resolve their disputes with providers of goods and services may reach into six figures by now, but Peru is a country of almost 26 million people; INDECOPI's total "clientele" would represent less than one percent of that population. The educational outreach that the agency conducts in hopes of educating consumers about their rights and obligations in a market society reaches many more, but the effects are unlikely to reveal themselves in the short term; they will probably become evident only with a change of generations, that is, in twenty years or so.

The INDECOPI staff responsible for advancing market values through regulation and adjudication represents another force for change whose influence should grow across the generations. All told it represents a smaller percentage of the membership of the national bar than does the "clientele" as a percentage of the population. Yet the part-time nature of much of the staff is highly significant. To turn important administrative operations over to non-bureaucrats with full-time jobs, not merely interests, in the private sector is a radical departure from Latin American (as it would be from European) institutional practice. In the absence of strong social norms against using government office for personal gain, the presence of part-time staffers would appear to raise undue risks of interest conflicts and corruption. On the other hand, if I am right that corporative, solidaristic forms of social organization are obstacles to the implementation of the rule of law, reliance on part-timers could well turn out to be beneficial just because their careers are not wholly bound up with the state institution that employs them and they are positioned to spread their more rule-oriented values—as well as their sense of the importance of acting publicly to advance them—within the national bar.

This analysis offers no easy answers to World Bank, IDB, and USAID reformers who would like to engineer the rule of law as quickly as possible. Rather, it suggests that Latin American societies can only transform themselves from corporative to rule of law societies via transgenerational processes of change that cannot be significantly accelerated. On the other hand, if realism on this point causes us to turn away from an exclusive focus on “whole system” development to focus instead on the construction of the rule of law “by parts,” that is, by finding and reinforcing instances of culturally institutionalized rule-observant behavior and encouraging such behaviors gradually to generalize themselves throughout the society, we may see progress.

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