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# **The Judicial Sector in Latin America and the Caribbean**

## **Elements of Reform**

Maria Dakolias

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## FOREWORD

The countries in Latin America and the Caribbean are emerging from a period of major change and adjustment. These recent changes have caused a rethinking of the role of the state. There has been greater reliance on markets and the private sector with the state acting as an important facilitator and regulator of private sector activity and development. However, public institutions in the region have been unable to effectively respond to these challenges. In order to support and encourage sustainable and equitable development, Latin American and Caribbean governments are engaged in institution building which will provide greater efficiency, functional autonomy and improved service. The judiciary is a necessary public institution which should provide equitable, expeditious and transparent dispute resolution to the citizens, economic agents and the state. However, in many countries in the region there is a need for reform in order to improve the quality and efficiency of the administration of justice. This in turn will foster an enabling environment that is conducive to trade, financing and investment.

The judiciary in many parts of the Latin American and Caribbean region has experienced lengthy case delays, extensive case backlogs, limited access by the population, a lack of transparency and predictability in court decisions and weak public confidence in the judicial system. This inefficiency in the administration of justice is a product of many obstacles. These include a lack of independence of the judiciary, the inadequate administrative capacity of the courts, deficient case management, a shortage of judges and lack of training, noncompetitive personnel practices, expenditure control systems that lack transparency, inadequate legal education and training, weak enforcement and sanctions for unethical behavior, lack of alternative dispute resolution mechanisms, and cumbersome laws and procedures. This technical note discusses some of the elements of judicial reform while providing examples of reforms in the region. It is my hope that it will assist governments, practitioners, researchers and World Bank staff in developing future judicial reform programs.

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## **ABSTRACT**

The Bank has been a relatively new participant in judicial reform with a number of projects under implementation and preparation, and even more being contemplated. The majority of the Bank's work has been in Latin America; consequently the Bank's work in this area is being examined as other countries throughout the world only now begin major reform efforts. The Bank's experiences have made it clear that there is a need to define the elements of an overall judicial reform program which can be adapted given the country-specific needs. As a result, it is important for the Bank to develop a coherent approach to judicial sector projects since governments from around the world are increasingly asking the Bank for assistance in the reform process. This paper proposes a program for judicial reform which specifically addresses the main factors affecting the quality of court services, its monopolistic nature and the resultant inefficiency. The reform program also addresses the economic and legal causes at the root of an inefficient and inequitable judiciary. While an exhaustive list of reform measures cannot be provided, this paper discusses the main elements necessary to ensure an equitable and efficient judiciary. The basic elements of judicial reform should include measures with respect to guaranteeing judicial independence through changes to judicial budgeting, judicial appointment, and disciplinary systems improving court administration through adoption of case management and court management reforms; adopting procedural reforms; providing alternative dispute resolution mechanisms; enhancing the public's access to justice; incorporating gender issues in the reform process; and redefining and/or expanding legal education and training programs for students, lawyers and judges.





## **PREFACE and ACKNOWLEDGMENTS**

This report was prepared under the Public Sector Modernization Unit of the Technical Department in the Latin America and the Caribbean region. The Public Sector Modernization Unit has been providing support and advice to judicial reform projects in the region, and this report is designed to compile the different experiences of the region as a way to assist future judicial reform efforts. The report especially benefited from the support of Mr. Malcolm D. Rowat, Manager of the Public Sector Modernization Unit, whose valuable direction and comments were instrumental in bringing this report to completion, as well as the support of Mr. Sri-Ram Aiyer, Director of the Technical Department. The author is thankful to Denise Manning-Cabrol for her research assistance during the preparation of this paper, and to the Legal Department and Bryant Garth for their valuable comments and suggestions during the various drafts of this report. A version of this report will be published in the Spring 1996 volume of the Virginia Journal of International Law.



## EXECUTIVE SUMMARY

The purpose of this paper is to outline some of the elements of judicial reform that should be considered during a country specific review as well as during the design of a judicial reform program. While an exhaustive list of reform measures cannot be provided, this paper discusses the main elements necessary to ensure an equitable and efficient judiciary. These elements taken as a whole are designed to improve the efficiency and effectiveness of the judiciary--that is, its ability to resolve conflicts in a predictable, fair and timely manner. An effective government requires functioning legal and judicial institutions to accomplish the interrelated goals of promoting private sector development, encouraging development of all other societal institutions and alleviating poverty. The paper draws upon the reforms of the Latin America and Caribbean Region where the Bank has had its first experience as well as includes experiences from many OECD countries. However, these experiences will have relevance for other regions contemplating reform.

As the Latin American and Caribbean Region continues the process of economic development, greater importance is being given to judicial reform. A well-functioning judiciary is important for economic development. The purpose of any judiciary of any society is to order social relationships and resolve conflicts among these societal actors. Currently the judiciary is unable to ensure predictable and efficient conflict resolution to enforce individual and property rights. It is unable to meet the demands from the private sector and the public at large, especially the poor. Given the current state of crisis of Latin American and Caribbean judicial systems, the goal of the reform efforts is the promotion of economic development. Judicial reform is part of the process of redefining the state and its relationship with society, and economic development cannot continue without effective enforcement, definition and interpretation of property rights. More specifically, judicial reform is aimed at increasing the efficiency and equity in resolving disputes by improving access to justice which is not rationed and promoting private sector development.

The public as well as most judges and lawyers also consider the time required for resolution of a typical case as excessive. It is not uncommon for cases to take up to 12 years to be resolved in court. As a result, the courts are experiencing tremendous backlogs. In Brazil, more than 4 million cases were filed in the courts of first instance in 1990, but only 58 percent of those cases were adjudicated by the end of 1990. In Bolivia, in several first instance courts, only 42 percent of the cases that enter the system are disposed of in the same year. In Trinidad and Tobago, only about 30 percent of the cases filed are resolved in the same year. The increasing backlogs and time delays throughout the region have shown an increase in demand for court services.

With the increase in economic activity, the courts have also experienced an increase in case filings, but they have not been able to keep up with the pace of filings thereby causing backlogs. In addition, the courts have been poorly managed. The courts have historically been managed by the judges themselves who have spent up to 70% of

their time on court administrative matters. Even worse, judges have little training prior to assuming responsibilities on the bench or while on the job. Regardless of wealth, there is a desire to avoid the judicial system's delays and unpredictability. As a result, there is widespread recognition that judicial reform is necessary. In fact, many countries in Latin America and the Caribbean have embarked on reforming their judicial systems and have increasingly requested assistance from the World Bank in this area. However, the elements of judicial reform and some preliminary priorities need to be formulated.

The most important elements include the independence of the judiciary-- the appointment, evaluation, and disciplinary systems; judicial administration-- court administration, case administration, and procedural codes; access to justice-- alternative dispute resolution mechanisms, court costs, legal aid, small claims courts, and gender issues; legal education --for students and the public and training for lawyers and judges; and the bar associations. Although these are the basic elements, the individuality and uniqueness of each judicial system does not permit complete specificity in the recommendations provided within this paper. Such specificity can only come as a result of an in-depth review of each country's judicial sector. The sequencing of the reforms also requires country-specific review, however, some initial priority areas could include: administration of the courts, independence of the judiciary, training for judges, court personnel and lawyers and improving the access to justice. Some preliminary activities in these areas are provided under each recommendation section.

Independence of the judiciary has structural, organizational and administrative aspects which must be considered during reform. This is essential in order to change the public's perception of corrupt behavior in the judiciary. Several aspects that should be considered include substantive, personal, collective and internal independence. Such independence allows the judiciary to make decisions according to the law and not based on external or internal political factors. Personal independence for judges can be achieved through appropriate judicial terms, salaries and case and court assignments. In addition, the method in which judges are appointed, evaluated and promoted play an important role in independence as well as maintaining qualified judges on the bench. An important part of the quality will depend on the disciplinary and evaluation systems in place. Judicial independence requires a transparent and merit-based appointment system. Such a system could involve a judicial council which participates in the process.

All these elements constitute the overall independence of the judiciary and must be considered during judicial reform. Specific administrative and organizational reform measures for enhancing judicial independence regardless of the type of independence should include: judicial budget autonomy, the existence of a uniform appointment system, stable terms, disciplinary system for court personnel, and adequate salaries and retirement benefits for judges. Transparent methods of appointment, removal and supervision should be included in judicial reform programs in order to ensure personal and functional independence for judges. Independence may also be strengthened by building the administrative capacity and training of judges and court personnel. In this

way, the judiciary becomes efficient and obtains more respect, thus improving the quality of personnel attracted to a judicial career.

The administrative aspects of independence include court and case administration. Court administration involves the administrative functions of the courts, including administrative offices, personnel, budget, information systems, statistics, planning and court facilities. Historically, the court budget has not been able to meet the needs of the judiciary. Judges and court personnel work under conditions that are not conducive for efficient administration of justice. The inadequate court facilities and lack of technology compound this situation. Due to a lack of space for archives and active case storage, cases are often found lined up along the hallways of the courts. Case administration, on the other hand, refers to the processing of cases, including, for example, case management. This can have a tremendous impact on the efficiency of the courts. Most courts experience severe case backlogs and are unable to reduce their caseloads to cope with delay. For example, in 1993, there were approximately 500,000 cases pending in the entire court system in Ecuador. The Argentine statistics office estimates that over 1,000,000 cases were pending in the entire Federal system in 1992. By 1993 in Colombia, over 4 million cases were pending. One way to address such backlogs is to review the procedural codes to determine whether they are creating any backlogs in the system.

In order to address the administration element of reform, the program should review the budgetary process and ensure that there be budget autonomy. In addition, activities should also include assistance in decentralizing the administration of budgets. Additionally, a permanent administrative full-time position should be created as part of the judicial structure. A review of the current number of personnel should be completed to determine the actual needs given the court and case management techniques as well as establish clear terms of appointment, classification of positions and a system of promotions based on evaluations. Finally the court facilities should be modernized to accommodate such reforms.

Access to justice depends on the proper functioning of the judicial system as a whole, but some specific factors include the economic, psychological, informational and physical barriers for individuals to access judicial services. This includes, for example, court costs and facilities as well as language differences which may be found among indigenous populations, for example. Proper legal aid programs and alternative forms of justice can also assist in improving access. Adequate and efficient legal aid and public defenders programs should be made available to provide legal assistance and advice for those who can not otherwise afford to bring an action or defend themselves in a law suit. Access to justice can be enhanced through alternative dispute resolution mechanisms (ADR). Alternative dispute resolution mechanisms including arbitration, mediation, conciliation, and justices of the peace can be used to alleviate delays and corruption. Another important element of access are gender issues which should be considered under each element of reform. Gender differences create obstacles for women, preventing them from accessing the legal and judicial system to enforce their rights.

In order to improve access to justice judicial reform programs should consider both court-annexed ADR as well as private ADR. This will permit competition in resolving disputes thereby addressing the monopoly of the judiciary. Pilot programs can be developed in a wide variety of areas including court-annexed ADR, private ADR or *jueces de paz*. Such programs should also concentrate on providing qualified legal representation for the poor. In addition, information should be provided to facilitate public use of the judiciary. This could include providing translators for those who do not speak the official language and assistance for those who do not read or write. Improved access will also depend on court costs as well as lawyers fees that are charged. Judicial reform programs should review court costs to determine whether they are high enough to deter frivolous claims and corruptive behavior and whether they provide for waivers to improve access. Lawyers fees awarded by the court should also be reviewed in this way. Gender issues in judicial reform programs are an important part of alleviating poverty and achieving economic growth. Women constitute a majority of the individuals using legal aid services; and therefore, by necessity the programs should focus on areas that affect women most. In addition, judges must be made aware that specific gender issues are often involved in the cases before them.

Legal education and training is fundamental for judicial reform. This includes legal education and training for students, continuing legal education for practicing lawyers, judicial training for judges and legal awareness education for the public. The quality of law schools has been deteriorating and therefore there is a need to improve both the university level education as well as promote continuing training for professionals. In most Latin American countries the public universities have no entrance requirements, and each school establishes its own graduation requirements. Due to low salaries, law professors usually work on a part-time basis, and therefore, have little time to devote to research. As a result, judges often are not prepared for the bench.

Legal education at the university level is important for the future of the legal profession, but it is an ambitious area that has had limited success in the past. An evaluation of the open access of law schools should be done in order to prevent an excess supply of lawyers and therefore, a misallocation of resources. Judicial reform programs should concentrate on the training of judges, and most importantly, on training for current judges as the current reforms will only be successful if the sitting judges are convinced of the need for judicial reform. Finally, public education should be included in the reform program. This could also include public campaigns as a way to provide better education and access to the population at large.

The main role of the bar associations in all countries is to regulate the profession through entrance requirements and the disciplinary system, to provide legal training for its members, and provide basic legal services to the community. The requirements for qualifying as a practicing attorney, ethical standards and the disciplinary procedures must be clearly established and enforced. Generally in Latin America, the requirements to practice law entail merely holding a law degree from a university and being a member of

the bar; this is the case in Argentina, Peru and Ecuador. Bar associations are responsible for enforcing the disciplinary system; however, the mechanisms in place usually do not operate properly.

The bar associations should take a more active role in monitoring the legal profession as well as the judiciary and establishing clear ethical standards. These standards should be enforced by an effective disciplinary system which can impose appropriate penalties. The bar association should also assist in improving access to justice by providing some basic legal services to their community. In addition, the bar association should provide training for its members. Such training should include substantive legal courses as well as courses in case management techniques.

These are some of the most important elements of reform and ideally a reform program should attempt to cover as many of the elements lacking in a specific country as possible. However, resource constraints as well as other donor participation should be taken into account when establishing priorities. Although some general recommendations are made within each chapter of the paper, specific recommendations can only be made once a judicial sector review is completed for that country. Furthermore, priorities for implementation can only be provided on a specific country basis. Judicial reform programs should be implemented in stages: the sequencing of such stages should be planned taking into account the costs and benefits of each stage. The initial stages, however, should avoid legislative reform because of its extremely costly nature in terms of political capital. Each country's legal, economic, social and political environment must be factored into the recommendations as well as into developing priorities for implementation. The Bank can assist in this process by financing judicial sector studies. With this, constructive dialogue can take place with the governments as well as a design of appropriate avenues of reform.

There have been several initiatives in the Latin America and Caribbean Region which provide a basis for this approach to judicial reform. The Bank first began with a small judicial technology component in a larger Argentine Social Sector Reform Loan in 1989 and then a separate Judicial Infrastructure Loan in Venezuela in 1994 which concentrated on infrastructure, technology and some substantive studies in other areas to compensate for the lack of a prior sector review. During implementation, however, the project has been substantially revised. At the same time, the Bank began to develop a second generation approach to judicial reform. In 1992, the Bank embarked on a judicial sector review in Argentina financed by an Institutional Development Fund Grant. In 1995, a judicial reform project was approved for Bolivia where several studies had been completed which influenced the components that were included. The Bank has adopted a prior review approach and now produces its own judicial sector reports. Such reports have been completed in Ecuador and Peru where projects are under preparation. These projects have aimed to include a broader range of components than was included in the first project in Venezuela, as well as an effort to include a broad participation by the legal community in the preparation of the individual components.

Judicial reform should be conducted through a consensus approach and should be initiated from within the country. Only if these two objectives are met -- **judicial reform from within and consensus** -- will the reforms be long-term systemic changes instead of superficial reforms subject to reversal. Consensus requires that the political limitations and the priority pragmatic strategies be taken into account. Any program of judicial reform must also consider the vested interests in the judiciary, the bar associations, and the other branches of government. These vested interests can impede consensus. Projects should encourage the participation of a broadly composed informal committee or judicial council (*consejo*) during the preparation and implementation stage in order to promote consensus in the projects, provide an obvious counterpart as well as ensure accountability. Though it is ideal to have full consensus, it may not be realistic. Therefore, at some point it is important to begin some form of reform activity while at the same time continuing the consensus building.

The Latin America and Caribbean Region today is politically, economically and socially better suited for judicial reforms than the 1960s and 1970s. There is greater economic stability in the region which has allowed these countries to begin the so-called second generation reforms. The economic reforms have also increased transactions with unknown actors and thus has increased the demand for formal mechanisms to resolve conflicts. Second, the reforms are a result of the local initiative and strong commitment: there is wide support among governments including across political parties, legal community, private sector as well as among NGO's for such reforms. Finally, the programs include a wide variety of elements which are specifically designed for country needs.

The objective of these projects today is to provide a service that is efficient and equitable as well as respected and valued by the community. In a market economy, an effective judicial system is expected and needed by citizens, the government and the private sector in order to resolve conflicts and order social relationships. As markets become more open and transactions more complex, formal and impartial judicial institutions will be essential. Without such institutions, private sector development as well as public sector modernization will not be complete. Similarly, such institutions contribute to the economic efficiency and lead to growth which in turn alleviates poverty. Judicial reform should especially be considered in tandem when contemplating any legal reform because without a functioning judiciary, laws cannot effectively be enforced. As a result, comprehensive judicial reform can have a tremendous impact on the success of the modernization of the state as well as make an important contribution to the overall development process.



## I. INTRODUCTION

During the 1980s, development efforts focused on a macro-economic agenda that out of necessity took priority over institutional reforms. "[F]or decades, governments in Latin America failed to develop the institutions needed to handle their populations' basic problems because they concentrated most of their resources on managing their countries' economic assets and regulating almost every aspect of economic life."<sup>1</sup> However, as economic stability became a part of reality, many countries began to work on achieving social equity as well as political and economic reforms. As a result, the development process has now evolved into second generation reforms with an expanded scope that focuses on institutional reforms, such as judicial reform. In the words of one Minister of Justice, "it is not enough to build highways and factories to modernize a state . . . a reliable justice system is needed as well."<sup>2</sup> An effective government requires functioning legal and judicial institutions to accomplish the interrelated goals of promoting private sector development, encouraging development of all other societal institutions, alleviating poverty and consolidating democracy. Legal principles supporting the prevailing economic system in Latin America are nominally based on the freedom to exercise individual and property rights.<sup>3</sup> But legislation is meaningless without an effective judicial system to enforce it.

The purpose of the judiciary of any society is to order social relationships (among private and public entities and individuals)<sup>4</sup> and resolve conflicts among these societal actors. The Latin America judicial sector does not effectively accomplish these purposes but is, in fact, currently perceived by all of its users -- private individuals and the business community -- and its actors -- judges and lawyers -- to be in a state of crisis.<sup>5</sup> As a result, the public and the business community distrusts the judiciary and believes judicial resolution to be excessively time-consuming. This perception of ineffectiveness by the institution's potential users prevents its intended beneficiaries from accessing its services, and when forced to use its services, believe they will be unjustly treated. Consequently, the judiciary cannot fulfill its purposes of ordering society and resolving societal conflicts

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<sup>1</sup> Shahid Javed Burki and Sebastian Edwards, "Consolidating Economic Reforms in Latin America and the Caribbean," 32 Finance and Development 7 (1995).

<sup>2</sup> Minister Rene Blattman, La Paz Presencia, Bolivia, July 22, 1994.

<sup>3</sup> Edgardo Buscaglia and Maria Dakolias, Judicial Reform in Latin America: Economic Efficiency vs. Institutional Inertia, Working Paper Series, Econ-2377-06-495, School of Business Administration, Georgetown University (1995).

<sup>4</sup> See generally Max Weber, Law in Economy and Society (1954).

<sup>5</sup> Buscaglia and Dakolias, Judicial Reform, *supra* note 3.

and is therefore in need of reform. This paper will discuss what judicial reform is, the reasons why it is necessary for economic and social development in Latin America, and specific recommendations with the benefit of the information provided by the region's experiences.<sup>6</sup> Although the Caribbean is included in this paper, not all the problems and recommendations will be relevant for those countries based on a common law system since these countries have a specific set of concerns. After discussing the specific elements of Latin American and Caribbean judicial reform efforts, the final section of this paper will provide a more extensive discussion of project design. It is important to mention that although this paper concentrates on the civil aspects of judicial reform, many of the elements apply to both civil and criminal courts. However, the Bank is prevented by its Articles of Agreement to work within the criminal law area since intervention in this area is not considered to be for productive purposes, i.e. they do not seek to promote economic development.<sup>7</sup>

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<sup>6</sup> This paper is based on extensive field work in the region, but it does not presume to include all the countries in the region and therefore the list of experiences is not exhaustive.

<sup>7</sup> Articles I (ii) and III Section 1 of the Articles of Agreement as amended effective February 16, 1989. However, the Bank is not prevented from financing court administration and infrastructure that include the criminal courts, since often such reforms cannot be separated by jurisdiction. See I. Shihata, "Legal Framework for Development: The World Bank's Role in Legal and Judicial Reform," paper prepared for the World Bank Judicial Reform Conference, June, 1994.

## II. THE GOALS OF JUDICIAL REFORM

Economic reform requires a well-functioning judiciary which can interpret and apply the laws and regulations in a predictable and efficient manner. With the emergence of an open market, there is an increased need for a judicial system. The transition from family run businesses --which did not rely on laws and formal mechanisms to resolve conflicts-- to an increase in transactions with unknown actors has created a need for formal conflict resolution. These new business relationships need impartial decision-making within more formal institutions. However, the current judicial system is unable to satisfy this demand, thereby forcing the parties to continue relying on informal mechanisms and long-standing family or personal ties to do business.<sup>8</sup> This sometimes discourages business transactions with unknown but possibly more efficient actors which leads to an inefficient allocation of resources.<sup>9</sup> This situation adds cost and risk to business transactions and, thus, reduces the size of the markets, and consequently, the competitiveness of the market.<sup>10</sup>

In addition, the increase in economic integration between countries and regions demands a judiciary that meets international standards. For example, the WTO, MERCOSUR, and NAFTA require certain principles to govern trade issues. Economic integration requires greater harmonization of laws which in turn requires that they be consistently applied by the member countries. The Member Countries must have assurance that the laws will be applied and interpreted in accordance with these international or regional standards. In this way, the countries around the world must

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<sup>8</sup> In Peru, 32 percent of those surveyed indicated that they would not switch suppliers even if a lower price were offered. World Bank, Peru: Judicial Sector Assessment (November 30, 1994) at 5. See also, World Bank, Bolivia: Judicial Reform SAR (March 24, 1995). In Argentina, the cost of debt collection is prohibitive where some 70% of the loans are at fault, but banks do not bring actions to court.

<sup>9</sup> The results of businesses surveyed throughout Latin America indicate that the judicial system is considered to be among the top ten most significant constraints to private sector development. The results of this survey indicate that in samples of 60 to 100 firms per country, the majority of these enterprises consider the role of the judiciary as "deficient." A survey was conducted by the World Bank in May 1993 to determine the constraints to Ecuadoran private sector development. In this survey, the judicial system was considered to be the sixth most significant constraint to private sector development. According to the business survey results, a malfunctioning judiciary affects the decision of whether to invest because of the lack of certainty and probability of delay in enforcing contractual rights. The results of the 68 enterprises surveyed indicate that the most significant constraints to private sector development were as follows: political instability, inflation and price instability, lack of skilled labor, lack of infrastructure, high level of taxation, poor functioning of the judicial system, regulatory constraints, access to credit and lack of services. World Bank, Ecuador: Private Sector Assessment (1994).

<sup>10</sup> Buscaglia and Dakolias, Judicial Reform, *supra* note 3.

modernize their judiciaries in order to accommodate these demands and provide a level playing field in the international arena.

The government must be able to enforce rules of the game it has created; through the judiciary, it can provide this service by enforcing individual and property rights.<sup>11</sup> Consistent enforcement in turn provides for a stable institutional environment where the long term consequences of economic decisions can be assessed. In this context, an ideal judiciary applies and interprets the laws equitably and efficiently which means that there must be: (a) predictability in the outcomes of cases; (b) accessibility to the courts by the population regardless of income level; (c) reasonable times to disposition; and (d) adequate court-provided remedies.<sup>12</sup>

Contrary to this ideal, the judicial sector in Latin America neither effectively nor efficiently enforces existing legislation. Currently the system is plagued with distrust and delays in disposing of cases which have impeded private sector development and access to the courts. First, the public has a widespread distrust of the judicial sector. For example, in Argentina only 13 percent of the public have confidence in the administration of justice.<sup>13</sup> In Brazil, 74 percent of the public view the administration of justice as fair or poor.<sup>14</sup> The worst case perhaps exists in Peru, where 92 percent of the population lack confidence in the judges.<sup>15</sup> Court officers, including judges<sup>16</sup> and support personnel as

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<sup>11</sup> According to the Coase Theorem, allocative efficiency will be ensured once clear property rights are established and guaranteed by the government. Consequently, the government does not need to intervene further, because once private parties have clearly defined property rights, they can bargain towards an efficient outcome. Ronald H. Coase, "The Problems of Social Cost," 3 *J. of L. and Economics* 1 (1960). The current state of the Latin American judicial system, however, does not provide for properly defined property rights and thus prevents the efficient allocation of resources.

<sup>12</sup> Buscaglia and Dakolias, *Judicial Reform*, *supra* note 3.

<sup>13</sup> Institute Gallop de la Argentina, *Estudio de Opinión Acerca de la Justicia en Argentina*, March 1994. Moreover, only 16 percent of the public polled in Argentina have confidence in that country's judges.

<sup>14</sup> Maria Terez Sadek and Rogerio Bastos Arantes, "The Crisis of the Brazilian Judiciary: The Judges Perspective," Paper presented at the XVIth World Congress of the International Political Science Association 9 (August 21-25, 1994) (citing FIBGE, "Justicia e Vitimizacao," 1 Participacao Politico-Social, 1988).

<sup>15</sup> Eighty-six percent of the population has either little or no confidence in the overall administration of justice. Peru: Judicial Sector Assessment, *supra* note 8.

<sup>16</sup> Corruption cases involving judges and court employees are common throughout the region. In particular, the poor reputation of Latin American judges results from the public's perception that many judges use their positions for personal gain, and consequently, apply the law arbitrarily. In Peru, for example, the population's dissatisfaction with the judiciary has increased dramatically, as represented by the number of disciplinary actions filed. In 1991, 3,319 complaints were filed, while in 1993, 9,121 were filed. *EBIS*, Nov. 29, 1994, (citing Angel Paez, "The Dreadful Court," *La Republica*, Oct. 9, 1994). See I. Shihata, "Judicial Reform: Issues Addressed in World Bank Projects" paper presented in Montevideo,

well as lawyers and government officials are perceived to be at the root of the problem and thereby make it difficult to even promote any change. The judiciary, in economic terms, has a monopoly on the supply of justice, and consequently, has incentives to act inefficiently.<sup>17</sup> The judiciary captures the rents in kind by providing less than optimal service which in turn causes delay in the resolution of cases.

The public as well as most judges and lawyers also consider the time required for resolution of a typical case as excessive-- this is the consequential damages individuals and businesses suffer due to the prolonged time for resolution and the courts incapacity to satisfy the population's demand for court services.<sup>18</sup> It is not uncommon for cases to take up 12 years to be resolved in court.<sup>19</sup> As a result, the courts are experiencing tremendous backlogs. In Brazil, more than 4 million cases were filed in the courts of first instance in 1990, but only 58 percent of those cases were adjudicated by the end of 1990.<sup>20</sup> In Bolivia, in several first instance courts, only 42 percent of the cases that enter the system are disposed of in the same year.<sup>21</sup> In Trinidad and Tobago, only about 30 percent of the cases filed are resolved in the same year.<sup>22</sup> The increasing backlogs and time delays throughout the region has shown an increase in demand for court services.<sup>23</sup> The

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Uruguay October 19-20 at the Inter-American Development Bank Conference about Justice and Development in Latin America and the Caribbean II.

<sup>17</sup> Carlos Peña Gonzalez, "El Acceso a la Justicia: Elementos para la Reforma Judicial," 9 (forthcoming).

<sup>18</sup> Buscaglia and Dakolias, Judicial Reform, *supra* note 3.

<sup>19</sup> Edgardo Buscaglia and Maria Dakolias, Delay Study (1995). The study found a 12 year expected delay for labor cases in Ecuador in 1991. In the United States' state courts, 51% of the cases take more than two years to be disposed of. National Center for State Courts, 1994.

<sup>20</sup> In 1990, 4,209,623 cases were filed. Tereza Sadek and Bastos Arantes, *supra* note 14, at 9. By contrast in Japan's District Courts there were a total of 563,000 cases pending at the end of 1995.

<sup>21</sup> Bolivia: Judicial Reform SAR, *supra* note 8.

<sup>22</sup> World Bank, Trinidad and Tobago: Judicial Sector Report (July 1995).

<sup>23</sup> The increase in cases filed may be a result in Chile of privatization or an increase in pluralism in civil society. Peña, *supra* note 17, at 24. Similarly, other authors have argued that new policies of economic liberalization result in new patterns of transacting with new and unknown actors; therefore, new types of disputes exist between private interests and regulatory actors that the court must resolve. These actors argue that in either what they term centrally planned or domestic mercantilist economies the role of the courts is much less important than under an open market economy. In a centrally planned economy, all disputes are resolved within the confines of ministries. In a domestic mercantilist economy, the court generally does not resolve disputes between the government and private entities as allocation of resources is based on favor. Robert M. Sherwood, Geoffrey Sheperd, Celso Marcos de Souza, "Judicial Systems and Economic Performance," 34 The Quarterly Rev. of Economics and Finance, 101, 101-2 (1994).

judiciaries in Chile and Ecuador, typical cases, do not increase the supply of services in response to increased demands for services.<sup>24</sup>

Given the current state of crisis of Latin American judicial systems, the benefits and goals of the reform efforts can be broadly grouped into two overall structural goals: enhancement and reinforcement of democracy and promotion of economic development. Judicial reform is necessary for a functioning democracy and is part of the process of redefining the state and its relationship with society, and economic development cannot continue without effective enforcement, definition and interpretation of property rights. More specifically, judicial reform is aimed at increasing the efficiency and equity in resolving disputes by improving access to justice which is not rationed<sup>25</sup> and promoting private sector development.

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<sup>24</sup> *Id.* and Buscaglia and Dakolias, *Delay Study*, *supra* note 19.

<sup>25</sup> Paul M. Li, "How are Judicial Schools Compared to the Rest of the World," 34 *Judges Journal* 17 (1995) (citing Judge Learned Hand).

### III. JUDICIAL REFORMS IN LATIN AMERICA AND THE CARIBBEAN

In order to achieve these goals, a program for judicial reform should be designed to specifically address the main factors affecting the quality of court services<sup>26</sup>, its monopolistic nature and the resultant inefficiency. This reform effort must also address the political, economic and legal causes at the root of an inefficient and inequitable judiciary.<sup>27</sup> If such a holistic approach is not adopted, there will be a minimal probability for success. While an exhaustive list of reform measures cannot be provided, this paper discusses the main elements necessary to assure an equitable and efficient judiciary.<sup>28</sup> The basic elements of judicial reform should include measures with respect to guaranteeing judicial independence through changes to judicial budgeting, judicial appointment, and disciplinary systems; improving court administration through the adoption of case management and court management reforms; adopting procedural reforms; providing alternative dispute resolution mechanisms; enhancing the public's access to justice; incorporating gender issues in the reform process; and redefining and/or expanding legal education and training programs for students, lawyers and judges. Although these are the basic elements, the individuality and uniqueness of each judicial system does not permit complete specificity in the recommendations provided below. Such specificity can only come as a result of an in-depth review of each country's judicial sector.

#### JUDICIAL INDEPENDENCE

Administering justice at all levels depends on the quality of judges; therefore, judicial independence is an imperative feature of any judicial reform project. Contrary to common opinion, judicial independence signifies much more than a judge's freedom from political influence. Independence has a number of definitions and dimensions,<sup>29</sup> including

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<sup>26</sup> Buscaglia and Dakolias, Judicial Reform, *supra* note 3.

<sup>27</sup> Buscaglia and Dakolias, Judicial Reform, *supra* note 3.

<sup>28</sup> Buscaglia and Dakolias, Judicial Reform, *supra* note 3.

<sup>29</sup> Owen Fiss describes three different types of judicial independence: first, party detachment, which is an independence from the interests of the parties, second, individual autonomy, independence from the bureaucratic judicial structure, i.e. other judges, and third, political insularity, independence from the other governmental institutions. Owen Fiss, "The Right Degree of Independence," in Transition to Democracy in Latin America: The Role of Judiciary 55-6 (1993). Theodore Becker has defined independence as follows: "(a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of the judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the belief or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court." Theodore Lewis Becker, Comparative Judicial Politics 144 (1970). Keith S. Rosenn defines judicial independence as: "the degree to which judges actually decide cases in accordance with their own

structural, organizational and administrative aspects of a judicial system, which all play a role in judicial independence.<sup>30</sup> However, given that a number of the structural aspects of independence are constitutional in nature, the focus in this section will be on the administrative and organizational aspects of independence.<sup>31</sup>

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determinations of the evidence, the law and justice, free from coercion, blandishments, interference or threats of governmental authorities or private citizens.” Keith S. Rosenn, “The Protection of Judicial Independence in Latin America,” 19 Univ. of Miami Inter-American L. Rev. 7 (1987).

<sup>30</sup> See Proposiciones para la Reforma Judicial (1991) (stating that the public’s decreasing respect in Chile for the judiciary results from structural and organizational factors and that transparent mechanisms and mechanisms for public control of the judiciary are as important as the principle of independence).

<sup>31</sup> Structural independence, as used here, refers to the judicial branch's independence from the political branches of power, which in U.S. constitutional law is accomplished by the concept of separation of powers. In all Latin American countries, one observes the formal, structural independence that is guaranteed in the constitutions of the region. Rosenn, supra note 28, at 13. Some of the formalistic techniques placed in Latin American constitutions to guarantee such independence include provisions that prohibit interference by other branches of the government in judicial proceedings or prohibit other branches from exercising judicial functions, require judges to write reasoned opinions, provide for public trials when the case involves public officials, prohibit the reduction of judicial salaries, guarantee the judiciary a fixed percentage of the budget, specified tenure, pre-determined selection processes and qualifications, prohibit involuntary transfers and prohibit certain extra-judicial activities. Moreover, a number of Latin American countries provide for certain types of judicial review mechanisms that allow courts, for example, to declare administrative acts or a legislative act unconstitutional, as applied in the specific case at hand. For descriptions of a number of judicial review mechanisms in Latin America see Alan R. Brewer-Carias, Judicial Review in Comparative Law (1989).

However, these structural mechanisms in Latin American constitutions have not guaranteed the courts' decision making autonomy or substantive independence. Buscaglia and Dakolias, Judicial Reform, supra note 3. Historically, interventions by the legislative and executive branches have destroyed public confidence and trust in the judicial system and forced judges to be even more dependent on the other branches of government. For example, in Uruguay the government eliminated the judiciary as a separate branch of government in 1977. In Argentina, the Supreme Court has been completely replaced six times since 1946. OAS, "Report of the Inter-American Juridical Committee on the 'Improvement of the Administration of Justice in the Americas Protection and Guarantees for Judges and Lawyers in Exercise of their Functions,'" 21-26 (Dec. 13, 1994). Keith Rosenn provides a detailed list of instances where Latin American structural independence has been violated, including: formal abrogation of judicial independence, bypassing ordinary courts by setting up separate courts, dismissal of judges, transferring and reassignment of judges, reduction of salaries and denying enforcement of judicial decisions. Rosenn, supra note 28, at 23-31.

Decision-making autonomy does not need clear separation of powers, but rather a traditional respect for judicial authority emanating from the legislature and executive branches. It may, therefore, be sufficient to develop substantive independence as a way to ensure uniformity in the interpretation of the law. It is interesting to note that the judiciaries in Canada, France, Germany and Great Britain function with substantive independence, despite their lack of structural independence. Buscaglia and Dakolias, Judicial Reform, supra note 3. In fact, one commentator has argued that the Latin American countries have adopted a mixed system of judicial independence and separation of powers relying both on the U.S. system of check and balances and separation of institutions and the French system of separation of powers but consolidation of institutions where judicial and administrative jurisdiction are considered two distinct aspects of a single executive authority. This author concludes that the Latin American countries do not have judicial independence because of this structural intermixing, and they should move more towards the



There are several different types of independence: *substantive independence*, which is *functional or decisional independence* in German and American law respectively (making judicial decisions and exercising official duties subject to no other authority but the law), *personal independence* (adequately secured judicial terms of office and tenure), *collective independence* (judicial participation in the central administration of courts) and *internal independence* (independence from judicial superiors and colleagues).<sup>32</sup>

The first type of judicial independence is *functional or decisional independence* or the ability to make decisions according to the law and not according to external political factors.<sup>33</sup> A number of external factors can affect a judge's decision including pressure from the political branches of the government, other members of the judiciary, and public or personal relationships with respect to the parties or the subject matter of the particular case. The branches of government, and in particular the executive, has historically influenced judicial decision-making. The judiciaries in Latin American countries have historically not acted as significant institutional counterforces to legislative and executive abuses of power for a number of historical, political and structural reasons.<sup>34</sup>

Interference in the decision-making process can also occur within the court system itself. This is part of what has been termed *internal independence*. In most Latin American countries, geographic and subject matter jurisdictions are not well-defined. This allows for undue political interference by the supreme court, as well as by the legislature, in the lower courts' judicial activities. For example, one observes that, with few exceptions, indiscriminate federal judicial review of state court decisions is common

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French model and less towards the American model. However, this move will be meaningless if there is no respect for judicial decision-making. Nicholas D.S. Brumm, "Divergent Models of Public Law in Latin America: A Historical and Prescriptive Analysis," 24 Univ. of Miami Inter-American L. Rev. 1 (1992).

<sup>32</sup> Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," in Judicial Independence: the Contemporary Debate 595, 598-9 (ed. Shimon Shetreet, 1985).

<sup>33</sup> For example, in Chile Judge Carlos Cerda Fernandez was suspended from the Santiago Court of Appeals after refusing to close a case that implicated armed forces officers in kidnapping and disappearance charges. However, the judge was reinstated on appeal in 1991. OAS, *supra* note 32, at 30 (citing Lawyers Committee, 1991).

<sup>34</sup> One commentator lists seven factors cited as explanations of the judiciary's traditional role of dependence: a tradition of executive dominance, political instability, the Roman or code law system with little support for judicial activism, the use of precedent and judicial law or policy or policy making, the highly complex structure and processes of the judicial system itself that prevents a number of issues from coming before the courts, the limited use of judicial review, the lack of popular independent power base in the population and the appointment, tenure and impeachment processes. Joel G. Verner, "The Independence of Supreme Courts in Latin America: A Review of the Literature." 16 J. Lat. Am. Stud. 463, 468-77 (1984). Verner then attempts to quantify the levels of independence of the different Latin American judicial systems and provide a typology of the same. *Id.* at 477-504.

in the region. In this context, state cases lacking federal constitutional issues at stake are ultimately appealable to the federal courts, who are empowered to reverse state court decisions on purely state law grounds.<sup>35</sup> Moreover, when specific jurisdictional limits do exist, courts must respect such jurisdictional requirements.<sup>36</sup>

It is also important that the individual judges have *personal independence*. Personal independence refers to the fact that judges have secure judicial terms and salaries, and the judiciary controls case assignments, court scheduling and judicial transfers to a different court.<sup>37</sup> Forced-reassignments can be particularly inimical to judge's personal independence.<sup>38</sup> Personal independence for judges can be achieved through appropriate methods of appointment, removal and supervision.<sup>39</sup> In addition to reinforcing personal judicial independence, these measures also assist in assuring judicial accountability. Judges are public service providers and should not only be independent and impartial but also accountable to the population they serve.<sup>40</sup>

Although many Latin American and Caribbean judiciaries lack independence, it has been argued that this lack of independence may be necessary for economic development. Currently, there is a tension between democracy and economic reform and between economic reform and social policy exists.<sup>41</sup> For example, during recent reforms in Latin America some countries have benefited from a strong executive that can act in an efficient manner. The dilemma is then how to, at the same time, provide for the

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<sup>35</sup> The "recurso de amparo" in Mexico represents a good example of the above. Buscaglia and Dakolias, Judicial Reform, *supra* note 3. See Keith S. Rosenn, "Federalism in the Americas in Comparative Perspective," 26 The Univ. of Miami Inter-Am. L. Rev. 1 26-27 (1994) ("the Mexican federal courts routinely review state court decisions in which the only federal question is whether the state court correctly interpreted or applied state law . . . This kind of amparo is called the amparo de la legalidad or the amparo-casación. The Supreme Court leaves the interpretation of the facts to the state courts, but every question of the meaning of state law can be converted into a federal constitutional question. This has resulted in a deluge of cases filed in the federal courts of appeals from state court decisions . . .").

<sup>36</sup> For example, in 1994, the Argentine Supreme Court removed a highly visible case (the Shrimp Case) from a first instance judge.

<sup>37</sup> Shetreet, *supra* note 32, at 598-99. According to Shetreet's typology this is both personal and collective independence.

<sup>38</sup> In France, a judge cannot be moved to another court in a different location without his or her consent, even if it is considered a promotion. Research Papers of the National Commission on Judicial Discipline & Removal 1449 (1993).

<sup>39</sup> *Id.* at 1460.

<sup>40</sup> *Id.* at 1461. See also Mauro Cappelletti, "Who Watches the Watchmen?: A Comparative Study on Judicial Responsibility," 31 Am. J. Comp. L. 1 (1983).

<sup>41</sup> Colin I. Bradford Jr., "Redefining the Role of the State: Political Processes, State Capacity and the New Agenda in Latin America" in Redefining the State in Latin America 18 (1994).

institutional checks that guarantee accountability and oversight.<sup>42</sup> This experience occurs most often when the executive has the power to issue decrees while underdeveloped or delegitimized judicial systems are not able to prevent executive abuse of power through effective judicial control or legislative oversight.<sup>43</sup> In several cases of stalemate between the legislative and executive, the executive has been able to bypass confrontations through decrees in order to achieve economic policy with little to nonexistent scrutiny from the judiciary. The Argentine and Peruvian experiences demonstrate such behavior. However, judicial review could be a key component of economic reforms. Moreover, without this oversight and consultation, economic reforms may be unstable and subject to reversal.<sup>44</sup>

### **Judicial Appointment and Evaluation Systems**

In order for any judicial system to provide justice, its service providers, the judiciary, must be highly qualified, competent and respected individuals in society. Therefore, adequate institutional mechanisms must exist for selecting and maintaining such individuals in the judicial structure. Such institutional mechanisms include appointment processes, terms of appointment, salary levels and evaluation systems. All of these elements must be properly fitted in order to provide the appropriate incentives for judicial actors to provide quality service. In other words, the appointment process must be tailored to find the highest quality of individuals, terms of appointment must not offer improper incentives to act in personal interests, salaries must be sufficient to attract and maintain high quality professionals and, finally, an evaluation system must be in place in order to allow the profession and the public to monitor judicial activity. Finally, a factor that is often forgotten is that of transparency. For a market to function, in this case the market for judicial services, there must be sufficient information available to potential users of its services.

Judicial independence requires a transparent and merit-based judicial appointment system. A variety of different appointment systems exist.<sup>45</sup> Some countries have chosen

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<sup>42</sup> Stephan Haggard and Robert Kaufman, "Democratic Institutions, Economic Policy and Performance in Latin America," in Redefining the State in Latin America 71 (1994).

<sup>43</sup> Id.

<sup>44</sup> Bradford, supra note 41, at 74.

<sup>45</sup> Fernando Flores-Garcia discusses the different methods for selecting judges: designation or appointment, appointment by the judiciary, popular election, appointment through contests, hybrid systems, and the judicial career (judicial school). The author concludes that Mexico needs to establish a judicial career and judicial schools. Fernando Flores-Garcia, "Sistemas de Acceso a la Judicatura en México," in Justicia y Sociedad 217 (1994). Other authors have argued that appointment by the judicial system itself creates "auto-generation" and "judicial nepotism". In Chile, it has been found that some judges have as many as twenty-eight relatives in the judiciary. Gisela von Muhlenbrock, "Discretionality and Corruption: the Chilean judiciary," presented at the Corruption and Democracy Workshop, North-

to establish special committees that review credentials and nominate qualified lawyers. Such committees may take the form of a judicial council<sup>46</sup> with representatives from all levels of the judicial branch, members of the legislature, representatives of the executive, bar association members and sometimes even private lawyers or the public. This may bring a perception of objectivity to the process if specific standards are followed. Such a council is used for nominating Supreme Court justices in El Salvador. In Chile, the president makes a selection from a list of names provided by the supreme court.<sup>47</sup> Other countries use committees, managed by the executive, to recommend individuals.<sup>48</sup> Although appointments are often made by the executive, in some systems, the courts review and suggest candidates for the positions.<sup>49</sup> Judicial schools can also be the main source of judicial appointments, as is the case in Uruguay. It has been argued, however, that there should be a mix of career judges as well as those from outside the judicial system.<sup>50</sup> Finally, it should also be noted that the appointment process is different for lower court judges who are often appointed by the supreme court.<sup>51</sup> In any appointment system, however, the most important aspect of such a system is that it be respected.<sup>52</sup>

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South Center, University of Miami May 9, 1995 at 14. Instead, one such work argues that a search committee, made up of temporary members, should be created consisting of parliamentarians and judges. Propositiones, *supra* note 29. Finally, a Peruvian commentator has argued that judges should be elected in order to have a more democratic system that is closer to the people, arguing that the current nomination process is one of the largest barriers to judicial independence. Pedro Fernandez Paredes, "Un Poder Judicial contra la realidad: Reflexiones sobre el Proyecto de Ley Orgánica del Poder Judicial", *Advocatus*.

<sup>46</sup> The judicial council is an administrative creation that has its origin in many of the European court systems and was created to balance the traditional powers of the ministry of justice. Although the councils differ significantly from country to country, generally they are given powers over selecting and nominating judges, overseeing judicial functions (including promoting and transferring judges) and disciplinary processes. Such councils will be discussed in greater detail under the relevant subject areas.

<sup>47</sup> OAS, *supra* note 31, at 42.

<sup>48</sup> In Germany, for instance, the ministry of justice handles the nomination process. National Commission, *supra* note 38, at 1448.

<sup>49</sup> In Germany, the Executive Council of the Court provides recommendations to the ministry of justice. *Id.*

<sup>50</sup> In France, judicial nominations come from the judicial school. Student shortages have forced the judiciary to select lawyers who have practiced for 25 years or in other cases exams are given to recruit judges in certain age groups in an effort to promote diversity. *Id.* at 1441-2. In Uruguay, for example, a candidate who has completed training in the judicial school is very likely to be appointed; however, the system does not preclude appointment of applicants who have not attended the judicial school.

<sup>51</sup> In Bolivia, 46 percent of the judges have become judges after working first as clerks. Bolivia: Judicial Reform SAR, *supra* note 8.

<sup>52</sup> For example, in April 1992, President Fujimori in Peru rejected all of the candidates for supreme court justices submitted by the Association of Judges. OAS, *supra* note 31, at 38.

A system based on the highest professional standards and personal integrity will promote quality personnel and quality justice. Judicial appointments that are based on standards to ensure political loyalty only perpetuate the dependence of the judiciary. It is essential, therefore, that only those individuals truly qualified be considered for judicial positions. Standards set forth in the appointment process may be applied through a number of different standards systems, many times depending on the respective appointment system: exams, a judicial career, and/or special training. Most countries, including Argentina, Chile and Ecuador, do not require a judge first to pass an exam or a course in order to be appointed to the bench.<sup>53</sup> In Brazil, however, entrance to the judiciary is by public exam,<sup>54</sup> in Peru and Venezuela new judges are appointed by a *concurso publico*.<sup>55</sup>

In addition to the judicial appointment system, the judicial term also plays an important role in ensuring the independence of the judiciary. Judicial terms should be set to allow for as much independence as possible.<sup>56</sup> Although it may not be advantageous to have life terms for all judges, life terms can provide judges, in some instances, an environment that permits them to be free from outside pressures and political influences. The Province of Tucuman in Argentina recently instituted life terms for all judges to improve independence of the judiciary. Fixed terms may cause some judges to act inappropriately or unethically in order to ensure work opportunities after their judicial service. For example, Supreme Court justices in Ecuador are appointed for six years with the possibility of re-appointment. Such a system creates an environment where judges may not recuse themselves from their former private cases because they may have a vested interest in maintaining control over the case, if they find themselves in the private sector again. The same problem exists if judges are not provided with secure and stable pensions. However, even when Latin American judges have life-time tenure, history has shown that life terms do not always guarantee judicial positions as the Executive has violated such terms.<sup>57</sup> Although there may be life terms in certain countries, a trial period

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<sup>53</sup> To be named to a judgeship in a municipality in Chile, a candidate must only have a law degree, practiced law for two years, and be 25 years old. Ley Organica, Art. 252. In Venezuela, judicial candidates need only two years of experience. If, however, candidates do not have such experience, they may take an intensive course for six weekends given by the judicial school with judicial instructors. However, pursuant to new requirements, judicial candidates must take a combined oral and written exam. World Bank, *Venezuela: Judicial Sector: Assessment*: (Work in progress).

<sup>54</sup> Terza Sadek and Bastos Arantes, *supra* note 13, at 10.

<sup>55</sup> In both Peru and Venezuela, the "concurso publico" systems have only recently be implemented.

<sup>56</sup> In 1993 in Peru, about 50 percent of the superior court judges were provisional judges without tenure, and therefore, were unwilling to take action that might risk their jobs. Peru: Judicial Sector Assessment, *supra* note 7.

<sup>57</sup> This violation does not even have to be explicit. In El Salvador, for example, President Velasco, frequently changed the retirement age in order to replace judges. OAS, *supra* note 30, at 27.

may be an option for a country to consider. Germany is an example of a country that uses probationary periods.<sup>58</sup> However, the incentives for good behavior may be in effect only during the probationary period.<sup>59</sup> The judicial term and the appointment systems must be considered jointly in order to provide the necessary balance of incentives for encouraging appropriate judicial behavior.

In order to avoid problems associated with an aging population of judges, many countries have implemented mandatory retirement ages.<sup>60</sup> However, arguments have been made that given some of the low retirement ages, the judicial system may actually lose many judges who still may be able to continue their responsibilities.<sup>61</sup> Another option is to allow judges, at a certain age, to take voluntary retirement or enter a mandatory senior status that would entail a lighter case load.<sup>62</sup> This allows the judges themselves to evaluate whether they are capable of continuing their responsibilities.<sup>63</sup>

Similarly, an independent judiciary requires competitive salary determinations.<sup>64</sup> On average, salaries remain low as compared to other private sector and sometimes to other public sector jobs.<sup>65</sup> For example, in Ecuador, judges' salaries were increased 100 percent in 1992. However, such compensation is still considered low in comparison with

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<sup>58</sup> In Germany, after three years of probationary service, judges become eligible to apply for life tenure. If rejected, they can reapply after five years of service. National Commission, *supra* note 37, at 1528. Some have argued, however, that such probationary periods can have a detrimental effect on the independence of the judiciary system. Shetreet, *supra* note 31, at 624-5.

<sup>59</sup> In the United States, federal judges hold office during good behavior and their compensation cannot be diminished during their term in office.

<sup>60</sup> Retirement ages exist in a number of developed countries as well: Canada's is 75 years old; Australia's is 70 years old; Germany's is 68 for federal judges; and France's is 65 years of age. National Commission, *supra* note 37, at 1407.

<sup>61</sup> *Id.* at 1408. Others have argued that the implementation of a mandatory retirement age provides for new judges who are receptive to new attitudes and ideas. One Chilean commentator has taken this view arguing that an upper age limit should be placed on the judiciary in order to permanently rejuvenate the judicial power and produce an evolution in the interpretation of laws. *Proposiciones*, *supra* note 29.

<sup>62</sup> In either case, a new judge could be appointed. *Id.* at 1408.

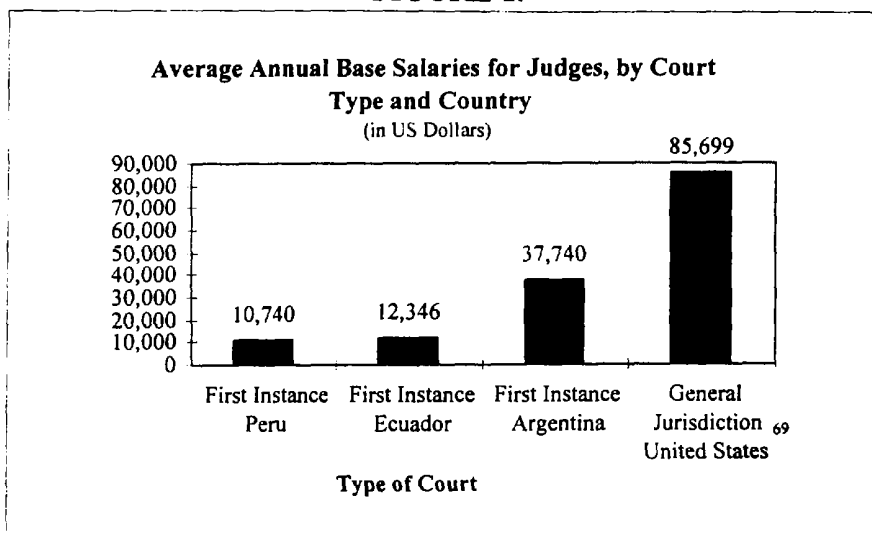
<sup>63</sup> This system currently exists in Canada. *Id.* at 1429.

<sup>64</sup> It should be noted, however, that in many countries, the base salary does not reflect the total salary, and when the total salary is computed, it may be significantly higher than the base salary.

<sup>65</sup> However, in France, a member of the judiciary receives the highest salary for the civil service. National Commission, *supra* note 37, at 1440. In Chile, the chief justice of the Supreme Court has a higher salary than the president of the republic and other members of the judiciary have higher salaries than other public sector jobs with the same professional requirements. von Muhlenbrock, *supra* note 45 at 13.

lawyers' salaries in non-profit agencies.<sup>66</sup> Judicial salaries must be comparable to the salary levels of legislators and other professionals.<sup>67</sup> Some countries base judicial salaries on those of other civil servants, as in Uruguay and Paraguay, while other countries ambiguously require an "adequate salary" or "one appropriate for their position".<sup>68</sup> In Bolivia judicial salaries are comparable to public sector salaries and in some cases are even higher. (see figures 1 and 2)

FIGURE 1.



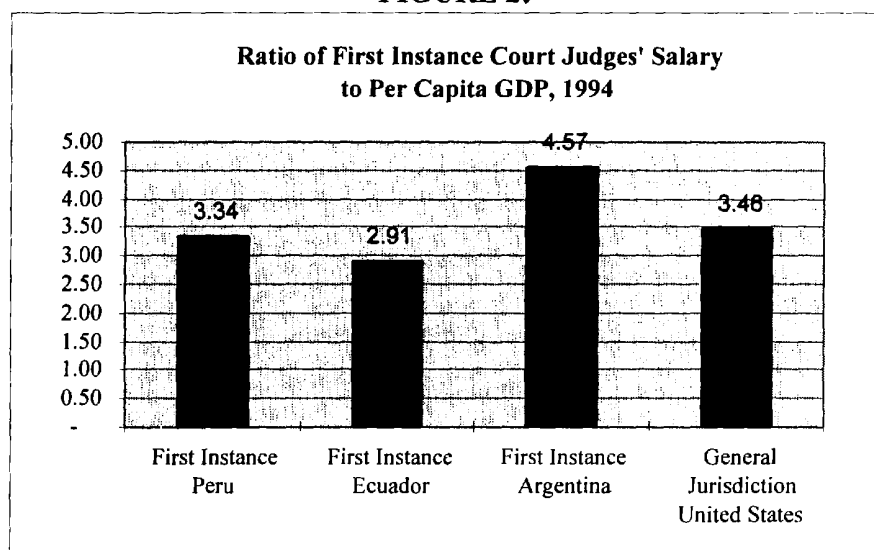
<sup>66</sup> Buscaglia and Dakolias, *Judicial Reform*, *supra* note 3.

<sup>67</sup> Jorge Reinaldo Navossi, "La Corte Suprema de Justicia de la Nación y la Expectativa de su Independencia," *Jurisprudencia Argentina*, 8 No. 5903, (October 18, 1994).

<sup>68</sup> Mexico requires adequate compensation as determined annually, and Peru's constitution ensures judges a compensation that is worthy of their mission. OAS, *supra* note 30, at 41. Similarly, in Canada, the legislature determines judicial salaries. *Id.* at 51.

<sup>69</sup> U.S. Judicial salaries for first instance judges range from \$61,740 to \$113,000. 2 *State Court Report* 1 (1995).

FIGURE 2.



Once judges are appointed, a system of periodic evaluation is necessary for maintaining the high standards set by a council or other standard-setting mechanism. For example, Chile and El Salvador have established a yearly evaluation system managed by the Supreme Court.<sup>70</sup> These programs are considered to have improved the public's image of the judiciary.<sup>71</sup> Germany and France also use performance evaluations to make promotion decisions.<sup>72</sup> Other countries, like the United States, do not link performance evaluations with promotions or salary increases.<sup>73</sup> Consideration should be given to

<sup>70</sup> However, one author argues that the system in Chile is lacking because the Supreme Court has final determination, the proceedings are secret and the grounds are not discussed with the party involved. *Código Organico de Tribunales 1993* articles 273-78 as cited in von Muhlenbrock *supra* note 45 at 10. In Bolivia, a basic performance evaluation system was adopted, and Peru is planning to have five year periodic evaluations. Peru: Judicial Sector Assessment, *supra* note 7, at 24.

<sup>71</sup> The Organic Code of Tribunals, Art. 275. *Situación y Políticas Judiciales en América Latina* 329 (ed. Jorge Correa Sutil, 1993). If there is a unsatisfactory evaluation for two consecutive years, the judge is automatically dismissed regardless of tenure. OAS, *supra* note 30, at 41.

<sup>72</sup> Judges have performance evaluations every four years. Such evaluations include the number of cases completed as well as other performance measures. National Commission, *supra* note 37, at 1451.

<sup>73</sup> Performance evaluations are a vehicle for making judges aware of potential problems or inappropriate behavior. *Id.* at 1409. In 1983, the National Center for State Courts launched a six-state project to develop a system for evaluating judicial performance. Each of the six states have developed their own pilot programs on how to improve evaluation processes. Some of the approaches have included evaluation through bar and media polls. Others have adopted committees that oversee judicial evaluation. Other approaches include publishing case statistics. Maurice J. Sponzo, "Independence vs. Accountability." 26 *Judges J.* 12 (1987).



assuring that promotion systems do not encroach judicial independence.<sup>74</sup> If the evaluation process is linked to promotion and salary increases, the evaluation should not be based solely on the number of cases adjudicated by a judge as this may encourage rapid but unjust decision-making. Bolivia is currently experimenting with using compliance with time benchmarks as one criterion in performance evaluation.<sup>75</sup> Since judges should be free from even the "slightest interference by third parties when applying the law", who implements performance standards-becomes an important question. Thus, it may be unwise to have the Ministry of Justice evaluate judges; instead, the judiciary should be evaluated by peers.

One final element should be incorporated into any appointment or evaluation process that a country may chose to implement: transparency. Currently, the Latin American public perceives the appointment process as a secretive process without any participation or knowledge from the outside.<sup>76</sup> The public should be privy, in some way, to the nomination process and the evaluation processes.<sup>77</sup> Providing mechanisms for transparency and participation will allow the public to gain confidence in the appointment process, the quality of judges themselves and in turn the judicial system.

### **Disciplinary System**

An effective disciplinary system is essential for maintaining high standards of justice. Presently, many disciplinary systems, where they exist, are not effective and, in some cases, are simply ignored. This creates an environment where the public and lawyers cannot or will not bring ethical charges against a judge.

A number of different structures exist for disciplinary systems. For example, the judicial council may have jurisdiction over judicial discipline, in addition to the appointment and the evaluation processes, thus creating a uniform system and a central office.<sup>78</sup> Moreover, the review should be conducted by people who do not have prior

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<sup>74</sup> In France, for instance, a commission of judges, appointed by the Ministry of Justice, conducts the promotion process according to standards set by the Ministry of Justice. National Commission, *supra* note 37, at 1442.

<sup>75</sup> Bolivia: Judicial Reform SAR, *supra* note 8.

<sup>76</sup> Situación, *supra* note 71, at 53.

<sup>77</sup> In Canada, the Justice Department encourages lawyers, judges, legal academics, citizens and members of parliament to submit candidate names for judgeships. National Commission, *supra* note 37, at 1426.

<sup>78</sup> An additional factor to be taken into account when creating a supervisory organ is whether it should be centralized or decentralized. The Peruvian head of the Office for Supervision of Magistracy has argued that the Peruvian system should be decentralized with local supervisory offices that receive complaints. FBIS, Nov. 29, 1994, (citing Interview with Carlos Giusti Acuna, Head of the Office for Supervision of the Magistracy in *La República*).

relationships with the judges in question.<sup>79</sup> Judicial councils can receive allegations of misconduct and provide initial investigations.<sup>80</sup> It is not necessary that the judicial council conduct investigations, but there should be some type of commission that investigates the allegations of misconduct.<sup>81</sup> In other cases, it may be the Ministry of Justice that has responsibility for the disciplinary system.<sup>82</sup> In a number of countries, the disciplinary system is administered and monitored totally within the judicial structure.<sup>83</sup> In any system, judges as well as lawyers and the public should have the right to bring a complaint against a judge. It is also important that the judiciary be involved in the disciplinary process -- always assuring, however, that decisions are made objectively.<sup>84</sup> Regardless of the disciplinary structure selected, a number of consistent problems exist in disciplinary systems, including the absence of clear standards of ethical behavior,

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<sup>79</sup> The Canadian Judicial Council receives and investigates all complaints made against federal judges. National Commission, *supra* note 37, at 1411.

<sup>80</sup> The U.S. Circuit Councils are composed of the chief circuit judge and an equal number of circuit and district court judges who oversee the district courts and review charges of judicial disability or misconduct. Federal Judicial Center, *Deskbook for Chief Judges of U.S. District Courts* 24 (1993) at 33. The judicial council's internal review process was created in 1980 by the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980." Pursuant this system, "any person may file a complaint with the clerk of the court of appeals for the circuit. The chief judge of the circuit reviews the complaints, which he may dismiss if it does not meet statutory requirements, if it directly relates to the merits of a decision or a procedural ruling, or if it is frivolous. He can also conclude the proceeding upon finding that appropriate corrective action has been taken. Otherwise, the chief judge must appoint a special committee, consisting of the chief judge and equal numbers of circuit and district judges, to investigate the complaint and file a report with the council . . .". The council is then directed to take appropriate action. Additionally, the complainant may petition the council to review the chief judge's actions to dismiss an action or conclude a proceeding. Stephen B. Burbank, "Politics and progress in implementing the Federal Judicial Discipline Act," 71 *Judicature* 13, 15 (1987).

<sup>81</sup> In England, there is no commission for investigating allegations; therefore, there is no effective public accountability because of the lack of a defined disciplinary procedure. National Commission, *supra* note 37, at 1540.

<sup>82</sup> In Argentina, prior to the 1994 constitution, the legislature had the sole responsibility for disciplining judges. Under this system, a significant backlog was created. In 1994, the legislature had more than 350 cases of judicial discipline waiting to be reviewed. "Conferencia Sobre la Reforma de la Constitución Nacional Aspectos Sobresalientes," Dr. José Luis Lazzarini, Profesor Titular de Derecho Constitucional de la Universidad de la Plata (June 22, 1995).

<sup>83</sup> With the exception of supreme court judges who usually can be removed solely by the legislature.

<sup>84</sup> In Germany, the Court of Public Service composed of judges decides on disciplinary actions. National Commission, *supra* note 37, at 1532. In Belgium, the court has jurisdiction over discipline. *Id.* at 1470. In Canada, although decisions to discipline are scant, the number of complaints about judicial behavior has increased. Additionally, there have been an increase in the number of allegations of insults directed at women and minorities. Unfortunately, judicial councils have determined that these comments were "innocent and unfortunate". *Id.* at 1507. In Peru, one of the grounds for removal of a judge is sexual harassment. FBIS, *supra* note 77.

inappropriate enforcement mechanisms and the lack of transparency in the disciplinary process.

The lack of clear ethical standards that define the expected behavior of the judges or provide clear guidelines by which to assess their conduct generate incentives for corruption. The absence of clear standards also inhibits the development of an enforcement mechanism capable of addressing charges of corruption within the courts. The disciplinary punishment should also be realistic and appropriate for the violation because although suspension and removal may be available, they are seldom, if ever, applied.<sup>85</sup> Again, it is important that such punishments do not infringe on judicial independence.<sup>86</sup> The preliminary removal proceedings should be conducted by the court or a board that includes a majority of judges selected by the judiciary. Some argue that removal should only be done by the judiciary.<sup>87</sup> In this sense, the judiciary is self-regulating because the investigation, reporting and decision to remove all occur within the judicial branch without interference from the political branches of the government.<sup>88</sup>

### Recommendations

All these elements constitute the overall independence of the judiciary and must be considered during judicial reform. Judicial reform should seek to address each type of independence. Specific administrative and organizational reform measures for enhancing

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<sup>85</sup> In Mexico, a judge can be dismissed as well as prevented from holding any other public office for up to fourteen years. However, there have been no cases of removal or dismissal of judges found. National Commission, *supra* note 37, at 1608. In England, since judges must be removed by Her Majesty judges are usually pressured into resigning instead of dealing with these formal procedures. The Lord Chancellor, however, may remove lower court judges. Since, 1971, only one judge has been dismissed by the Lord Chancellor. *Id.* at 1536-38. The Canadian Judicial Council has *never* recommended removal of a judge because judges often resign when a recommendation for removal is expected. *Id.* at 1466. In Germany, removal has *never* been used as a disciplinary mechanism even though it is an available punishment. *Id.* at 1452.

Peru has a number of different levels of sanctions including warnings, fines, suspension, separation and removal from office. Removal power lies with the consejo, while the Office for the Supervision of the Magistracy may impose the rest of the sanctions. In 1994, 538 sanctions were imposed with 33 representing separations. These figures include both judges and court employees. No removals were imposed, however, because during that time period the consejo had not yet been formed. FBIS, *supra* note 77.

<sup>86</sup> In Canada, for instance, the ability to suspend a judge's salary as a part of removal proceedings has been declared an unconstitutional interference with judicial independence. National Commission, *supra* note 37, at 1432.

<sup>87</sup> In Germany, federal judicial removal can only be decided by the Disciplinary Court composed of a three-judge panel. *Id.* at 1453. In Quebec, the Court of Appeals makes final removal decisions. The Law Association for Asia and the Western Pacific recommends that senior judges have the responsibility for removal since removal by Parliament may be abused. *Id.* at 1463.

<sup>88</sup> *Id.* at 1436.

judicial independence regardless of the type of independence should include: judicial budget autonomy, the existence of a uniform appointment system, stable terms, disciplinary system for court personnel, and adequate salaries and retirement benefits for judges. Transparent methods of appointment, removal and supervision should be included in judicial reform programs in order to ensure personal and functional independence for judges. Independence may also be strengthened by building the administrative capacity and training of judges and court personnel. In this way, the judiciary becomes efficient and obtains more respect, thus improving the quality of personnel attracted to a judicial career.

It may be difficult within the confines of a judicial reform project to address the independence issues directly because they usually require constitutional or legislative changes. Additionally, in many cases, it is not the laws themselves that create a lack of independence but the actions of the judiciary. Ultimately, it is up to the judiciary to act independently.<sup>89</sup> This lack of independence and the high level of politicization is usually found at even the upper echelons of the judiciary, thus, presenting an argument for starting reform efforts with the courts of first instance and working from the ground up. Nevertheless, independence at the highest levels should be addressed simultaneously. Judicial reform programs based on enhancing the independence of the courts may be politically unfeasible among some members of the legislatures, executive and even the judiciary given the various vested interests, however they are essential if real reform is to occur.

Ideally, appointment process should be reviewed for all levels of the judiciary since one of the main goals of the reform is to assure that professionals administer justice. In many cases this would mean changes in the appointment process would require constitutional or major legislative reforms. It is important that judicial reform programs include both the upper and lower echelons of the court system simultaneously. This is because even though any country's supreme court selection process will inevitably be one where political processes dominate, in many cases it is the responsibility of the higher courts to appoint the lower court judges. In order to diminish the system of patronage, the reforms will necessarily begin with the higher courts as has been recently accomplished in Mexico.

As part of their appointment and evaluations systems, a number of Latin American countries have established judicial councils. Generally, such judicial councils' responsibilities include: court administration, human resources and judicial and personnel misconduct. They may have jurisdiction over lower courts as well as the supreme court. In the Province of Tucuman in Argentina, the creation of the Consejo for the appointment process has ensured that more qualified lawyers are being appointed to the bench at all levels. It is important that the members of a council be independent and not be run by the

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<sup>89</sup> John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 48 (1980).

party in power. Argentina, Ecuador and Peru have recently created judicial councils.<sup>90</sup> These councils should include membership from the judiciary, the bar, the citizens, and the executive when established, similar to the one proposed in Chile<sup>91</sup>, and should be chaired by a judge, as is done in Bolivia.<sup>92</sup> Finally, in forming a Consejo, it is important to consider whether its members will occupy part-time or full-time positions.<sup>93</sup>

Judicial appointment, terms and evaluation all play an important part in developing an appropriate incentive scheme for all of the judicial systems' actors, including judges, lawyers and court personnel. This could include requiring exams on technical laws for judicial appointment which may provide the appropriate incentives for judges to delegate more of the administrative responsibilities and publishing case statistics for each court which can provide incentives for judges to operate more efficiently.<sup>94</sup> Salaries should also be carefully evaluated under the projects in order to provide appropriate incentives for judges as well as court personnel.<sup>95</sup> Reform programs should focus on providing the appropriate set of incentives for changing these actors'

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<sup>90</sup> Argentina and Ecuador have yet to establish these councils, and some argue that in Ecuador the legislature does not want to give up the power to appoint members of the supreme court. The seven members of the Peruvian judicial council (Consejo de la Magistratura) include: two from the universities, two from the Colegio de Profesionales, and one each from the Ministerio Publico, the judiciary and the Colegio de Abogados de Lima. The Peruvian judicial council, however, does not include a member of the executive because of the politically sensitive recent history. Peru's judicial council names judges without formal approval from the executive or legislative branches. This exclusion of the executive, may, in effect, create further problems because it ignores the Ministry of Justice's role in the administration of justice.

<sup>91</sup> Provincial councils in France and Canada follow this pattern. The composition of the judicial council must be carefully considered because of the conflict between judicial independence and accountability. National Commission, *supra* note 37, at 1473.

<sup>92</sup> Bolivia recently established a judicial council of five members, headed by the president of the supreme court. It will be responsible for administration, including human resources and judicial careers, through enabling legislation that is currently being prepared. The Salvadoran judicial council includes lawyers nominated by the supreme court, members of the bar, judges from the various jurisdictional levels, law professors, and a representative of the attorney general. The legislature elects all of the members. Chile has proposed a Consejo Nacional de la Justicia, but there has been no consensus to implement it.

<sup>93</sup> Costa Rica's Consejo is part-time, but most other Latin American countries prefer a full-time composition.

<sup>94</sup> This may encourage judges to allocate more time to cases and learning the law since the exams will require such knowledge while at the same time publishing statistics will also encourage judges to allocate more time to cases since there will be in a sense some competition among judges.

<sup>95</sup> Salaries should be carefully evaluated because the base salary provides little evidence of the total remuneration. As is the case in Ecuador, the base salary represents only 22.8 percent of total remuneration. In Argentina, a supreme court justice with twenty years of experience receives US\$112,726 even though the base salary is only US\$4,955 per month. In addition, in Argentina, judges do not pay income taxes. Interview with Mr. Robert Page, June 30, 1994.

behavior to provide efficient and quality justice -- especially important in such an incentives scheme is the disciplinary system.

If internal judicial disciplinary mechanisms do not operate properly, political interference will force the extra-institutional (and sometimes extra-constitutional) removal of judges, as occurred in Mexico in 1994. Such political interference because of the absence of functioning disciplinary mechanisms undermines the judicial institutions, the public's confidence in the same and the independence of the judges. Judicial reform programs should address whether the current disciplinary mechanisms are appropriate and if so whether they are being implemented. Consideration should be given to establishing review committees which can receive and review complaints and interact with the public as well as the legal community. Although the final disciplinary decision may be made outside the judiciary, consideration should be given to having the initial disciplinary review conducted by an interdisciplinary committee which includes judges. In addition, it is essential to review the ethical guidelines and provide training for judges with respect to such standards.

Finally, in order to educate judges concerning what behavior is not acceptable and inform the public of the disciplinary process, a compilation of the year's complaints should be available to the judges as well as the public. Publishing opinions is important as it provides clear indications and definitions of unacceptable and punishable behavior.<sup>96</sup> Such publication also assures the public that complaints are dealt with in a serious manner, thus providing a needed measure of accountability. Some have argued that additional measures for providing transparency and accountability should include opportunities for the public and the bar associations to send comments concerning judicial behavior.<sup>97</sup>

## JUDICIAL ADMINISTRATION

Judges in many Latin American countries are faced with severe backlogs, low salaries, poorly trained staff, and a lack of technology -- all of which create barriers preventing judges from performing their jobs in an efficient manner. As a result, the administration of justice needs to be reviewed as one of the most important areas for reform. Administration of justice encompasses two areas: the administration of the courts and the administration of cases, both of which must be addressed in order to improve the administration of justice. *Court administration* involves the administrative functions of the courts, including administrative offices, personnel, budget, information systems, statistics, planning, and maintenance of the courts. *Case administration*, on the other hand, refers to the processing of cases, including, for example, case management.

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<sup>96</sup> In many Latin American countries, as well as in Australia, "misbehavior" is defined pursuant a judicial discipline case opinion. *Id.* at 1418.

<sup>97</sup> *Id.* at 1406.

## Court Administration

In many Latin American countries, the judges themselves are often in charge of court administration. This added responsibility prevents judges from spending much needed time on judicial decision-making. In fact, judges in Ecuador spend up to 70 percent or more of their time on administrative matters, leaving little time for judicial responsibilities.<sup>98</sup> The same administrative duties occupy 65 and 69 percent of available judicial time in Brazil and Peru respectively.<sup>99</sup> Moreover, it is quite common for judges to delegate many of their judicial responsibilities to their clerks and keep the administrative responsibilities for themselves. Three aspects of court administration merit particular attention: first, the centralization of administrative responsibilities and the consequent need to delegate administrative responsibilities; second, the administration of court personnel; and third, the judicial budget.

The overall court administration is often centralized. In some cases, the higher courts prefer to handle the general administration of the system, but this can create inefficiency if lower courts are forced to make even the most simple requests to a centralized office.<sup>100</sup> It is advisable to work towards an administrative system that is connected to the different levels of judicial activity in order to be able to provide a court system that services geographic and subject-specific needs.

As caseloads continue to rise, judges may be forced to delegate more responsibilities as more pressure mounts on the court to perform its judicial functions. Some courts have experimented with establishing separate administrative positions and staffing them with persons specifically trained in management, and thus, allowing such personnel to make the day-to-day administrative decisions. This should leave judges free to make policies for the court and oversee the overall administration of the court while leaving the day-to-day administrative matters to the professional managers. Establishing these new administrative positions has proven successful. Consequently, judges are beginning to realize that this can be a tremendous assistance in the administration of justice. However, such positions should be made official so that they transcend changes in power. For example, in Ecuador, only after a long process of adjustment and initial resistance, a professional managerial approach was accepted, but it was repealed by subsequent changes of a new Supreme Court president. As a result, the current supreme court president signs checks for gasoline and decides whether a court employee in the province may take an extended leave for sickness. Peru represents a unique case in Latin America, where the administrative position is official and has not been affected by a

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<sup>98</sup> World Bank, Ecuador: Judicial Sector Assessment 10 (Aug. 19, 1994).

<sup>99</sup> Buscaglia and Dakolias, Delay Study *supra* note 18, at 27.

<sup>100</sup> In Germany, the Ministry of Justice is responsible for the overall administration of the courts including preparing the budget. National Commission, *supra* note 37, at 1447.

change in presidents. Bolivia and Chile are also using administrators on a pilot basis in some courts.<sup>101</sup>

The second aspect of judicial reform with respect to court administration is personnel administration. A review must be conducted of the current staff and its distribution in the court system as a number of countries have an over-staffed judicial structure. Very often courts have proposed solutions based on adding more personnel and judges as a way to deal with the increasing caseload. In Brazil, 81 percent of the judges indicated that the insufficient number of court personnel is the cause of the inefficient judiciary. However, increased court personnel alone does not necessarily make for a more efficient environment. In many countries in Latin America, as is true in Ecuador, the number of staff assigned to each court is fixed and set by regulation or statute.<sup>102</sup> Thus, the number of staff members is the same in every First Instance court regardless of the specific caseload. Furthermore, in cases where there is a surplus of staff members, there is no evidence that these courts are more efficient than those operating with fewer personnel. In addition to the official personnel, many countries, including Argentina, Ecuador, Peru and Chile, have unofficial court clerks who are not paid by the judiciary but work for small payments to process cases.<sup>103</sup>

It is important to note, however, that many judges in Latin America have tremendous caseloads. Perhaps at some point it may be justified to increase the number of judges due to this fact. Decisions on whether to increase the number of positions and judicial assignments should be based on caseload trends.<sup>104</sup> This of course, requires courts to keep records and provide indicators to accurately predict the future. Very often, courts have proposed solutions based on adding more personnel and judges as a way to

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<sup>101</sup> Argentina adopted the idea of a Consejo de Administración some time ago to transfer administrative responsibilities from the judges. However, since the judges, viewing the project as a power struggle for the control of their courts, did not want to give up their administrative responsibilities, the idea failed.

<sup>102</sup> For instance, a first instance judge in Ecuador has five support staff members, and the superior courts each have six. In Argentina, the courts of first instance at the federal and provincial level also have a set number of staff members as provided in the Ley Organica. However, the number of staff members is not the same for every superior court; instead, the number of personnel is determined on the basis of their specific budget, which, in turn, does not reflect the court's caseload. In some Argentine federal courts, there are 32 personnel for every judge. Interview with Mr. Robert Page, June 30, 1994. In Bolivia, the personnel to judge ratio is 2.5 to 1. In Venezuela, depending on the type of court, there may be a 19 to 4 personnel to judges ratio. Venezuela: Judicial Sector Assessment, *supra* note 53.

<sup>103</sup> A number of courts have "unofficial clerks" who are not government payroll employees but complete the administrative responsibilities on a free-lance basis receiving the court fees as payment of their services.

<sup>104</sup> It should be noted, however, that it is difficult to determine the actual number of judicial and non-judicial resources needed using only caseload data without knowledge of what types of cases are being processed and how they are being disposed. Mary Louis Clifford and Lynn A. Jensen, Court Case Management Information Systems Manual, National Center for State Courts 43, 54 (1983).



deal with the increasing caseload.<sup>105</sup> In Brazil, 81 percent of the judges indicated that the insufficient number of court personnel is the cause of the inefficient judiciary.<sup>106</sup> However, increased court personnel alone does not necessarily make for a more efficient environment.<sup>107</sup> For example, in Paraguay oral procedures were implemented for noncriminal cases, and the number of judges was increased by one-third. The new judges were recruited from those graduates who completed a course at the judicial training institute. These reforms resulted in less time for disposal per case.<sup>108</sup>

## Judicial Budgets

A budget that is independent of political forces is necessary to ensure an independent judiciary.<sup>109</sup> In order to accomplish this goal, however, the judiciary must have sufficient budgetary experience and financial abilities to forecast judicial budgetary needs. It should also be noted that although judicial budgeting is an important aspect of judicial independence, it is in itself an important reform measure that goes well beyond the independence issue, as any aspect of judicial reform will depend on effective judicial budgeting.

The judiciary must have budgetary autonomy since the executive and the legislature may act as barriers to the allocation of sufficient resources. This may be as severe as to impede the court from providing their services efficiently and fairly. Many countries in Latin America provide budgets to the judiciaries which allow for only minimal standards of justice for the public. Such budgets perpetuate judicial dependence,

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<sup>105</sup> In Peru, the judiciary estimates that there is a 25-30 percent shortage of judges. Lima Expresso, March 12, 1994.

<sup>106</sup> Tereza Sadek and Bastos Arantes, supra note 14.

<sup>107</sup> In fact, the correlation between the number of judges per million inhabitants and efficiency is quite low. Chile has 3.8 judges for every 100,000 inhabitants, Germany has 28 judges per 100,000 inhabitants, and Japan has 2 judges for every 100,000 inhabitants. Buscaglia and Dakolias, Judicial Reform, supra note 3. One extreme example of the low or non-existent correlation between efficiency and the number of court personnel is Colombia. It is the "leading [Latin American] country in numbers of judges per inhabitant. There are 17 judges for every 100,000 inhabitants [, and it] ranks second among countries contributing the most money to their judicial systems...", but it has an estimated nine-year lag in judicial activity, according to Justice Minister Nestor Humberto Martinez who argues the system does not need more judges but improved organization and logistics. FBIS, Dec. 13, 1994 (citing El Tiempo, Nov. 28, 1994 and El Tiempo, Dec. 1, 1994). Although there may be no correlation between the number of judges and efficiency, such a comparison may still be relevant for considering access to justice issues. In Santiago, Chile the number of courts was increased but the total number of cases disposed remained unchanged, von Muhlenbrock, supra note 45 at 20.

<sup>108</sup> Harry Blair and Gary Hansen, Weighing in on the Scales of Justice Strategy: Approaches for Donor Supported Rule of Law Programs 30 (USAID, Program and Operations Assessments, Feb. 1994).

<sup>109</sup> This is one aspect of what Shimon Shetreet labels as collective independence, that is, the judiciary's participation in the central administration of courts. Shetreet, supra note 31, at 598-9.

generate corruption among court personnel, and prevent the judiciary from attracting well-qualified judges and support staff. Given the inherent problems related to the lack of independence, the judiciary should control and manage the budget it receives from the legislature.<sup>110</sup> Moreover, as administration and budgetary responsibilities are intimately interrelated, true administrative efficiency cannot occur unless the judiciary controls and implements an efficient budgetary program.<sup>111</sup>

In order to have an efficient allocation of budget resources, the judiciary must have technical, financial accounting and auditing abilities. In most Latin American countries the judicial personnel are not sufficiently trained in accounting and financial affairs. In some cases, the judges themselves manage the budget. In most countries, no actual centralized administrative court procedures exist.<sup>112</sup> Additionally, the lack of specialized personnel prevents the judiciary from realistically planning its budgetary needs. The executive cannot provide the requisite judicial budget if the judiciary itself cannot prepare a well-reasoned detailed budget proposal for approval by the legislative branch. In several Latin American countries-- including Brazil, Colombia and El Salvador-- the judiciary is obligated to prepare the judicial budget.<sup>113</sup> While it will always be the ultimate responsibility of the legislature to vote on the final budget, it is essential that the judiciary be able to define its financial needs based on forecasting

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<sup>110</sup> Although before 1939 the Department of Justice in the United States handled the federal judicial budget, personnel, and audit issues, currently these responsibilities are under the Administrative Office of the U.S. Courts. The Chief Justice and the Judicial Conference appoint the director of this Office. Deskbook for Chief Judges, *supra* note 79. In Canada, however, the Ministry of Justice defends the courts' budget in the legislature. OAS, *supra* note 30, at 49.

<sup>111</sup> Shetreet also argues in favor of this approach, which he labels the *exclusive judicial model of responsibility*, contrasting it with the other two models that currently exist: *exclusive executive and shared executive-judicial models*. Shetreet, *supra* note 31, at 646-9.

<sup>112</sup> In the U.S. state court budgetary processes, there has been a trend toward *unitary budgeting*. This budgeting process is a fundamental departure from traditional state court fiscal management in states. It consists of one central authority, in this case the judiciary itself, with the responsibility for planning, channeling and auditing judicial expenditures, whereas traditional fiscal management relied on local funding, deriving revenue from various sources and an inflexible connection with an expenditure schedule that is only nominally a budget. It is argued that unitary budgeting allows better judicial administration, more equitable distribution of judicial services and provides a mechanism by which the judiciary itself can be effectively administered. Geoffrey C. Hazard, Jr., Martin B. McNamara, Irwin F. Sentilles, III, *Court Finance and Unitary Budgeting* (1973). A number of the states that implement unitary budgets do so through judicial budget boards made up of judges from the different levels of justice administration. See e.g. Robert M. Campbell, "Judicial Budget Board to Unify Judiciary's Requests for State Funds," *Texas Bar Journal*, 1229-36 (Nov. 1984). Consequently, this prevents the budgeting from being skewed towards the higher court levels.

<sup>113</sup> Constit. of Brazil, Art. 99; Constit. of Colombia, Art. 256(5); Decreto No. 415, Diario Oficial, Jan. 13, 1993 (El Salvador).

expected filings, dispositions, and pending cases.<sup>114</sup> Judicial control of the budget does not, however, necessarily signify a centralized budgetary allocation. In most Latin America countries, the Supreme Court manages the overall judicial budget; therefore, the centralized administration results in an asymmetric allocation of judicial resources. In many countries, the rural courts do not receive resources based on the population or caseloads.<sup>115</sup> This inequity only enhances the inaccessibility of the judiciary to low-income rural communities.

Although many countries in Latin America have proposed allotting a pre-specified amount of the national budget to the judiciary as a method of increasing judicial resources, this is neither a necessary nor a sufficient solution. First, country-specific procedural requirements and the differences in the population's cultural propensity to demand court services makes it unwise to state that a higher fixed proportion of the government's budget would necessarily improve the functioning of the judicial system.<sup>116</sup> Second, a legislated percentage of judicial spending is not always respected.<sup>117</sup> However, it is always important to note that an increase in the budget is not sufficient to reform the judiciary. The size of the budget alone does not affect judicial efficiency (measured by backlogs and delays),<sup>118</sup> though some of the reform measures that do affect the efficiency may require an increase in resources.

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<sup>114</sup> See generally Victor E. Flango and Mary E. Elsner, "Estimating Caseloads: Two Methods Tested in Tulsa," 7 State Court J. 18 (1983) (describing the projection method and the forecast method for estimating future case filings and concluding that both methods are viable methods).

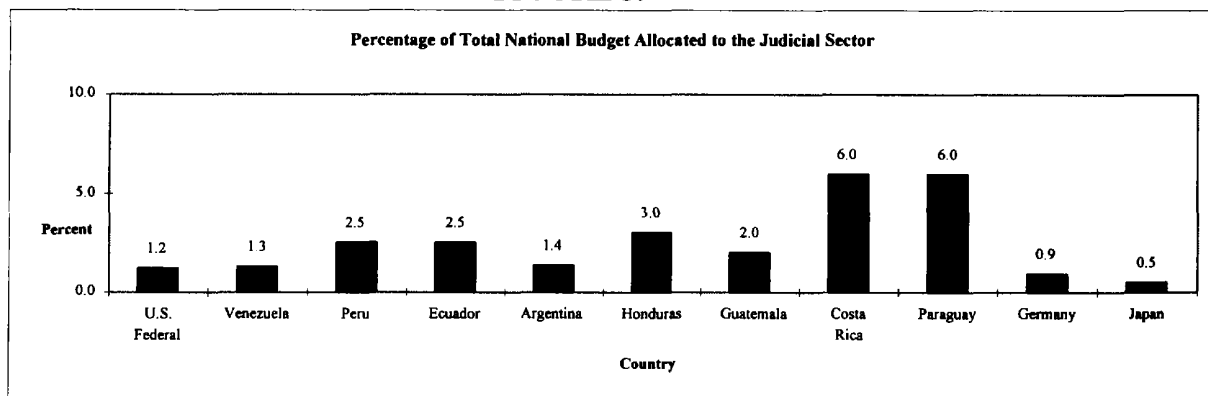
<sup>115</sup> In Bolivia, judicial resources are allocated in an inverse proportion to population. Bolivia: Judicial Reform SAR, supra note 7.

<sup>116</sup> Buscaglia and Dakolias, Judicial Reform, supra note 3.

<sup>117</sup> In Honduras, for example, even though the judiciary has a right to 3.0 percent of the national budget, it generally receives about 0.5 percent per year. In Ecuador, where the judiciary has a right to 2.5 percent of the national budget, it received 0.96 percent in 1993, 1.4 percent in 1994 and 1.6 percent in 1995.

<sup>118</sup> There is no significant correlation between judicial efficiency and the size of the government budget allocated to the judiciary. Buscaglia and Dakolias, Judicial Reform, supra note 3.

**FIGURE 3.**



### **Court Facilities**

Historically, court facilities have not been a priority in the allocation of the national budget and therefore, the judicial budgets have been prevented from acquiring modern court facilities. In some cases, judicial budgets have not included any funds for capital improvements. As a result, court facilities have not been able to meet the increased demands on the judicial system and therefore do not adequately reflect the needs of judges, court personnel and the users. The increased need for modern technology, security and for courts that can accommodate oral proceedings have placed great strain on the traditional design of court facilities.<sup>119</sup> Court facilities have received increased attention since they affect the overall perception and image of the administration of justice.

Currently in many countries judges and court personnel work under conditions that are not conducive for efficient administration of justice. Due to a lack of space for archives and active case storage, cases are often found lined up along the hallways of the courts. This can be a health and safety risk especially where some have had to be closed due to dangerous conditions caused by the weight of the paper. In addition, there are often long lines just to enter the courthouse and some lines have been known to take up to two hours. Many courts also do not offer security for the judges. The condition of the courthouse has an effect both on the public as well as the court personnel and it also affects the image of the judiciary. Courthouses must reflect the needs of the court personnel and the users of the system.

The planning for courthouses should take into account the number of people using the courts, the personnel, use of automation and the need for security. Such issues should be considered under the overall judicial reform program. In many countries there are no design standards for courthouses; instead each building can have different

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<sup>119</sup> Interview with Mr. Robert Page, June 15, 1994.

configurations.<sup>120</sup> Some may have no windows or electricity where others have private showers for each judge. Investment in courthouses should be considered after there is a clear understanding of the reforms that will be implemented. This is especially true in countries considering instituting oral procedures which will require separate rooms for trials. Adequate facilities are needed to implement the overall reforms and must be considered during any reform effort.

### **Case Administration**

The administration of cases is the basis of administering justice. Most courts experience severe case backlogs and are unable to reduce their caseloads to cope with delay. For example, in 1993, there were approximately 12,000 pending cases in the Supreme Court of Ecuador<sup>121</sup> and approximately 500,000 in the entire system.<sup>122</sup> The Argentine statistics office estimates that over 1,000,000 cases were pending in the entire Federal system in 1992.<sup>123</sup> By 1993 in Colombia, over 4 million cases were pending.<sup>124</sup>

Improving administrative procedures requires revision of existing procedures with respect to inefficiency in record management, caseload and case management, caseload management, and maintaining case statistics and archives. These measures have a significant impact on reducing delay.<sup>125</sup> In addition to revising the procedures for administering cases, it would also be beneficial to include case tracking technology that could assist the courts in maintaining records.<sup>126</sup> In the Santa Cruz district courts of Bolivia, a case tracking system is being tested on a pilot basis. This project should be studied for potential use in other parts of Bolivia and, possibly, for adoption in other countries. Maintaining accurate case statistics is essential to monitoring progress as well as forecasting future resource needs. Data on current caseloads will provide a benchmark from which to evaluate new programs and procedures,<sup>127</sup> in addition to providing the necessary

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<sup>120</sup> See American Courthouse--Planning and Design for the Judicial Process, published 1978 and the California Trial Court Facilities Standards adopted by the Judicial Council November 8, 1991, published by the Judicial Council of California, Administrative Office of the Courts.

<sup>121</sup> Ecuador: Judicial Sector Assessment, *supra* note 96, at 6-7.

<sup>122</sup> Development Associates, Inc, "Concept Paper for a Project to Strengthen the Administration of Justice in Ecuador For the United States Agency for International Development Mission to Ecuador," 5 (March 1993). By contrast, in Japan, there were 762,000 cases pending in the civil, administrative and family courts at the end of 1995.

<sup>123</sup> Interview with Mr. Robert Page, June 30, 1994.

<sup>124</sup> FBIS, *supra* note 102.

<sup>125</sup> *Id.*

<sup>126</sup> Thomas G. Dibble, A Guide to Court Records Management (1986).

<sup>127</sup> Clifford and Jensen, *supra* note 106, at 66.

information for budgetary projections. Case statistics will also encourage court research that is currently being done only in isolated instances in Latin America.

Appropriate case management techniques require courts to be able to compile data on caseloads.<sup>128</sup> The projects must prepare the court administrative staff to do the planning and research necessary to carry out case management techniques.<sup>129</sup> It is also important that caseload evaluations be done by the courts as well because this can address questions of delay and establish time standards for case processing and monitoring of individual case progress.<sup>130</sup> An evaluation of the workload is important for strategic planning and research, resource utilization and operation activities of judicial and non-judicial personnel.<sup>131</sup> Case related data can be used for a variety of management issues including resource allocation, forecasting, caseload management, performance measurement, public information and national trend analysis.<sup>132</sup> In addition, it can also assist in identifying courts that are operating effectively and inform other courts about successful programs and procedures.<sup>133</sup> Providing the public with information on cases will generate support for the courts and also quash false pretensions about the court's activities and functions as well as educate court personnel on their important role in case adjudication.<sup>134</sup> The public availability of such information is also important for providing public accountability of the court's work as well as for controlling resources that are provided to the judiciary.<sup>135</sup>

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<sup>125</sup> Case management includes administrative control and case tracking functions done by the courts. This includes the need for planning models, variance reports, caseload data, case status data, caseload evaluation and performance measurement reports, judicial and non-judicial workload analysis, data resource allocation and planning and research reports. *Id.* at 39-40.

<sup>129</sup> Management information is essential. To acquire management information there are three different kinds of reports: filing disposition ratios, pending case inventory and time lapse studies. According to one author, the time lapse studies are the most useful because they allow courts to identify causes of delay. Peter Ford, *Judges as Managers: Some Recent Developments in Judicial Administration in United States and Canada*, Report in SES Fellowship (Aug-Nov. 1989).

<sup>130</sup> Caseload evaluation reports focus on the movement of cases and the speed with which cases are processed. Clifford and Jensen, *supra* note 106, at 40-41.

<sup>131</sup> This type of analysis is very sophisticated and requires not only caseload volumes and activity data but also actual or estimated judicial and non-judicial workloads. It focuses on planning rather than expediting and monitoring individual cases. *Id.* at 41.

<sup>132</sup> The case related data is especially important for estimating the number of judges required to handle current and projected caseloads, determining where such judges are needed, ascertaining how many non-judicial personnel are needed, and, finally, planning what facilities and equipment will be needed. *Id.* at 52.

<sup>133</sup> *Id.* at 66.

<sup>134</sup> *Id.* at 63.

<sup>135</sup> *Id.* at 66.

To confront excessive delays, it is crucial that a delay reduction study be conducted in order to identify bottlenecks in the process.<sup>136</sup> Thus, a delay reduction program should be developed.<sup>137</sup> This is an important way to measure performance of the system because the study allows measurable standards to be established as has been done in Argentina and Ecuador through the Bank's delay studies. The courts can determine whether the actual case times occur within the limits of the established standards.<sup>138</sup> Reform programs may also include changes in the administrative procedures as well as the procedural codes to aid the efficient processing of cases.

Some have argued that the delay problems may stem from the fact that judges do not take an active role in moving cases through the system.<sup>139</sup> Over ninety percent of the judges surveyed in Chile indicated that the judges are passive with respect to case processing.<sup>140</sup> Other such studies may find that delays occur when cases pile up on a secretary's desk in a court of First Instance. Frustrated by the system, parties and lawyers are often willing to pay a special price for an improved quality in court service: to move cases along faster<sup>141</sup> or fix the outcome of a case, thus contributing to the corruption in the system and effectively limiting or denying access to justice. One survey in Peru identified clerks to be the principle source of corruption.<sup>142</sup> As a result, addressing the excessive delays in current judicial systems will help ameliorate the problems with respect to increases in demands for court services while working towards eliminating corruption and improve user's confidence in the system.

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<sup>136</sup> A large amount of research has been completed in the United States with respect to court delays. See e.g. Barry Mahoney, *Changing Times in Trial Courts* (1988); Thomas W. Church, Jr. "Who Sets the Pace of Litigation?" 65 *Judicature* 76 (1981); Stewart S. Nagel and Marian Neef, "Time-Oriented Models and Legal Process: Reducing Delay and Forecasting the Future." 1978 *Wash. Univ. L. Quarterly* 467 (1978). However, little research has been conducted in Latin America.

<sup>137</sup> This includes case event and time interval data for projecting how much time it actually takes to process specific types of cases and providing long-range projections. Clifford and Jensen, *supra* note 106, at 55.

<sup>138</sup> *Id.* at 62.

<sup>139</sup> Judicial activism has been shown to decrease delays. Buscaglia and Dakolias, *Delay Study*, *supra* note 18.

<sup>140</sup> Situación, *supra* note 71, at 325.

<sup>141</sup> Propositiones, *supra* note 29, at 92.

<sup>142</sup> Thirty-nine percent of those surveyed indicated that the clerks were the principle source of corruption. Peru: Judicial Sector Assessment, *supra* note 7, at 44.

## Recommendations

A review of the current number of personnel should be completed to determine the actual needs given the court and case management techniques as well as establish clear terms of appointment, classification of positions and a system of promotions based on evaluations. This review should also include any unofficial court personnel. Moreover, if the unofficial clerks were barred from the courts, it should be noted how much the courts would be impacted and the potential number of pending cases that would increase. Until caseloads decrease to manageable levels, it will be inefficient to prohibit such assistance in the courts, even if it promotes payment for services. Additionally, a permanent administrative full-time position should be created as part of the permanent judicial structure. Certain aspects of decentralization should also be incorporated into the administrative reforms. By relieving judges of administrative duties case processing times will significantly decrease.<sup>143</sup> As mentioned above, requiring technical law exams for judicial appointment and reappointment may encourage judges to delegate these administrative responsibilities due to the higher qualifications required. Exams for court personnel should also be considered.

Judicial reform programs should review the budgetary process and ensure that there be budget autonomy. Assuming this, judicial budget offices should be established and staffed with qualified personnel. Programs should concentrate on providing training for court personnel to manage and prepare judicial budgets. It is essential that the judiciary not only justify any increase in judicial spending but also manage the current budgets efficiently. For example, in Peru the judicial budget increased from 0.6 percent to 2.5 percent (see Figure III), but every year the Judiciary has returned money to the Executive because it does not have the capacity to use it. In addition, activities should also include assistance in decentralizing the administration of budgets as is being done successfully in Ecuador, where each Superior Court handles the provincial budget. However, monitoring mechanisms should be in place prior to any decentralization.

In order to discuss the size of the budget, a review of the budget should be conducted relative to the total government spending and income in the country. The main objective of a budget review is to determine how the given resources can be spent more efficiently. This could be done in part by comparing the number of cases filed versus the number of cases resolved in a given court across time. On the basis of the analysis, the allocation of the budget can be evaluated as well as the possible need for additional investment to enhance efficiency.

Performance standards should be developed for the judiciary. There has been some initiative taken in Chile to develop performance standards (*indicadores de gestión*) for the budget and personnel, but such standards should be created for the entire system. It may be worthwhile to create some regional standards first and then develop country specific

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<sup>143</sup> Buscaglia and Dakolias, *Delay Study*, *supra* note 18.



standards.<sup>144</sup> It is important, however, to mention that these performance standards and evaluation guidelines should be developed with the participation of the judges and other judicial actors. Programs should include case management, and thus, both caseload and records management<sup>145</sup> together with a delay reduction program and general statistics and information gathering systems.<sup>146</sup> Such activities could be complemented with information technology,<sup>147</sup> as technology can be used to reduce delays.<sup>148</sup> First implemented on a pilot basis in order to learn from them, these measures can then be improved prior to expanding them nationwide. For example, each pilot could focus on different delay reduction techniques including case management methods,<sup>149</sup> case reassignments, and fast track programs. Since such pilot programs depend, for the most part, on the people implementing them,<sup>150</sup> training is essential to implement this component of judicial reform by educating court personnel (judges, secretaries and clerks) in the new methods and systems for managing caseloads. In addition to the technical training programs, it is also important to improve the service mentality within the judicial branch, especially at the trial court level. Judges can work within the existing legal framework to facilitate caseload, promote conciliation and settlement of cases and improve judicial relationships with lawyers, litigants and court staff.

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<sup>144</sup> This can be patterned after the regional standards that currently exist with respect to procedural codes. The Instituto Iberoamericano de Derecho Procesal have adopted a number of regional standards including procedural standards for conciliation.

<sup>145</sup> The current system for records management will be upgraded including adopting a records management system (numbering, disposition schedules, etc.), purging of files that are no longer active so that the courts will only have to deal with and store active cases, improving the judicial archive system to allow for more storage of case files and updating records storage equipment for trial courts.

<sup>146</sup> Colombia has recently implemented a national statistics system. FBIS, supra note 102.

<sup>147</sup> See generally, Charles W. Nihan and Russell R. Wheeler, "Using Technology to Improve the Administration of Justice in the Federal Courts," 1981 Brigham Young Univ. L. Rev. 659 (1981); William A. Hamilton, "Computer-Induced Improvements in the Administration of Justice," 4 Computer/Law J. 55 (1983). The results of a computer pilot project in Peru showed that judges' productivity doubled with the use of computers. Lima Expreso, March 12, 1994. However, it should be noted, that simply providing technology alone will not provide the projected benefits if there is not proper training and utilization of such material. One Chilean lawyer noted: "[t]here are courts in Santiago that have been equipped with computer systems that have not produced results because the judges themselves resist using them." FBIS, Aug. 17, 1994 (citing La Nación, June 13, 1994).

<sup>148</sup> Buscaglia and Dakolias, Delay Study, supra note 18.

<sup>149</sup> Id.

<sup>150</sup> For instance, in Ecuador two pilot courts have had very different degrees of success due to the interests of those involved in implementing the programs. The achievements of the successful pilot court have encouraged the personnel and the judge to take their own initiative to expand the project.

## PROCEDURAL CODES

The Procedural Codes provide the framework for processing cases and are an important element when considering judicial reform. In some cases, merely implementing current procedures may be sufficient, while in others procedural reform may be necessary.<sup>151</sup> For example, although there are time limitations they are regularly ignored. One reason this occurs is that it may be beneficial to drag the case out until the amount demanded is worth less due to inflation.<sup>152</sup> However, like Argentina and Brazil, some countries now require judges to adjust awards for inflation. Although the procedural reforms generally involve the particular procedural codes of each individual country, some common issues may be addressed: oral and immediate procedures, time-saving reforms and *ex parte* communication issues.

Several Latin American countries, including Argentina, Bolivia, Costa Rica, El Salvador and Guatemala, have chosen to revise their criminal procedural codes to incorporate oral procedures. Peru and Venezuela have instituted oral civil proceedings, although they have only been implemented in Peru. Oral procedures have allowed for public trials, which, in turn, has helped make judges publicly accountable for their decisions. However, sufficient training has not been offered to judges and lawyers before the oral procedures were implemented.<sup>153</sup> This has created a situation where the judges and lawyers lack the necessary skills for using the new procedures to their fullest extent. There has been no study to date which compares the time delays in the courts before and after the implementation of oral procedures. Moreover, adequate court reporting must accompany the oral proceedings as was done in 1991 in Trinidad and Tobago in order to assist in the efficient use of oral procedures. In addition to improving the efficiency of the courts, court reporting also provides real accountability.

Procedural reform requires an initial identification of procedural bottlenecks hampering the efficiency of the courts and causing delay. In Brazil, 82 percent of the judges indicated that excessive procedural formalities is the cause of inefficient administration of justice.<sup>154</sup> The large number of appeals are partly attributed to delays in certain courts. For example, in Brazil, 73 percent of the judges interviewed cite the high volume of appeals as the leading cause of delay.<sup>155</sup> Imposing stricter requirements for filing appeals may be an option. Although time limitations are essential, judges do not enforce

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<sup>151</sup> For example, according to the Bolivian Minister of Justice, Bolivia needs to enforce already existing statutory deadlines, but needs to reform the civil and criminal codes of procedure to make them more oral and immediate. *FBIS*, Aug. 29, 1994 (citing *Presencia*, July 22, 1994).

<sup>152</sup> Ecuador: Judicial Sector Assessment, *supra* note 98, at 6.

<sup>153</sup> This was the case in Argentina and is now being experienced in Peru.

<sup>154</sup> Terza Sadek and Bastos Arantes, *supra* note 13.

<sup>155</sup> *Id.*

them with any regularity. In a sampling of cases from Venezuela, for example, 100 percent of the sample failed to meet the required deadlines.<sup>156</sup> In Argentina, the codes include set time limitations; however, they are rarely enforced.<sup>157</sup> The civil procedural code often establishes penalties for judges who do not conform to the legally mandated deadlines to process cases. In Argentina and Bolivia, the judge may lose jurisdiction over the case; however, the available sanctions are rarely applied. According to a Bank financed study in Bolivia, the procedural process for First Instance cases should not last more than 42 days, when they in fact last 519 days -- ten times longer. Additionally, discovery takes six months when the maximum time period is fifty days.<sup>158</sup> This study concludes that judges themselves are the primary contributors to delay problems.<sup>159</sup>

Revised or properly enforced procedural codes can also reduce delays and backlogs by providing mechanisms for the early resolution of cases, including, among others, procedures for facilitating use of alternative dispute mechanisms. In addition, the procedural codes could also be revised so that judges have more control to move their cases. In some countries, the procedural codes permit the judges to engage in settlement discussions with the parties, but very often the judge does not implement this method of settlement. The formal discovery process could be improved to foster early exchange of information between the parties to encourage settlement. For example, in Uruguay, 60 percent of court actions settle during conciliation hearings, and of those, 85 percent settle as a result of the defendant's realization that the plaintiff had a valid claim.<sup>160</sup> However, judges, who currently do not see this as their role, must actively use these mechanisms to seek early resolutions. Another option for reducing delays that has been used in Peru and Venezuela is the appointment of temporary judges. In Venezuela, the *consejo* will appoint a temporary judge to handle twenty cases.<sup>161</sup> If such a system is adopted it is important, however, to assure that the quality of justice is not lowered. This may be done, in part, by providing that the temporary judges come from the corps of retired judges.

Finally, the last aspect of procedural reform that has received scant attention in Latin America is *ex parte* communication.<sup>162</sup> When *ex parte* communication is permitted, parties

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<sup>151</sup> Cases take an average of 242 days to reach the sentencing phase; a period for which 60 day time period is mandated. Venezuela: Judicial Sector Assessment, *supra* note 54.

<sup>157</sup> For example, since 1988, the *Fuero Laboral* in the Province of Rio Negro sets specific time limits for the judge to make a decision, and if the time limit is passed, that judge loses jurisdiction over the case.

<sup>158</sup> Bolivia: Judicial Reform SAR, *supra* note 7.

<sup>159</sup> The courts use 34 percent of the time used to dispose of a case, while the litigants use only 7 percent.

<sup>160</sup> Cappelletti (1978), *supra* note 39, at 1031.

<sup>161</sup> Venezuela: Judicial Sector Assessment, *supra* note 52.

<sup>162</sup> Ecuador: Judicial Sector Assessment, *supra* note 96, at 6-7.

may approach judges and judges can request to see parties or their lawyers separately. Such *ex parte* communication is widely practiced among the legal systems in Latin America, as the codes generally do not regulate it. *Ex parte* communication contributes to the general perception of corruption that permeates the judicial system and permits such corruption to occur with greater frequency. Procedural reform must address the eradication of *ex parte* communication.

### **Recommendations**

Judicial reform programs should place emphasis on enforcing and implementing existing rules and procedures. Procedural revision should occur as necessary to complement other reforms. If, however, there is procedural reform, it first should be done on a pilot basis working within the existing procedural and institutional framework and should include training. For example, courts could automatically dismiss cases that have been inactive for two years assuming that there is prior notification to the lawyers and parties involved as is done in Trinidad and Tobago as well as courts in the United States. In addition, the issue of *ex parte* communication should be addressed as part of the ethical standards endorsed by the court. In addition, a delay study should be conducted to identify which procedural steps cause the longest delays so that revisions can be experimented with during the reform process. For example, since the *termino de pruebas* period has been found to be the longest stage of the process, reforms should address this issue first.<sup>163</sup>

### **ACCESS TO JUSTICE**

One of the most important issues in judicial reform is the public's access to justice. The court's justice must be accessible to those who need to use their services for legitimate purposes.<sup>164</sup> Access depends on the proper functioning of the system as a whole. Improved access to justice is essential for providing basic services to society and meeting the previously mentioned goals of democratization and institutionalization and redefining the relationship between society and the state. As noted earlier, the public's perception of the judicial system is the defining factor determining whether anyone voluntarily seeks the system's services. In particular, low income citizens tend to have an especially low level of confidence in the judicial system compared to other sectors of the population. Moreover, it has been demonstrated that this perception can effectively be changed. In Chile, for example, it has been established that poor people who have had no experience with the judiciary have a 20 percent confidence rate in the judiciary, but those individuals who have experience with the judiciary have a somewhat improved level of confidence.<sup>165</sup> The courts

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<sup>163</sup> Bolivia: Judicial Reform SAR, *supra* note 7 and Buscaglia and Dakolias, *Delay Study*, *supra* note 18.

<sup>164</sup> National Center for State Courts, *Trial Court Performance Standards* 8 (1990).

<sup>165</sup> Peffa, *supra* note 16, at 28.

provide a necessary public service that should be designed so that everyone, regardless of their economic means, can access it taking into account the limited amount of resources available.

Access can be evaluated by a number of factors: the time it takes to adjudicate a case, the parties' direct and indirect costs of litigation (filing expenses, court and bailiffs' fees, attorneys' compensation, lost wages, etc.), the ability of the potential users to have knowledge of, understand and follow the procedural steps during the life of a case, and the physical access to the courts.<sup>166</sup> In other words, a judicial system may present *economic, psychological, informational and physical barriers* for individuals who need its services.<sup>167</sup> A number of solutions exist to overcome or lessen certain *economic barriers* to justice, including reducing incidental costs to litigation, providing efficient legal aid programs and creating less expensive, alternative forms of justice.

### **Alternative Dispute Resolution Mechanisms**

Access to justice can be enhanced through alternative dispute resolution mechanisms (ADR). The delays, inefficiency and corruption in the judicial system have the effect of encouraging litigants to completely avoid the formal judicial system, opting for extra-judicial conflict resolution. ADR can provide parties alternative methods to resolve their disputes amicably without the delays of the formal system. ADR, at the same time, increases access to a greater percentage of the population.

One of the most important benefits of expanding the extra-judicial mechanisms for resolving disputes is to increase the access to justice for a greater percentage of the population.<sup>168</sup> Another added benefit is to provide additional alternatives to the formal justice system. In El Salvador, mediation provides parties a means to settle disputes without a lawyer and within two months. This has been especially important for the poor. Initially, judges and lawyers may feel threatened by the loss of power caused by the additional avenues provided to the litigants. However, judges should be co-opted by ADR's ability to alleviate judges' caseloads by removing complex and highly visible cases from their dockets. Lawyers may also fear that they will need to acquire new skills and play under new rules. However, they too may find that in the long run ADR is useful for their clients as well as themselves.<sup>169</sup> Some projects have even found that parties may abide by

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<sup>166</sup> Trial Court Performance Standards, *supra* note 161, at 9.

<sup>167</sup> Earl Johnson, "Thinking about Access: A Preliminary Typology of Possible Strategies," in *Access to Justice* 3 (ed. Mauro Cappelletti, 1978).

<sup>168</sup> *See generally*, Mauro Cappelletti, "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement," 56 *The Modern Law Rev.* 282, 288 (1993).

<sup>169</sup> For example, 69.1 percent of the Brazilian judges interviewed indicated that it is important to expand the use of extra-judicial conciliation in order to improve the administration of justice. Terza Sadek and Bastos Arantes, *supra* note 13.

mediation agreements more often than judicial decisions. In Chile, for example, a 70 percent success rate exists for mediation proceedings.

ADR can provide a number of advantages. Well-trained mediators and arbitrators can provide specialized knowledge. They may provide more predictable outcomes than the formal court system where judges may not be as familiar with the subject matter. ADR also provides additional advantages such as: ADR is particularly beneficial when the parties want to maintain a future relationship and going to court may further strain their relationship; the parties want to play an active role in resolving the dispute; the parties may be more willing to talk directly with the other side in an ADR environment; finally, if the parties have privacy concerns the ADR system may be better than the court system. Notwithstanding the advantages of the ADR system, the disadvantages of formal litigation may be the deciding factor in the decision to use ADR.<sup>170</sup> A party's decision on whether to go to ADR or the court system may depend on the speed of the system, ability to choose the arbiter or mediator or on the party's perception of the possibility of losing the case in the formal system.<sup>171</sup>

Although there are many forms of ADR, the most common forms include arbitration, mediation, conciliation and, in some instances, justices of the peace.<sup>172</sup> In many countries, the chamber of commerce provides *arbitration* services for contract and commercial disputes. Delays to the private sector can mean excessive costs and serious problems for business transactions. Such a service can provide companies with alternative mechanisms to resolve disputes by arbiters who may be more familiar with the nature of the business than judges. This can be a tremendous advantage when the stakes are high. The acceptance and use of arbitration by the Latin American business community has increased

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<sup>170</sup> Some of the disadvantages of formal litigation may include court resolution time, the cost of litigation, attorney's fees, court fees in some instances, and the parties' time and emotional costs. In addition, the parties will have to spend time with their attorney to explain their desires and concerns, and even then, the parties may lose control over the case. Since the courts may not understand the circumstances of the case, the parties may also have to educate the judges. Finally, there is the danger that the decision may be based on procedural rules and not necessarily on the merits of the case. National ADR Institute for Federal Judges, *Judges Deskbook on Court ADR* (1993).

<sup>171</sup> Notably, one study of court-annexed litigation in six states of the United States found that such arbitration procedures did not affect the outcome of the cases. Keith O. Boyum, "Afterword: Does Court-Annexed Arbitration 'Work'?" 14 *The Justice Sys. J.* 244, 245 (1991).

<sup>172</sup> In the United States, conciliation and mediation have merged; however, in Latin America the two have remained separate. In Latin America, conciliation does not include a third party neutral. For a discussion of the conciliation mechanism in Mexican law see José Ovalle Favela, "Instituciones no Jurisdiccionales: Conciliación, Arbitraje y Ombudsman" in *Justicia y Sociedad* 974 (1994). Other ADR mechanisms may include early neutral evaluation, summary jury trial, appellate ADR, court mini-trial and judge-hosted settlement conferences. *Deskbook on Court ADR*, *supra* note 167.

significantly in recent years.<sup>173</sup> However, the procedure has been, by and large, restricted to the business community.

*Mediation* is also a settlement process that "facilitates negotiations among parties to help them reach settlement."<sup>174</sup> In Latin America, the legal framework for mediation, found in the Latin American codes of civil procedure, exists but impartial neutral third party mediators are not usually available. Success rates are approximately 20% when this method is used.<sup>175</sup> Very often, it is the same judge assigned to the case that acts as mediator.<sup>176</sup> Such a procedure does not permit parties to be candid about the case or discuss their settlement positions. In fact, judges often complain that there are ethical considerations when the same judge is mediator and decision-maker. Moreover, in many Latin American and Caribbean countries, the potential for ADR mechanisms as a way of reducing backlog and delays is lost by the passive mentality adopted by court officers who do not see themselves as driving forces in the settlement of disputes. Finally, experience has shown that mediation, in particular, can also effectively settle disputes for many who cannot afford to litigate.<sup>177</sup>

*Justices of the Peace*, currently being used in some of the Latin American countries,<sup>178</sup> can also provide alternatives to the formal justice system.<sup>179</sup> These justices are

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<sup>173</sup> For description of arbitration mechanisms currently existing in Latin America see *El Arbitraje en el Derecho Latinoamericano y Español* (1989) and Malcolm D. Rowat, "Multilateral Approaches to Improving the Investment Climate of Developing Countries The Cases of ICSID and MIGA," 33 *Harvard Int'l Law J.* (1992). Similarly, a number of authors have encouraged the use of arbitration in Latin America. "A Courageous Course for Latin America: Urging the Ratification of ICSID," 5 *Houston J. of Int'l L.* 157 (1982); Victor Garita, "Conceptual Basis for a New Arbitral Statute in Costa Rica: A New Approach in Latin America," 65 *Tulane L. Rev.* 1633 (1991); Robert Layton, "Changing Attitudes toward Dispute Resolution in Latin America," 10 *J. of Int'l Arbitration* 123 (1993); Horacio A. Grigera Naon, "Arbitration in Latin America: Overcoming Traditional Hostility," 22 *Univ. of Miami Inter-American L. Rev.* 203 (1991); Frank E. Nattier, "International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards," 21 *Texas Int'l L. J.* 397 (1986).

<sup>174</sup> Deskbook on Court ADR, *supra* note 167.

<sup>175</sup> In Tucuman for example, where judges act as mediators in family courts there is only a 20% success rate.

<sup>176</sup> In Peru, the judges mediate; while in many other Latin American countries, clerks conduct the mediation.

<sup>177</sup> USAID, *supra* note 107, at 39.

<sup>178</sup> In Colombia, the 1991 Constitution created the justice of peace, who should decide conflicts based on equity. Situación, *supra* note 71, at 129, 170. In Argentina, the justices of the peace have been eliminated on the national level, but they are still used on the provincial level. *Id.* at 82. The Minister of Justice of Bolivia, Rene Blattman has also suggested introducing justices of the peace in Bolivia. FBIS, *supra* note 148, at 49-50. In some countries, as in Peru, they are predominantly lay magistrates. However, in a number of countries, for example Mexico and Uruguay, the justices of the peace are law-trained. Countries outside of Latin America are also experimenting with this institution. A recent Italian statute, which took effect on January 1, 1993, established over 4,000 justices of the peace, who have the ability to

sometimes elected by the community, and in other cases are appointed by the judicial system.<sup>180</sup> These individuals may have little or no formal training prior to assuming their responsibilities. The position may be volunteer or fully compensated.<sup>181</sup> Additionally, the system may require that the justice of peace be law-trained or provide for lay justices.<sup>182</sup> However, if a lay justice of peace system is implemented, it is especially important to provide training, as is the case in Venezuela.<sup>183</sup> Consideration should also be given to providing these judges training as mediators as, in many instances, that is their primary role in society. In Peru, the justices of the peace propose solutions until the parties agree.<sup>184</sup> In other countries, the justice may have more substantial powers to impose sentences and conduct themselves like ordinary judges.<sup>185</sup> Some countries have created well-functioning

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decide cases based on equity rather than law. Cappelletti (1993), *supra* note 165. It is interesting to note that the justice of peace systems in Argentina, Mexico and Peru, have long been a part of the judicial system, but have only been recently incorporated into the Colombian and Venezuelan systems.

<sup>179</sup> In some countries, however, they are an integral part of the formal judicial system. In the United Kingdom, the magistrates (justices of the peace) are an essential part of that justice system, who, unlike the Latin American institutions, have primary responsibility for criminal matters. In fact, the magistrates dispose of 90 percent of all criminal cases. R. Scott and David Booth, "The Financing of Magistrates in the Courts in England," 7 *The Justice Sys. J* 124 (1982). A number of other countries use lay persons in their judicial systems. In Germany, for example, lower courts use lay judges to decide cases on panels with trained judges as a substitute for a jury. National Commission, *supra* note 37, at 1447.

<sup>180</sup> In some of the Argentine provinces, they are appointed by the Courts. In Peru, the law provides for popular election of the justices of the peace, but currently, the superior courts are appointing the justices. Peru has approximately 4,300 lay justices of the peace. Peru: Judicial Sector Assessment, *supra* note 7, at 57.

<sup>181</sup> In England, the magistrates are volunteers but receive reimbursements for administrative costs. In Peru, justices of the peace are volunteers and only recently have begun to receive funds for administrative costs.

<sup>182</sup> The Peruvian system, for example, provides for both law-trained and lay justices of the peace. Peru: Judicial Sector Assessment, *supra* note 7, at 56.

<sup>183</sup> Magistrates in England are lay individuals who receive extensive training before assuming office and refresher training in each three year period following the year of appointment. Kenneth W. Pain, *The Lay Magistrate: An elementary guide to the origins of the office of Justice of Peace and to the structure and jurisdiction of Magistrates' Courts in England and Wales* (1988). Additionally, an important aspect of the Magistrates' Courts is the law clerk, who is a permanent employee that provides administrative abilities and legal guidance to the lay magistrates. Hilary Astor, "The Unrepresented Defendant Revisited: A Consideration of the Role of the Clerk in Magistrates' Courts," 13 *J. of L. and Society* 225 (1986). In Venezuela, the justice of peace, who is a lay person appointed for a two year period, must complete training. Venezuela: Judicial Sector Assessment, *supra* note 52.

<sup>184</sup> Hans-Jurgen Brandt, *En Nombre de la Paz Comunal- un Analisis de la Justicia de Paz en el Peru* (1991).

<sup>185</sup> This is the case in the English judicial system. However, this is not the case for more serious crimes.



systems of justices of the peace where cases decided by a justice of the peace are seldom appealed.<sup>186</sup> The Peruvian justices of the peace are essential for providing access to justice. However, it is clear that there is no consistency in how cases are resolved.<sup>187</sup> As currently being implemented in Latin America, the justice of the peace system falls outside the formal justice system. The justice of the peace system is a response to the inefficiency of the judiciary and can provide needed competition to the resolution of conflicts. However, an effective justice of the peace system must complement the formal justice system and not add additional levels of justice to impede instead of improve access.<sup>188</sup>

ADR is becoming increasingly popular in Latin America because it offers alternatives to the delays and corruption that characterize the formal judicial system. Additionally, it provides healthy competition for the formal judicial sector. In El Salvador mediation is being conducted by the *Procuraduria* for child support and alimony cases. This program settles 90 percent of these cases in less than two months. In 1993, Argentina established a mediation center. The Argentine Ministry of Justice is leading this program successfully because several judges have been actively promoting the program. Analysis to date reveals that the judges send the most difficult cases or those that have already been in the judicial system for five to eight years to the mediation center. Nevertheless, the center has had approximately a 65 percent success rate in solving these cases through mediation.<sup>189</sup> Family and patrimonial cases have an over 70 percent success rate in mediation.

Although some countries have established successful ADR programs, there are several issues that still must be addressed. For example, a decision must be made as to whether arbitrators and mediators will be a regulated profession, whether there will be

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<sup>186</sup> In Peru, 63 percent of those surveyed stated they were satisfied with the outcome of the proceedings. Brandt, *supra* note 180, at 180.

<sup>187</sup> The advantages often cited on behalf of implementing a justice of peace institution include the fact that it is considered more democratic justice because it is administered by a lay person; it provides judicial service at a low cost because the justices are not part of the formal justice system and are either not paid or paid very small salaries; and the justice of peace system can reach areas of the country that the formal justice system does not reach. However, others argue the disadvantages of the institution include a lack of control and accountability over the justices; the impairment of legal rights because of the lay nature of the justices; persistent conflict of interests because the justices are part of the community; and confusion of the public and justices about the jurisdiction and powers of the justices.

<sup>188</sup> For example, the justice of peace system may provide justice in situations where no court is available or where the closure of courts during non-working hours prevents access. The justice of peace system in the state of New Mexico, according to one lay justice, provides access on an almost 24-hour basis to resolve personal and community disputes and provide advice, stating that most of these problems the justices confront are resolved informally and off the record. Linda Silberman, *Non-Attorney Justice in the United States: An Empirical Study* 71 (1979).

<sup>189</sup> Interview with Dr. Elena Heighen and Dr. Gladys Alvarez of Libra Foundation (June 5, 1994).

mandated training, and the ethical standards by which arbitrators should be judged.<sup>190</sup> The barriers to ADR and how they will be overcome must also be considered. Some lawyers, for example, do not support ADR mechanisms because they fear losing their clients and fees, believe that it will be used to delay the process or because they are not familiar with the new procedures. Additionally, certain judicial barriers exist. In a number of Latin American countries, including Peru and Ecuador, judges do not respect extra-judicial mediation agreements (and are not required to do so by law) because they argue that resolving conflicts is their responsibility thereby trying to keep hold of their ability to rent-seek. If ADR settlements are not enforced and respected by courts, they cannot be effectively used for improving access, reducing delays and cutting costs.

There are several ADR systems that can be established under a private or court-annexed system. *Court-annexed ADR* is an ADR program offered or authorized by the courts.<sup>191</sup> Under the court-annexed system, ADR can be voluntary where the parties themselves agree to participate or mandatory where the parties are compelled by the court. *Private ADR* is what is normally offered in Latin America by the chambers of commerce or by non-profit groups. *Private ADR* also includes international arbitration which is often used when there is a dispute involving a foreign investor. The Centre for Settlement of Investment Disputes connected to the World Bank,<sup>192</sup> the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Act, and some bilateral

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<sup>190</sup> Mauro Cappelletti emphasizes the following issues to be addressed when instituting ADR mechanisms: which institutions should be promoted, the best kinds of persons to staff such institutions and the minimum standards and guarantees to be maintained. Cappelletti (1993), *supra* note 165, at 288; *see also* Propositiones, *supra* note 29 (stating that when implementing an ADR program it's necessary to determine the jurisdiction of the arbitrator, define discovery powers, specify procedures and limitations for proceeding against the arbitrator's decision, provide enforcement mechanisms and determine the award's effect on third parties).

<sup>191</sup> Court-annexed mediation as currently being experimented with in Latin America, unlike court-annexed arbitration in the United States, is voluntary not mandatory. U.S. Court-annexed arbitration, also referred to as "mandatory", "compulsory" or "court-ordered" arbitration, has criteria established either in a statute or in a court's rules that identify cases eligible for arbitration. If a case falls within these criteria, the parties must go to arbitration as a prerequisite for trial. Additionally, unlike commercial or private arbitration, U.S. court-annexed arbitration is nonbinding. Therefore, all arbitration decisions may be appealed. In the United States, almost half of the states and at least 10 federal district courts have court-annexed arbitration. In the state programs, most "apply only to civil cases and deal with relatively small claims without complicating factors (e.g., demands for equitable relief, class action suits, family law issues). A few programs . . . focus on specialized cases, e.g., torts or auto damage claims." *See* John P. Melver and Susan Keilitz, "Court-Annexed Arbitration: An Introduction," 14 *The Justice Sys. J.* 123, 123-124 (1991). This article provides a comprehensive survey of the different state court systems with respect to jurisdictional boundaries, arbitrator qualifications, arbitrator selection and compensation, arbitration hearing procedures and rights of appeal.

<sup>192</sup> Convention on the Settlement of Investment Disputes between States and Nationals of other States, March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. *See* Malcolm Rowat, "ADR in the Latin American Context," paper prepared ADR Conference, November 16-17, Monterrey, Mexico, 1995; Ibrahim Shihata, "Judicial Reform: Issues addressed in World Bank Projects," paper prepared for Inter-American Development Bank Conference, Oct. 19-20, Montevideo, Uruguay, 1995.

investment treaties like NAFTA are some mechanisms which may be used. However, private arbitration agreements are enforced under the judicial system. When one party does not abide by the agreement, the other party may execute and enforce the award in court

In addition to the type of program offered, it is important to identify what types of cases are appropriate for ADR.<sup>193</sup> There is no universal rule as to what type of cases should be included or excluded. Historically, courts have used mediation and conciliation for domestic-related cases, especially divorce situations. However, cases of spousal abuse have usually been excluded from mediation programs because of the power imbalances usually found between the husband and the wife. In Argentina, these types of cases have not been excluded from mediation, but the program is too new to tell whether it has been successful.<sup>194</sup> However, sensitivity training by mediators and the possibility of joint extra-court and court remedies may be sufficient to alleviate these concerns,<sup>195</sup> especially when there may not be an alternative forum available. In the case of Ecuador, immediate family members may not bring legal actions against each other in a court of law. As a result, the ADR system is the only mechanism available for those suffering from domestic violence. Many countries use arbitration and/or mediation for labor cases. By and large, these mechanisms have been quite successful.<sup>196</sup> Finally, an evaluation must be made as to what particular types of cases are causing backlogs in the court system, whether these particular types of cases demand more court resources than other cases in the system and whether these cases would be more appropriately placed in an ADR system.

### Court Costs

Incidental costs form barriers for all sectors of the population, but especially limit the access of the poorer sectors of the population. Incidental costs to litigation include attorney and notary fees,<sup>197</sup> delays of the judicial system, and court fees. First, simply

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<sup>193</sup> Walter Horn, "A Guide to Allocating Resources between Mediation and Adjudication," 15 *Justice Sys. J.* 824 (1992).

<sup>194</sup> Since 1993, the mediation center has not received many cases involving domestic violence. Interview with Dr. Elena Heighten and Dr. Gladys Alvarez of Libra Foundation, June 5, 1994.

<sup>195</sup> If a mediation program accepts domestic violence cases, it must assure the safety of the victim-party. This may mean court-ordered restraining orders if such measures are available in the country's legal system or psychological or other counseling services.

<sup>196</sup> In Ecuador, the Labor Law requires that collective labor disputes be submitted to the Conciliation and Arbitration Tribunal within the Ministry of Labor. Ecuador: Judicial Sector Assessment, *supra* note 96, at 30. After these mechanisms were implemented the time for disposing of a matter decreased from 11 1/2 years, in 1991, to 9 1/2 years in 1993. Buscaglia and Dakolias, *Delay Study, supra* note 18. Moreover, the number of cases reaching final disposition was halved. Proyecto BID-CONAM-MTRH Study (1994).

<sup>197</sup> Often the number of notaries is limited by law as in Ecuador and Peru making it a virtual monopoly with high fees. In Lima and Quito, there are 60 and 30 notaries respectively. In Mexico, high examination standards are used as a barrier to entry.

requiring representation of an attorney impedes access.<sup>198</sup> However, in many instances it may not be avoided. Additionally, regulated fees and high attorney's fees may prevent a number of individuals from seeking legal assistance or advice. Lawyer's fees in some countries increase depending on the number of motions that are filed, whether the lawyer goes to court alone, or depending on the complexity of the case. In some instances, a legal aid attorney or a public defender may exist, but this may increase the costs of the proceeding because of the delays in acquiring such assistance may entail. For example, in Trinidad and Tobago it takes the legal aid office approximately three months to process applications for legal assistance.<sup>199</sup> Delays in the judicial system can deny access in a number of respects. For example, although the demand for judicial services has increased, the courts have been unable to supply the needed services.<sup>200</sup> Thus, in some countries, cases may take up to ten years to resolve thus diminishing the value of the case or, in some instances, barring recovery and justice completely. Delays also increase attorney costs, which may prohibit the party from pursuing a valid claim after the court of first instance. Given the many appeals available in Latin American courts, such delay causes hardship on both parties.

The third type of incidental cost is court fees. It is important that court costs be reasonable, fair, and affordable so as not to deter use of the system.<sup>201</sup> People who file legitimate claims have a right to proper access and court costs should not prevent people from enforcing their rights. However, this is not to say that fees should be eliminated. On the contrary, court fees are necessary in many types of cases and can produce revenues for the judiciary.<sup>202</sup> Reform programs may consider court fees with waivers for low income groups. Peru and Ecuador have recently established court fees with exemptions for certain cases. In addition to the official court fees, the view of individuals and businesses alike is that informal incentives are required in order to motivate court personnel, and at times judges, to process cases that would otherwise remain pending for years. This transaction fee does not necessarily inure to the benefit of the judicial system by offsetting the legitimate costs of sustaining a judicial system, but rather simply goes to the personal benefit of a

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<sup>198</sup> Venezuela, for example, mandates attorney representation before its courts. Venezuela: Judicial Sector Assessment, *supra* note 52. Notably, one of the benefits of the previously discussed ADR systems, especially mediation or justices of the peace, is that the need for attorney representation is significantly reduced under such systems.

<sup>199</sup> *Trinidad and Tobago: Sector Report*, *supra* note 21.

<sup>200</sup> Peña, *supra* note 16, at 24.

<sup>201</sup> Venezuela's recently increased court fees have raised accessibility concerns. Venezuela: Judicial Sector Assessment, *supra* note 52.

<sup>202</sup> One argument in favor of court fees is that public resources which are scarce should not finance transfers that occur in many commercial cases.

judge or court official and contributes to corruption in the system and effectively denies access to justice.<sup>203</sup>

## Legal Aid

Adequate and efficient legal aid and public defenders programs should be made available to provide legal assistance and advice for those who can not otherwise afford to bring an action or defend themselves in a law suit.<sup>204</sup> Although some form of legal aid may be available in some Latin American countries, it is usually limited. Moreover, for these systems to be efficient, it is essential that the public defender system be sufficiently staffed. Currently, the number of public defenders is usually minimal given the demand for assistance. For example, in Ecuador there are a total of twenty-one public defenders in the country even after an unprecedented overall budget increase.<sup>205</sup> There are only four public defenders in both Quito and Guayaquil where there are over two million and three million people, respectively.<sup>206</sup> The entire city of Buenos Aires has only 14 public defenders. These public defenders presumably provide free legal services to indigents in criminal, civil, commercial, labor, traffic and landlord/tenant cases. Consequently, long waiting lists exist for those requesting the assistance of a public defender, creating hardship on those who cannot afford an attorney and cannot obtain a public defender. This insufficient number of public defenders causes even further delays in the judicial process.<sup>207</sup> Finally, it is important to point out that many Latin American and Caribbean countries provide parties

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<sup>203</sup> Ecuador: Judicial Sector Assessment, *supra* note 96, at 26.

<sup>204</sup> Legal aid programs can be classified into three legal assistance models: the judicature model, the public salaried model and a combined approach model. The judicature system provides affordable or gratuitous lawyers. The areas of discussion in this type of system include the income eligibility limits, the method of proving eligibility, the compensation of the attorney, the availability of free legal advice in addition to court representation. Sweden, France, Belgium, Great Britain and Germany have such programs. Mauro Cappelletti, Bryant Garth and Nicolo Trocker, "Access to Justice Variations and Continuity of a World-Wide Movement," 54 *Revista Juridica de la Universidad de Puerto Rico* 221, 228 (1985). The public salaried model is the model used most frequently in Latin America through public defenders programs, where a government employee provides legal assistance. The United States, although relying in part on public defenders and having experimented with the judicature model to a limited extent with the Legal Services Corporation, now primarily relies on uncoordinated, ad hoc pro bono services offered by private attorneys. For a comparison of the U.S. and the German legal assistance systems see Heribert Hirte, "Access to the Courts for Indigent Persons: A Comparative Analysis of the Legal Framework in the United Kingdom, United States and Germany," 40 *Int'l and Comparative L. Quarterly* 91 (1991). In Venezuela, the law mandates that appointment of an attorney for individuals without representation; however, the law does not provide for payment of such attorney. Therefore, the system must, unsuccessfully, depend on the volunteer services of the legal community. Venezuela: Judicial Sector Assessment, *supra* note 52.

<sup>205</sup> Ecuador: Judicial Sector Assessment, *supra* note 96, at 25.

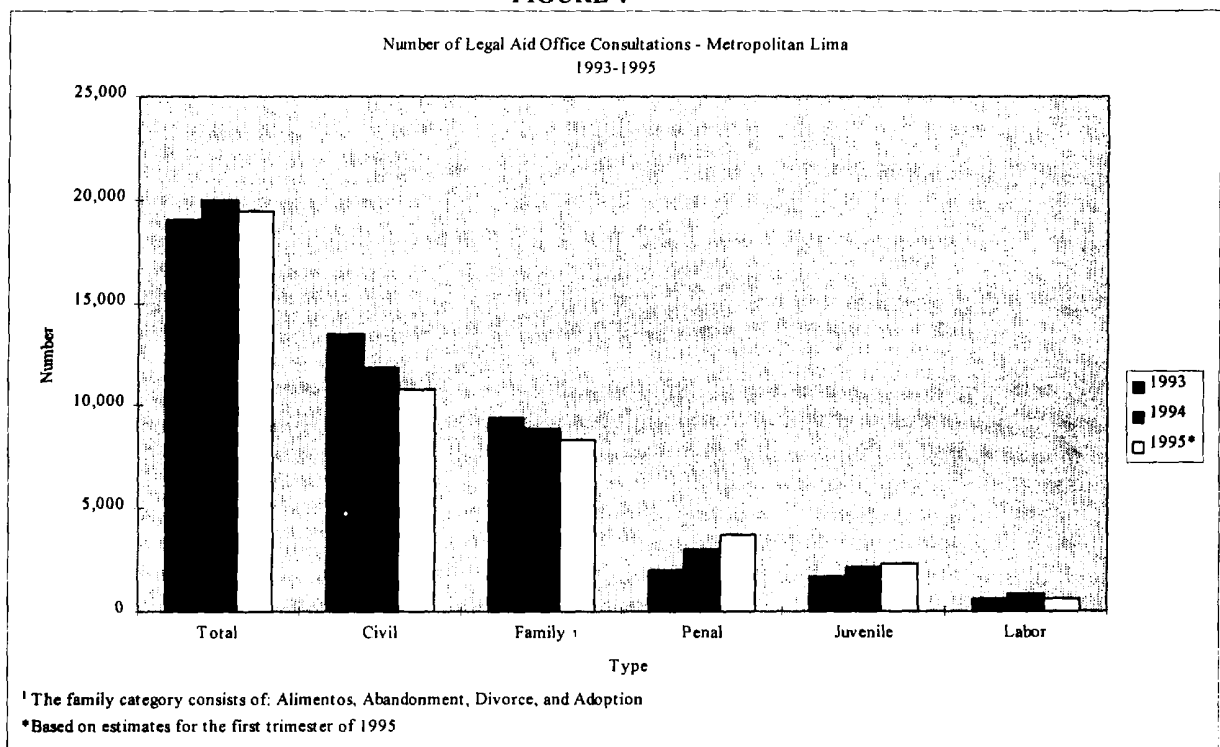
<sup>206</sup> *Id.* at 25.

<sup>207</sup> *Id.* at 26.

with a constitutional right to assistance in certain cases. Therefore, the lack of such services explicitly infringes these individual's rights.

The Ministry of Justice, NGOs, bar associations, or universities all may operate legal aid offices, in addition to public defenders offices. In Peru, there is only one lawyer per *consultorio juridico* and only seven such offices in Lima. Seven additional offices service the rest of the country. The seven attorneys in Lima handled 19,719 cases in 1992.<sup>208</sup> (see Figure 4) These lawyers generally receive low salaries,<sup>209</sup> which has caused them, in some instances, to charge unauthorized fees to their clients as is the case in Peru. In addition, these offices sometimes cannot handle the number of requests that they receive for assistance either due to the income requirements or the insufficient number of lawyers available.<sup>210</sup>

**FIGURE 4**



<sup>208</sup> Peru: Judicial Sector Assessment, *supra* note 7, at 35.

<sup>209</sup> In Trinidad and Tobago legal aid lawyer's fees are usually one sixth the market rate. *Trinidad and Tobago: Sector Report, supra* note 21.

<sup>210</sup> In Trinidad and Tobago, there were over 10,000 requests made to the legal aid office in 1993 and only 10% were accepted due to the low income thresholds that are in place. *Id.*

In addition to legal aid provided directly by government-provided services, legal aid can be provided through alternative sources, as part of a training program.<sup>211</sup> A number of countries require attorneys to provide legal aid, after law school, in order to become attorneys, while others require practical training while in law school.<sup>212</sup> In some countries, including Chile and Peru, lawyers must complete a specified amount of practical training after law school. In Peru, young lawyers can choose to complete this training in legal aid offices, thus providing important resources for these offices. Chile requires candidates to complete this training in the legal aid offices. Some countries may wish to consider adopting these practices by requiring new lawyers to work in legal aid offices, similar to the programs in Belgium, France and Holland,<sup>213</sup> as well as in Chile and Peru.

### **Small Claims Courts**

Small claims courts that handle cases up to a specified dollar amount is one option for reducing case backlogs in higher courts while improving access to justice. These courts may help alleviate delays, especially in urban areas where the delays appear to be more serious.<sup>214</sup> Small claims courts in Trinidad and Tobago handle civil matters up to a specified dollar amount.<sup>215</sup> In Uruguay, for example, the small claims filings use simple oral procedures, lawyers are not required and no appeals exist.<sup>216</sup> The public's acceptance of these courts has been extremely favorable, according to several opinion polls.<sup>217</sup> In order to create a level playing field for the parties and permit access to the courts where parties may otherwise be barred due to a lack of economic resources, it is important to consider

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<sup>211</sup> In Peru in 1993, approximately ninety NGOs provided legal services. Peru: Judicial Sector Assessment, *supra* note 7, at 35.

<sup>212</sup> In Trinidad and Tobago second year law student must handle at least one case in the legal aid program provided by the law school. *Trinidad and Tobago: Sector Report*, *supra* note 21.

<sup>213</sup> All of these countries require young lawyers to work in legal aid offices for three years as part of their practical training. In United States, the only two states that have apprenticeship requirements are Delaware and Vermont.

<sup>214</sup> The small claims courts have been developed most extensively in common law countries. Historically, the reasons behind the creation of small claims courts have been obstacles to access, including: costs, delays, complexity, formality and the need for legal representation. Christopher J. Whelan, "Small Claims Courts: Heritage and Adjustment," in *Small Claims Courts: A Comparative Study* 207 (ed. Christopher J. Whelan, 1990).

<sup>215</sup> An amount not exceeding TT\$5,000. *Trinidad and Tobago: Sector Report*, *supra* note 21.

<sup>216</sup> For a description of the Brazil's system with respect to small claims see Marcos Afonso Borges, "La Justicia de Pequeñas Causas en el Brasil," in *Justicia y Sociedad* 657 (1994) and for the Mexican system see Héctor Molina González, "Tribunales de Mínima Cuantía," in *Justicia y Sociedad* 669 (1994).

<sup>217</sup> Mauro Cappelletti and Bryant Garth, *Access to Justice A World Survey* 1029 (1978).

implementing a system where parties may appear pro se (without lawyers).<sup>218</sup> However, parties should not be prevented from being represented by a lawyer.<sup>219</sup> The proceedings should be oral so that the parties can easily explain their case to the judge.<sup>220</sup> This type of court system could allow so-called "neighbor disputes" to be resolved in an efficient and least costly manner, thus freeing higher courts for more complex cases. A small claims court which handles only limited types of cases will provide important access to the public.

### Other Barriers to Access

Access can also be enhanced through the availability of collective action mechanisms.<sup>221</sup> Such mechanisms reduce not only *psychological and information barriers* to accessing justice, but also economic barriers, while presenting important issues that might not otherwise appear before the courts.<sup>222</sup> Class actions allow a more efficient, less costly manner for providing a number of parties a vehicle to bring a common suit.<sup>223</sup> A

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<sup>218</sup> Some small claims courts have two different procedures for defended and undefended cases. However, interestingly, of the countries studied, more often than not when individuals are the claimants, the case is more likely to be defended than when businesses are the claimants. However, when individuals are acting as defendants, the claim is less likely to be defended. Whelan, *supra* note 210, at 214. This comparative study, however, also found that the better-educated, better-off individual is more likely to bring a claim, both in the United States and Australia. *Id.* at 218-9.

<sup>219</sup> Sometimes an imbalance of power may occur in small claims courts when large firms use the system as a debt collecting institution; consequently, individuals should have the ability to acquire an attorney. Some small claims have dealt with this power imbalance by simply prohibiting businesses from using the small claims courts. Cappelletti (1993) *supra* note 165. However, another commentator has argued that most courts have not eliminated business claims in small claims courts because merely the fact that businesses use the court does not deny consumers and individuals access that they would otherwise not have, concluding that business claimants should be eliminated only if they "chill" individual's claims, that is, if businesses are using resources such that individuals are prevented from using them, or if the easy access to small claims courts encourages business claimants to give credit too easily. Whelan, *supra* note 210, at 213.

<sup>220</sup> See Gonzalo Armienta Calderón, "La Oralidad como Expresión Simplificadora del Proceso," in *Justicia y Sociedad* 743 (1994).

<sup>221</sup> There are a number of different approaches to addressing collective or diffuse interests: the governmental approach where the government is responsible for representing diffuse interests; the private attorney general approach (*qui tam*) where individual parties are allowed to bring action on behalf of a collective interest; and finally, the organizational private attorney approach. In most countries, the first approach exists. It merely provides no other mechanisms for representing collective or diffuse interests because the government is viewed as responsible for such interests. The organizational private attorney approach has been adopted in a number of European countries and exists in Chile and Peru with respect to environmental issues.

<sup>222</sup> There are two types of interests involved. The first is the *collective interest* problem of a large number of individuals suffering the same injury or legal problem, for example, an airline crash. The other interest is that of *diffuse interest* organizations, for example, the desire of an environmentalist or consumer group to bring an action on behalf of a generalized public good.

<sup>223</sup> The class action is a device that has not been adopted with any frequency in civil law countries.



slightly different mechanism has been created in the continental European countries in what is known as the "collective action".<sup>224</sup> Such mechanisms create an environment that provides more power to the plaintiffs and minimizes legal costs for each individual.<sup>225</sup> Additional measures for reducing informational barriers include making court and legislative documents publicly accessible, providing informational material on specific legal issues, as well as furnishing simplified explanations of how the judicial system works. Chile, for example, has produced information on how to obtain a marital separation.

Finally, people should not face *physical barriers* to accessing the courts, including geographical and physical access. Courthouses should have facilities for physically challenged persons, and the court should be open to the public during reasonable hours.<sup>226</sup> In addition, persons who do not speak the official language used in the courts should be provided with translators.<sup>227</sup> This can be an important issue in a country that has a large indigenous population.<sup>228</sup> The indigenous people may be intimidated not only by the unfamiliarity of the court system but also by the language barrier, thus creating additional impediments for the judge's ability to obtain the necessary information for arriving at a just

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<sup>224</sup> Pursuant this procedural mechanism, associations have standing to sue on behalf of an interest after they have been registered as interested organizations. Environmental, women's, children's, handicapped and veteran's organizations, for example, have been certified to represent their particular interests in actions brought before the court system. Cappelletti (1993), *supra* note 165, at 286. For a detailed discussion of Italian collective action mechanisms see Douglas L. Parker, "Standing to Litigate 'Abstract Social Interests' in the United States and Italy: Reexamining 'Injury in Fact'" (forthcoming in *Columbia University Law Review*). For a discussion of the advantages and the disadvantages of these two mechanisms see Cappelletti (1985), *supra* note 200, at 238-9. Brazil, for example has begun experimenting with the collective action mechanisms in a recent consumer protection code adopted in 1990. Cappelletti (1993), *supra* note 165, at 56.

<sup>225</sup> According to one aspect of public choice theory, individuals will group together when a number of factors coalesce: they have a symmetry of interests, the group is relatively small in size, their interests are concentrated interests; and the group can easily be subject to sanction. It is difficult for large groups with diffuse interests, such as consumer groups, to successfully change public policies because, given their size, they can obtain only marginal gains because the benefits are spread across the entire population; information costs are high; and they cannot sanction free-riders. Thus, pursuant to public choice theory, class action and collective action mechanisms attempt to decrease some of the costs to the large, diffuse interests. *See generally* Mancur Olson, *The Logic of Collective Action* (1971).

<sup>226</sup> In Venezuela, for example, judges establish their own hours; therefore, no uniformity or predictability exists with respect to hours of operation. Venezuela: Judicial Sector Assessment, *supra* note 52. Notably, one of the benefits of the previously discussed justice of peace system is the possibility to resolve disputes in non-working hours, and thus, increasing access.

<sup>227</sup> The Bolivian Constitution requires that translators be provided. Bolivian Constit. Art. 116. For the United States federal court system, a statute was passed concerning access to interpreters. *See generally* Carlos A. Astiz, "A Comment on the Judicial Interpretation of the Federal Court Interpreters Act," 14 *The Justice Sys. J.* 103-9 (1990).

<sup>228</sup> Ecuador: Judicial Sector Assessment, *supra* note 96, at 25.

decision. Ecuador, for example, does not provide translation facilities for its indigenous populations.<sup>229</sup> Moreover, those persons who cannot read or write must also be provided with adequate assistance to use the court system, and court personnel should be trained and instructed to assist people in preparing the formal documents and filing them in the court.

## Gender Issues

Access to justice for women in Latin America is an area that merits particular attention for a number of reasons. First, because of higher levels of poverty, deficient education and lack of information, women face disproportionately higher barriers to accessing justice than other social groups. Women are more likely to be poor, and therefore, unable to overcome the previously mentioned economic barriers. Latin American women have a 34.2 percent probability of being found in the bottom 20 percent of the income distribution as compared to men who only have a 14.5 percent probability.<sup>230</sup> Moreover, because women experience higher levels of illiteracy they have a much lower level of knowledge about their legal rights and the judicial system.<sup>231</sup> One survey in Chile found that 30.5 percent of the women, as compared to 21.7 percent of the men, did not know their legal rights.<sup>232</sup> Second, a large percentage of the cases before Latin American courts (one-third) involve family law issues (see figure 5);<sup>233</sup> therefore, any judicial reform will require analysis of the problems women confront within the system.

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<sup>229</sup> According to the Ley Organica, justices of peace in Uruguay are required to be fluent in the indigenous languages used in a justice's jurisdiction, in addition to Spanish fluency. This requirement, however, may be waived. Ley Organica, Art. 183.

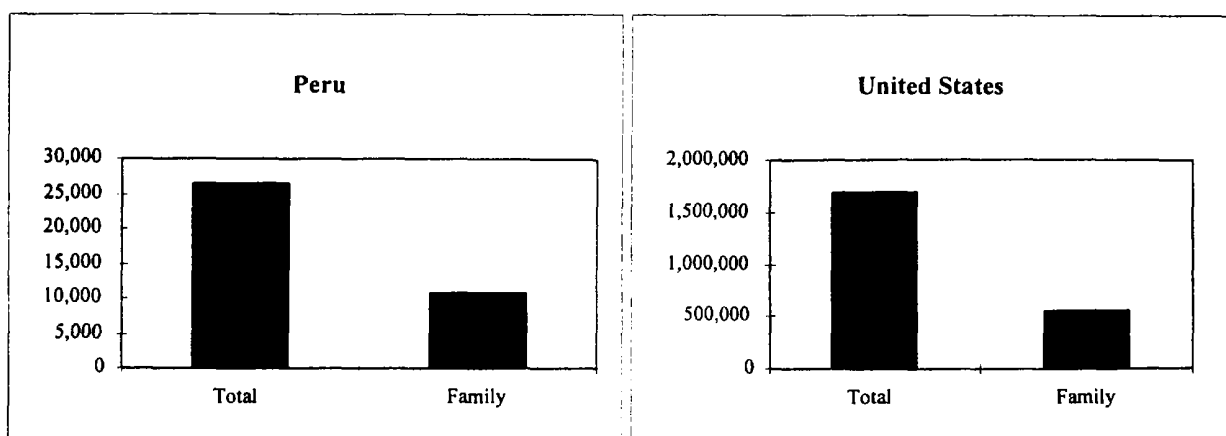
<sup>230</sup> George Psacharopoulos, Samuel Morley, Ariel Fiszbein, Haeduck Lee and Bill Wood, "La Pobreza y la Distribución de los ingresos en América Latina: Historia del Decenio de 1980," (June, 1993). Burki and Edwards have also found that the poverty increases of the recent years have fallen the heaviest on Latin American women. According to their study, the second most significant factor for determining poverty is sex. Moreover, single women heads of households, who are likely to be below the poverty line, are now a common phenomenon. Burki and Edwards, *supra* note 1, at 7-8.

<sup>231</sup> Currently, 73 percent of the illiterate population in Peru is female. Additionally, while females in the Province of Lima have on average 9.6 years of schooling, in one rural area (Apurímac), girls have an average of 1.9 years of schooling. *Informe Nacional Sobre la Mujer* 71 (Marzo, 1995).

<sup>232</sup> Peña, *supra* note 16, at 27.

<sup>233</sup> Moreover, this percentage is even higher for caseloads in the legal aid offices. In Peru, for example, the most frequently processed claim in the Lima Bar Association legal aid clinics was alimony (50%) followed by other domestic issues. Peru: Judicial Sector Assessment, *supra* note 7, at 35.

**FIGURE 5.**  
**Total Number of Cases versus Family Cases Litigated, 1994**



Finally, although a limited number of issues are highlighted here, all of the areas of judicial reform must consider and be cognizant of the inherent biases within the system against women in order to provide for effective judicial reform.

As previously discussed, Latin American countries are increasingly experimenting with ADR mechanisms to resolve family law problems. ADR in family cases has been very successful in many countries including Chile.<sup>234</sup> Several NGOs promote and support such ADR mechanisms. In Peru, for example, an NGO handles women's legal problems through mediation. The Ecuadoran NGOs have found that family-related cases are the second largest number of cases. Although, as mentioned above, ADR mechanisms may not be the ideal mechanisms given the imbalance of power, it may be the only justice available to women, as is the case in Ecuador.<sup>235</sup> Other countries have responded to family law problems by establishing family courts, as in Spain, Colombia, and in the Province of Tucuman in Argentina while others have expressed an interest in family law courts, including Ecuador, Peru and Chile.<sup>236</sup>

The fair treatment of women before the judicial system is fundamental. Gender awareness programs within the judicial community (lawyers and judges) should be part of any reform program. In the legal community, research has revealed that women are

<sup>234</sup> In Chile, 76.7 percent of the family cases are resolved by out-of-court settlements. Peña, *supra* note 16, at 42.

<sup>235</sup> As noted above, spouses may not bring legal actions in courts because of intra-family immunity laws.

<sup>236</sup> See e.g., Peña, *supra* note 16, at 42-8.

perceived to be less credible than men.<sup>237</sup> Due to the preponderance of beliefs such as these, women will not receive justice if such perceptions are not addressed. Although some of the laws are not gender-specific, the application of the law may be discriminatory. In other cases, the law does not protect certain rights. Examples of potentially discriminating applications of the law are family and labor law issues<sup>238</sup> and violence against women. Finally, women should be actively incorporated into the justice system as judges and lawyers in increasing numbers.<sup>239</sup>

## Recommendations

In order to provide competition in resolving disputes, judicial reform programs should consider both court-annexed ADR as well as private ADR.<sup>240</sup> The programs should target the court-annexed ADR systems first since most of the procedural codes already include conciliation, mediation or arbitration.<sup>241</sup> However, since these mechanisms are generally not used, judges and parties should be encouraged to use these systems and help educate the public about existing ADR mechanisms, as is currently being done in Peru. Pilot programs should be established to get courts and judges accustomed to the process. Because judges are often fearful that ADR will take power away from them, as has been detected in Ecuador, working groups that include judges should design the pilot programs. Eventually, these very same judges may promote the program to others within the judiciary. Arguably, judges should take an active part in the pilot program -- some argue that perhaps they could even be trained as mediators for court-annexed mediation programs. Such a program could consider having mediation judges different from those who would eventually decide the case as is being done in the labor courts in the province of Tucuman

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<sup>237</sup> Lynn Hecht Schafran, "Credibility in the Courts: Why is there a Gender Gap?" 34 *Judges J.* 5 (1995).

<sup>238</sup> See *Gender Discrimination in the Labor Market and the Role of the Law: Experiences in Six Latin American Countries*, World Bank (1994).

<sup>239</sup> This has been labeled the representative method for improving the situation of any social group. If the social group is included within the ranks of the decision-making apparatus, the social group's condition will necessarily change. See Elaine Martin, "The Representative Role of Women Judges," 22 *Judicature* 166 (1993) (analyzing whether women judges have changed the content of judicial decisions). In Venezuela, which has a much higher percentage of women among its judicial ranks than other Latin American Countries, 29 percent of appeal court judges are women; 50 percent of first instance judges; and 71 percent of public defenders. *Venezuela: Judicial Sector Assessment*, *supra* note 53. Notably, the participation of women in the judiciary is increasing although it is still minimal. In Buenos Aires in 1983, women constituted 11.20 percent of the judiciary, in 1985 20.10 percent and in 1992 25.64 percent. Peru currently has one woman on its Supreme Court.

<sup>240</sup> During the preparation of the proposed Bank financed Judicial Reform Project in Peru, the issue of the judiciary's monopoly is being addressed through competitive ADR which is intended to improve the service of the judiciary. Interview with Mr. Geoffrey Sheperd December 10, 1995.

<sup>241</sup> One Peruvian commentator has argued for implementing the court-annexed system in Peru modeled after the system used in Quebec. "Poder Judicial: sin vendas ni balanzas," *Advocatus* (No. 3, 1991).

in Argentina. Regardless of whether the ADR mechanism is sponsored by the bar association, as in Lima, or by judges, as in Ecuador, it is essential that one of these organizations, or a similar organization, has ownership over the program in order to make it politically viable.

Pilot programs can be developed in a wide variety of areas including court-annexed ADR, private ADR or *jueces de paz* (as is the case of Bolivia). It will be best to start with something that does not need legislative reform. In some cases, the courts have some authority to authorize these pilot projects, as has been done in Peru, Ecuador and Argentina. Such court-annexed programs should be voluntary for the parties. In addition, to avoid creating further delay, the mediation agreements should be binding on the parties and enforceable in court so as not to add further delay to the process. Training and evaluation components are essential to any pilot project. The evaluation period should include discussions among the members of the legal and judicial community, as well as, the public users of the programs.<sup>242</sup> Building on this experience, legislative reforms may then be developed.

Judicial reform programs should concentrate on providing qualified legal representation for the poor. However, providing project funding merely to increase the number of public defenders creates a problem of sustainability. Therefore, a legal defense fund which is demand- driven may be a more viable alternative.<sup>243</sup> This would allow indigents to have representation from a list of qualified attorneys. Priorities and the types of cases that constitute an automatic right to representation as well as the appropriate income thresholds would need to be established.

In addition, information should be provided to facilitate public use of the judiciary. This could include providing translators for those who do not speak the official language and assistance for those who do not read or write. Improved access will also depend on court costs as well as lawyers fees that are charged. Judicial reform programs should review court costs to determine whether they are high enough to deter frivolous claims and corruptive behavior but low enough to provide access. Lawyers fees should also be reviewed in this way. For example, Argentina recently limited by law lawyer's fees to a maximum of 25% of the judgment.

Gender differences create obstacles for women, preventing them from accessing the legal and judicial system to enforce their rights. Including gender issues in judicial reform programs is an important part of alleviating poverty and achieving economic growth. Women constitute a majority of the individuals using legal aid services; and therefore, by necessity the programs should focus on areas that affect women most. In Peru, almost half

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<sup>242</sup> Additionally, accurate statistics must be kept in order to evaluate the success of the pilot programs.

<sup>243</sup> This fund would be offered in addition to legal aid offices and public defenders and could be managed by the ministry of justice, the courts, legal aid offices, etc.

of the cases filed by the legal aid offices are family-related issues and the majority of its users are women. In Ecuador similar results were found.<sup>244</sup> These statistics indicate that family law issues affecting the majority of women together with legal aid must be addressed in judicial reform programs.

Since cases that affect women represent an important part of court caseloads, judges must be educated on these issues. They must be made aware that specific gender issues are often involved in the cases before them. This should include education with respect to family law, with emphasis on alimony and domestic violence cases. In Peru, for instance, judges are provided with a pamphlet concerning domestic violence to help them understand the issues involved. This is essential if judges are to be sensitive to the cases that come before them. Additionally, a survey should be conducted of the gender bias that currently exists in the court system and the judicial community.<sup>245</sup> A fair system of justice cannot exist unless the decision-makers, that is the judges, are not cognizant of and begin correcting, at the very least, unintentional biases of the current system. In many instances, such as in the above noted custody situation, the law itself is gender-neutral, but it is applied in a discriminatory manner. Women should also be provided with knowledge about the services available to them for accessing the judicial system or extra-judicial services and information with respect to legal issues affecting them.

## LEGAL EDUCATION AND TRAINING

The improvement of legal education is fundamental for judicial reform. Legal education and training for students, continuing legal education for practicing lawyers, judicial training for judges and legal awareness education for the public are key areas of reform. Legal education and training at every level is important, but the fundamental change must start in law schools. The quality of education in the law schools is said to have deteriorated in many countries over the years. In fact, in Brazil many cite this as the primary reason why graduates cannot pass the judicial entrance exam.<sup>246</sup> Priority areas for

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<sup>244</sup> In a legal clinic for poor women in Ecuador, almost all of the cases involved family law and violence issues. Women, Law and Development -- Action for Change 62 (ed. Margaret A. Schuler, 1990).

<sup>245</sup> In what became known as the New Jersey Supreme Court Task Force on Women in the Courts, a number of states conducted state surveys about judicial bias in the U.S. court system. The survey provided significant data to convince a previously disbelieving legal profession that the U.S. system suffered from gender bias. Women, *supra* note 245, at 107. A "gender bias task force collects local data on the existence and effect of gender bias in the court system, develops recommendations to eliminate gender bias, and uses this information to educate the judiciary." Marilyn Loftus, Lynn Hecht Schafran and Norma Wikler, "Established a Gender Bias Task Force," 4 *Law and Inequality* 103 (1986). According to these authors, in order to establish a successful gender bias task force there are three prerequisites: i) a core group of men and women made up of judges, lawyers, educators and the public concerned about the issue, ii) preparation with the legal communities to generate interest, and iii) significant expertise, personnel and money resources must be available. *Id.* 104.

<sup>246</sup> Terza Sadek and Bastos Arantes, *supra* note 13, at 10.

law school reform include establishing entrance and graduation requirements and revising curricula.

In most Latin American countries the public universities have no entrance requirements, and each school establishes its own graduation requirements.<sup>247</sup> Additionally, most countries do not have national legal education standards.<sup>248</sup> High standards for admissions and graduation must be established as a preliminary step to addressing some of the problems of the legal education system. A number of issues should also be considered with respect to revision of law school curricula, including specialty classes, teaching methods and practical training. Current law curricula offer little in the way of specialty law classes that might include intellectual property, law and economics, environmental law, secured transactions, finance, and accounting. Teaching methods focus predominantly on the traditional lecture method, which provides little opportunity for student-professor interaction. Although schools generally offer minimal practical training to students, some schools have established legal aid programs where students learn to assist those who have been incarcerated. Such a program is important both for the judicial system as well as the education of the students. Chile and Venezuela, as well as Germany and Canada, require practical training before receiving the right to practice law.<sup>249</sup> In Chile, lawyers must complete a six-month non-paid internship with the legal aid office to receive a license given by the Supreme Court.<sup>250</sup>

Law school professors also lack the necessary tools to improve the legal education system. Due to low salaries, law professors usually work on a part-time basis, and therefore, have little time to devote to research and reform of the legal education system, or the judicial system.<sup>251</sup> The part-time professors have the advantage of adding practical experience to the classroom, but such benefits are often at the expense of class preparation

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<sup>247</sup> Ecuador: Judicial Sector Assessment, *supra* note 96, at 21. In Central University in Ecuador, for example, 6,000 students are enrolled, but only 400 complete their coursework and only 80 complete the thesis requirement to obtain a degree.

<sup>248</sup> Argentina, however, has recently established a National Committee on Legal Education Standards, Summer 1994.

<sup>249</sup> National Commission, *supra* note 37, at 1447. Peru has a public service requirement under the Servicio Graduado de Derecho (SECIGRA).

<sup>250</sup> For an in depth, if dated, description of the Chilean legal education system see Steven Lowenstein, *Lawyers, Legal Education and Development: An Examination of the Process of Reform in Chile* (1970).

<sup>251</sup> At the Central University in Ecuador, out of a total of 120 professors only 20 are full-time. The average salary of a professor is 200,000 Sucres (approximately \$100) per month. Ecuador: Judicial Sector Assessment, *supra* note 96, at 21. In Argentina, at the University of Buenos Aires, a lecturer who teaches about four hours a week receives approximately \$100 dollars. In Peru, private university salaries are about US\$600-1,000 per month while public university salaries are about one tenth this amount. Peru: Judicial Sector Assessment, *supra* note 7, at 39.

and research activities. Ideally there should be a mix of full-time professors and practitioners. Student research is also limited to graduation-requirement theses. Currently, the University of Buenos Aires (UBA), Argentina's primary law school, is attempting to create a Master's program in order to better prepare lawyers for practice. As it stands now, the public institution's open access policy has made it impossible to manage quality.<sup>252</sup> the university has over 30,000 students. Although the law school is thought to be the best in Argentina, the standards have significantly decreased over the past years. Consequently, the Master's program is one attempt to increase these standards at UBA.<sup>253</sup>

In most countries in the region, limited or no continuing legal education (CLE) exists for practicing attorneys. Some countries do offer seminars but not on any systematic basis. However, a well-planned and organized continuing legal education program is essential for lawyers to keep abreast of changes in the laws and learn skills to better serve their clients. Bar associations, together with law schools, should be encouraged to take a lead in providing such training to its members. One effort was made in Chile, but with little success. However, in Mexico, successful programs have been developed by the law schools. When implementing a CLE program, it must be decided whether it will be mandatory or voluntary.<sup>254</sup> Additionally, the types of courses offered must be decided. In addition to substantive legal courses, courses need to be provided with respect to case management techniques for lawyers, as it has been shown that many lawyer errors are due to poor administration of law practice.<sup>255</sup>

Judicial training must include both initial training and continuing legal education. This is especially true for new judges that sometimes come from private practice and have limited experience. In these instances judicial training is indispensable. Basic training should include courses that assist judges in acting fairly, correctly and efficiently in their work. The courses should cover general subjects that all judges need to master, subjects relating to specific duties (including court and case management techniques) and new developments dealing with emerging areas of law and societal concerns.<sup>256</sup>

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<sup>252</sup> Neil Gold, *Argentina: The State of Legal Education*, (1994).

<sup>253</sup> The program is designed to improve the critical thinking of students. The UBA program is to be affiliated with several foreign law schools.

<sup>254</sup> A survey of attorneys in five mandatory CLE states in the United States found that 79-91 percent felt that attendance in such courses improved their professional competence. However, no empirical data is available to prove the value of CLE to the legal profession or the public. Mary Francis Edwards, "The Nature and Value of CLE," Paper Presented to the International Bar Association, Melbourne, Australia, Oct. 12, 1994.

<sup>255</sup> Fifty-nine percent of malpractice actions result from administrative errors and poor client relations. *Id.*

<sup>256</sup> For example, programs could include courses on judicial conduct, ethics, fairness, court management, decision-making, judicial stress, case settlement skills, family proceedings and specialty areas of the law: child abuse, complex commercial litigation, AIDS, domestic violence, gender bias, intellectual property, and environmental protection. Li, *supra* note 24, at 17.



Judicial training institutions can be roughly divided into two models: the judicial school and the peer group model. Under the civil law system, countries tend to have judicial schools under the Ministry of Justice since it is responsible for training prosecutors and attorneys, as well as judges. In this case, courses tend to be general so that the different professions can benefit.<sup>257</sup> Moreover, judicial schools in civil law countries tend to have permanent facilities with full-time faculty. In countries with judicial schools, generally students must pass exams before they may enter the judicial career. Incentives can be provided, as in France, for the students with the highest scores to choose the type of position and location of assignment.<sup>258</sup>

Under the common law system, training is the responsibility of the judiciary using the peer group model since judicial and prosecutorial training are conducted separately.<sup>259</sup> This model utilizes active judges who can share their knowledge, experience and skills with others. It focuses on law as it is practiced. There are usually no full-time faculty, no campus facilities or any standard curriculum, but instead provides courses that address current problems in handling cases.<sup>260</sup> Judges find that it is important to exchange working methods and ideas with their colleagues in this manner since they usually work in some degree of isolation.<sup>261</sup>

Many Latin American countries are leaning towards the judicial school model. Some of the countries have successfully established judicial schools and others have tried and failed.<sup>262</sup> Argentina has developed plans for a Federal Judicial School, but it has yet to be implemented. Despite the lack of a national school, several provinces have recently established judicial schools. In Brazil, the 1988 Constitution mandated special judicial schools, and some states have actually implemented this mandate on their own initiative.<sup>263</sup>

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<sup>257</sup> *Id.* at 47.

<sup>258</sup> France established a national judicial school in 1970 that also receives foreign judges and nonjudges. National Commission, *supra* note 37, at 1440. French students receive payment during their studies if they pledge to work in government service for 10 years. *Id.* at 1441. Training is also available at the National Judicial College in Reno, Nevada.

<sup>259</sup> Australia, Canada, and England have judicial schools that are national public entities with independent boards of directors usually chaired by the chief justice or a delegate. Bangladesh and Sri Lanka also use the peer group model but for pre-service training. Li, *supra* note 24, at 48.

<sup>260</sup> *Id.* at 18.

<sup>261</sup> *Id.* at 18.

<sup>262</sup> In those Latin American countries where judicial schools do not exist, it is not uncommon for judges to mention the need for training. Ecuador: Judicial Sector Assessment, *supra* note 96, at 22.

<sup>263</sup> Constit. of Brazil, Art. 93. Terza Sadek and Bastos Arantes, *supra* note 13, at 11.

In January of 1993, Panama founded a judicial school under the authority of the judiciary.<sup>264</sup>

Other alternatives or combined methods, however, should also be considered since it may be difficult to establish a new institution. Such an institution requires continuous investment over time. The judicial school in Ecuador, for example, failed as an institution; it may have been successful if it had been implemented as a series of courses. Additionally, many of the proposed schools have been slow to open due to a general lack of agreement on certain issues. Such is the case in Argentina where discussion continues as to whether the training should be under the Chief Justice, the Ministry of Justice, or be an independent public entity as is the case in Spain.<sup>265</sup> Chile has opted to create an independent institution that is currently in the process of being established.<sup>266</sup> The school will adopt business school teaching techniques and will train judges to be educators in the judicial school, thus following the peer group model. In Chile, there has also been some effort to train some Court of Appeal judges in the area of management. Such programs can be designed by local business management schools in cooperation with the courts; for example, a private business school in Chile designed its highly successful five-day program. In Ecuador, a private university has also expressed interest in designing a program under its business administration school.

CLE education is the second element for a well-trained judiciary,<sup>267</sup> as current judges need continuing judicial training in order keep abreast of legal changes and new areas of law. Since there are few courses offered, judges may, on occasion, attend seminars held by the bar association as is the case in the Province of Tucuman in Argentina. In Bolivia, 92 percent of the judges receive no additional training after law school.<sup>268</sup> For emerging areas of law, judges who have had such cases in their courts may act as trainers, in addition to experts in the areas.<sup>269</sup> CLE programs may also include live courses,

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<sup>264</sup> World Bank, Panama: Judicial Sector Assessment (work in progress).

<sup>265</sup> In the provinces, however, the schools are under the judiciary.

<sup>266</sup> The school will have a board of directors consisting of a member of the supreme court, the court of appeals, the president of the national association of judges, an academic who is a representative of the president of the Republic, the bar association and the law schools.

<sup>267</sup> In the United States, 35 states have mandatory judicial education requirements for judges. France requires four months of continued training at a rate of two weeks per year for the first eight years of tenure.

<sup>268</sup> Bolivia: Judicial Reform SAR, supra note 7.

<sup>269</sup> In such a capacity, judges can "identify for other judges what aspects are of judicial concern and deflect efforts by experts representing social interest groups to lobby judges to support their causes." Li, supra note 24, at 46.

handbooks for common problems and questions, as well as<sup>270</sup>, audiotapes and videotapes for study at one's own pace.<sup>271</sup>

The type of judicial training provided should be carefully considered during the reform process. Although the civil law countries concentrate on the training of new judges and the common law concentrate on continuing education for judges, both types of education are vitally important.<sup>272</sup> The issues that have to be addressed for any judicial training program include: whether training should be required for appointment; should there be a minimum CLE requirement; should testing be required after graduation from the judicial school; should the judiciary control education; should the training staff be responsible to the judiciary; and should such staff be full-time employees.<sup>273</sup>

Finally, legal education must be provided to the public as well, with respect to legal rights and familiarization with the judicial system itself. Part of the initial intimidation of the judicial system is very often the public's lack of knowledge with respect to how the system functions. Thus, public education about the courts will increase the public's confidence and the system's credibility.<sup>274</sup> Some countries have implemented radio and television programs to educate the public about the laws. These programs have concentrated on providing certain groups important information about their rights under the law. For instance, in Ecuador, a program called "streetsmart" informs domestic workers about their rights and the obligations of their employers. These programs can be very effective tools in educating the public, and they should be expanded to cover other areas of the laws as well. Some studies have indicated that once the public is informed of their rights and the available legal services, they tend to be more motivated in seeking assistance to address their grievances.<sup>275</sup>

In addition, the public should be educated about the importance of judicial reform in order to obtain consensus and support for the reform efforts. In this manner, the public will understand how the reforms are beneficial to them as individuals and the society as a whole.

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<sup>270</sup> Through media individuals in the province of Tucuman in Argentina have mobilized to file claims on behalf of all the users of different agencies in effect creating a form of class action.

<sup>271</sup> Such methods are being used not only in the United States but also in Bangladesh and Sri Lanka. *Id.* at 46.

<sup>272</sup> One reason for the civil law distinction is that being a judge is part of a career service path; and therefore, many new lawyers are young, usually between the ages of 23-25 years old, and have little experience while in common law countries, new judges usually have between 10-15 years of experience. *Id.* at 17-18.

<sup>273</sup> *Id.* at 49.

<sup>274</sup> National Commission, *supra* note 37, at 1411.

<sup>275</sup> USAID, *supra* note 107, at 39. It should be noted, however, that this will increase demands for judicial services, and consequently, increase pressure on judicial access. Peña, *supra* note 16, at 26.

In Argentina, 48 percent of the public discuss judicial reform, but do not know the purposes of the reforms.<sup>276</sup> Countries that have generated public discussions about judicial reform have also experienced the establishment of public interest groups and research institutions focused on judicial reform. Such groups contribute invaluable resources to the judicial reform effort by, for example, conducting seminars on judicial reform, public surveys on the judiciary and generating important public awareness.

## Recommendations

Legal education at the university level is important for the future of the legal profession, but it is an ambitious area that has had limited success in the past. Therefore, it may be more useful to concentrate initially on specific courses in the law schools and professional development for professors. In addition, projects should attempt to encourage law schools to work together, as illustrated by the Argentine example.<sup>277</sup> It would also be important to identify those schools that produce most of the judicial employees, in order to target resources appropriately. An evaluation of the open access of law schools should be done in order to prevent an excess supply of lawyers and therefore, a misallocation of resources.

Legal education for judges should be carefully considered in any reform process because even with the "best laws and the most modern court system, justice can never be better than the people who administer it."<sup>278</sup> Judicial reform programs should concentrate on the training of judges, and most importantly, on training for current judges as the current reforms will only be successful if the sitting judges are convinced of the need for judicial reform. New judges should also be trained, as is being done in the judicial school in Uruguay, but training for current judges should begin first.

Groups of lawyers and judges, formed by types of jurisdiction (civil, criminal, etc.), can identify their particular educational needs and design suitable programs. However, a needs assessment may be necessary in order to ascertain the needs of all the judges, for example, as is currently being done in Ecuador. Thus, the committee would be cognizant of the needs of the majority of judges. These committees should then evaluate each program through professional user satisfaction measurements rather than formal tests. Once the subject matter has been selected, judges with experience in these areas should act as trainers. Additionally, as part of a CLE program, a judges' school should consider

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<sup>276</sup> Estudio de Opinión, *supra* note 12. Through the media individuals in the province of Tucuman in Argentina have mobilized to file claims on behalf of all the users of different agencies in effect creating a form of class action.

<sup>277</sup> For the first time, a National Committee on Legal Education Standards (CELEP) was established by the Bank through an Institutional Development Fund Grant to improve the quality of legal education and lawyer's professional training. The Committee is composed of law school deans, judges, representatives of the bar and NGOs.

<sup>278</sup> Li, *supra* note 24, at 17.

providing the service of assisting judges in obtaining research assistance on legal questions from a central legal staff at the school.<sup>279</sup> For instance, in Costa Rica, judges can request assistance from the judicial school for guidance on jurisprudence with respect to their caseload.

Judicial training also provides an appropriate forum to discuss judicial views of problems in the judicial system, and thus, act as a vehicle for proposing and discovering possible solutions, as well as obtaining their support.<sup>280</sup> Gaining the support of judges for judicial reform is also important for developing pilot courts. Such pilot courts can be an effective means of building consensus for a national judicial reform effort. Initially, mandatory course for judges should be established, especially in areas relating to judicial ethics, using judges as trainers as is envisaged in Bolivia and Ecuador. Additionally, the ideal training program should provide separate education for attorneys, prosecutors, court personnel and judges.

Finally, public education should be included in the reform program. This could also include public campaigns as a way to provide better education and access to the population at large. With the necessary information individuals and groups can organize themselves to take collective action as has been successfully done by individuals in the Province of Tucuman in Argentina.

## BAR ASSOCIATIONS

The main role of the bar associations in all countries is to regulate the profession through entrance requirements and the disciplinary system, to provide legal training for its members, and provide basic legal services to the community. In addition, bar associations should be encouraged to take an active role in judicial reform.

The bar usually plays an important role in regulating the practice of law under the supervision of the Supreme Court. The requirements for qualifying as a practicing attorney, ethical standards and the disciplinary procedures must be clearly established and enforced. Generally in Latin America, the requirements to practice law entail merely holding a law degree from a university and being a member of the bar; this is the case in Argentina, Peru and Ecuador.

Another way to regulate the profession is through a disciplinary system. Bar associations are responsible for enforcing the disciplinary system; however, the mechanisms

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<sup>279</sup> *Id.* at 50.

<sup>280</sup> Similarly, special problems exist when the official registry of new and revised laws is not readily available. In these instances, the possibility of decisions being made without the knowledge of new laws may result in an increased number of appeals to rectify the decision. Institutionalized training programs will also provide assured mechanisms for dissemination of a wide-variety of essential information.

in place usually do not operate properly. In some cases the ethical standards are overly vague and in other cases they simply do not enforce standards in place.<sup>281</sup> In addition, the punishments may be so minimal that enforcement does not deter unethical behavior by the lawyers. In Ecuador, sanctions for violation of the ethics code may include: imposition of a fine ranging from 100 to 2,000 Sucres (approximately \$0.05- \$1.00) according to the seriousness of the violation.<sup>282</sup> Only recently did the Peruvian bar acquire the power to expel a member. The ethical standards, as well as the remedies available to the disciplinary system, must be reviewed and then effectively enforced in order to provide the necessary accountability to the legal profession.

In addition to regulation of the private profession, the bar association should provide training for its members. Such training should include substantive legal courses as well as courses in case management techniques. Since bar associations represent practicing attorneys, they can also provide a necessary forum to discuss changes in laws, make recommendations for reform, and implement changes. Any reform in the judicial system requires the cooperation and support of the lawyers. Bar associations can also play an important role in the independence of the judicial system by ensuring the public accountability of the judiciary. The bar association, in addition to disciplining its own members who do not conform to the ethical standards, can also encourage its members to report the behavior of judges who do not conform to legal and ethical norms. Unfortunately, the bar associations are often neither politically very strong nor highly respected by the members themselves.

Finally, bar associations provide some basic legal services to their community. These services are usually basic, but they can have an important impact given the limited number of legal aid organizations available in the region. One example is the bar association's Special Defense Fund in Venezuela which provides legal representation for the poor.<sup>283</sup> Another way to provide such services is through pro bono representation by bar members, however, this not common in Latin America. Appropriate incentives should be established to promote pro bono activity.

## **Recommendations**

The bar associations should take a more active role in monitoring the legal profession as well as the judiciary and establishing clear ethical standards. These standards should be enforced by an effective disciplinary system which can impose appropriate penalties. All ethics proceedings should be published and made available to the legal

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<sup>281</sup> In Trinidad and Tobago lawyers are rarely sanctioned. Trinidad and Tobago: Sector Report, *supra* note 21.

<sup>282</sup> Ecuador: Judicial Sector Assessment, *supra* note 96.

<sup>283</sup> Judicial Reform in Latin America and the Caribbean, ed. Malcolm Rowat, Waleed Malik, and Maria Dakolias, World Bank Technical Note 280 (1995) at 106.

profession and general community. In addition, the bar should conduct continuing legal training and provide support for the practical training of new law graduates, as in Venezuela.<sup>284</sup> The bar association should also assist in improving access to justice by providing legal representation to the poor. Many of the judicial reforms will affect the legal profession, thus it is important that they become participants and supporters of the reform process. This support can be achieved through participation in working groups as well as encouraging the bar associations to initiate reform programs as is being done with Peru's mediation pilot programs.

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<sup>284</sup> The bar association sponsors a clinical law program where experienced attorneys work with students on a volunteer basis.

#### **IV. IMPLEMENTATION OF A JUDICIAL REFORM PROGRAM: POLICY RECOMMENDATIONS**

The Bank has been a relatively new participant in judicial reform with a number of projects under implementation, preparation and even more being contemplated. The majority of the Bank's work has been in Latin America; and consequently, the Bank's work in this area is being examined as other countries throughout the world only begin major reform efforts.<sup>285</sup> Through these experiences, it is clear that there is a need to define the elements of an overall judicial reform program which can be adapted given the country specific needs. Though country specific needs can only be assessed after a country review, it is important that the review takes into account a broad reform program which can be adapted given the country specific needs. Though country specific needs can only be assessed after a country review, it is important that the review takes into account a broad reform program which can be implemented over time. As a result, it is important for the Bank to develop a coherent approach to judicial sector projects since governments from around the world are increasingly asking the Bank for assistance in the reform process.

There have been several initiatives in the Latin American and Caribbean Region which provide a basis for such an approach to judicial reform. The Bank first began with a small judicial technology component in a larger Argentine Sector Reform Loan in 1989 which has been successfully completed and then a separate Judicial Infrastructure Loan in Venezuela in 1994 which concentrated on infrastructure, technology and some substantive studies in other areas to compensate for the lack of a prior sector review. During implementation, however, the Venezuela project has been substantially revised to include support for the Judicial Council, judicial training and workshops which have promoted judges' involvement in the reform process. This experience has shown that such workshops should be conducted prior to implementation in order to make the judges part of the decision-making process.

During this same period, the Bank began developing a second generation approach to judicial reform. In 1992 the Bank embarked on a judicial sector review in Argentina financed by an Institutional Development Fund Grant where a multidisciplinary and politically diverse team reviewed many facets of the judicial sector including court administration, alternative dispute resolution mechanisms, legal aid, bar associations, procedural codes, legal education and training, infrastructure and successful reform efforts in the country. The review was designed so that the team would discuss its findings with an Advisory Committee composed of representatives from the Supreme Court of Argentina, Supreme Court of the Province of Buenos Aires, Ministry of Justice, and Law Schools. The composition of the team was also an important aspect of the review process. The team consisted of national and foreign lawyers specialized in different areas, business administration specialists, a judicial sociologist, a court administration specialist, and a legal

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<sup>285</sup> The Legal Department is providing support to the region on a number of these projects.



education specialist. At the completion of the report a seminar was held in Buenos Aires in 1994 to disseminate the results. The final report is now being published for even wider dissemination since this was the first time in Argentina that a report reviewed so many different aspects of the judicial sector as well as compiled a list of work already completed in Argentina. In 1995, a judicial reform project was approved for Bolivia where several studies had been completed, although not by the Bank, which influenced the components that were included. The Bank adopted this review approach and began producing its own sector work on the judicial system.

Judicial sector reviews are now considered to be a prerequisite for any lending operation in the area of judicial reform. Although not as detailed as in the case of Argentina, sector reports were later completed in Ecuador, Peru and Trinidad and Tobago in order to initiate discussions with the Governments and within the Bank on defining appropriate components for individual lending operations. These sector reports have enabled the Bank to build some expertise in this area and to disseminate reform efforts being implemented in different countries as well as different regions. In Ecuador and Peru, judicial reform projects are currently being prepared. The preparation of these projects has aimed to include a broader range of components than was included in the first project in Venezuela based on the sector reports that were completed. In addition, project preparation has included a broad participation by the legal community in the preparation of the individual components as was the case in Ecuador. These experiences to date in the region allow the Bank to develop further the elements of a coherent approach for judicial reform.

Judicial reform has many integral parts as described in Section II, though an initial reform program does not require that all the elements be implemented at once. Judicial reform will require a systematic change in how justice is delivered, and, therefore, should be expected to take generations to achieve. As a result, judicial reform programs should be implemented in stages: the sequencing of such stages should be planned taking into account the costs and benefits of each stage in terms of the country's political capacity and the judiciary's ability to implement such reforms.<sup>286</sup> The initial stages, however, should avoid legislative reform because of its extremely costly nature in terms of political capital, while in most cases implementing existing legislation will provide significant improvements and build the necessary confidence in the reform effort and the legal system. A preliminary outline for implementing this strategy is outlined below.

Judicial reform should be conducted through a consensus approach and should be initiated from within the country. Only if these two objectives are met -- **judicial reform from within and consensus** -- will the reforms be long-term systemic changes instead of superficial reforms subject to reversal. This initiative to embark on reforms related to the judiciary has come from within the countries themselves: the judiciary, executive, legal community, and local NGO's. Local governments and groups have shown a strong commitment to this process of reform by undertaking serious constitutional, legal and

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<sup>286</sup> Buscaglia and Dakolias, *Judicial Reform*, *supra* note 3.

procedural reforms as well as structural reforms in the judiciary. These groups have created a stronghold on the reform effort and have taken the lead in encouraging international development institutions to participate in this process. These institutions provide different types of assistance. The multilateral agencies including the World Bank and Inter-American Development Bank,<sup>287</sup> are concentrating on reforms that relate to the civil and commercial areas. On the other hand, the numerous bilateral agencies including the U.S. Agency for International Development<sup>288</sup> and the German GTZ through legal law foundations<sup>289</sup> have been active in the region in the penal as well as in the commercial and environmental areas. These agencies play an important complementary role in assisting judiciaries in their reform efforts.

In order to develop and implement a program, consensus is needed. Consensus requires that the political limitations and the priority pragmatic strategies be taken into account. This requires reform which incorporates specific elements as described earlier together with a planned sequencing of stages.<sup>290</sup> In order to determine which elements are necessary a prior review of the specific country's conditions is required by a multidisciplinary team. This review would examine the various elements identified in Section II taking into account the country's cultural, political, social and economic environment and identify priorities. Given the present state of judicial systems and the rent-seeking and vested interests within the current systems, the review should recognize and target the elements of reform that are more likely to create successful results. It may be beneficial to look for short term benefits for judges and political actors in the beginning that compensate them for the short term loss of rents, combining them with longer term benefits at later stages.<sup>291</sup>

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<sup>287</sup> The Inter-American Development Bank has also recently begun to finance judicial reform projects in the region. Although the only projects to date are in Costa Rica, Colombia and Nicaragua there are several projects under preparation in El Salvador, Honduras and Paraguay. There are also Grants for alternative dispute resolution mechanisms that have been approved for Colombia and Peru.

<sup>288</sup> USAID has been involved in administration of justice projects for many years especially in the Latin American and Caribbean Region and has provided much needed expertise and lessons learned to the other institutions now involved in this area. Most recently, many of the USAID projects were not renewed due to budget cuts and therefore it has relied on and assisted other agencies to continue the work it had begun.

<sup>289</sup> This includes technical assistance projects in Bolivia, Chile, Guatemala, Panama, Paraguay, and Venezuela. Other projects are planned in Brazil, Colombia, Honduras, Mexico, and Nicaragua.

<sup>290</sup> Taking into account that a number of structural aspects of independence may be beyond the scope of any Bank project, focus should be on the administrative and organizational aspects of independence.

<sup>291</sup> Buscaglia and Dakolias, Judicial Reform, *supra* note 3.

Any program of judicial reform must consider the vested interests in the judiciary, the bar associations, and the other branches of government.<sup>292</sup> These vested interests can impede consensus. This can be viewed in terms of the rent-seeking activities conducted by different groups within the public and private sector.<sup>293</sup> Thus, it is important to build coalitions to overcome these vested interests. For example, in Argentina, USAID had difficulty implementing reforms before switching to constituency building.<sup>294</sup> Preliminary projects have found that sometimes members of the bar have been "reluctant to be personally associated with open discussions of reform that might be seen as critical of the judiciary for fear that judges would become biased against them in future cases."<sup>295</sup> USAID, for example, has found that NGOs exercise very little leverage to implement reforms. They can sometimes provide a strong coalition for legal reform, but building these coalitions has been found to be difficult. Additionally, NGOs are often accused of only representing one group in the country. In some countries, NGOs originally thought that they could achieve reform without including the judiciary, but this experience has failed outright. In Chile, the NGO approach has been very positive due to the close relationship with the judiciary. Similarly, free and effective media is necessary for building support and generating public pressure for reform.<sup>296</sup> In Chile, for example, media coverage was very important for the Penal Code reform.

Projects should encourage the participation of a broadly composed informal committee or judicial council (*consejo*) during the preparation and implementation stage in order to promote consensus in the projects, provide an obvious counterpart as well as ensure accountability. Such a committee should ultimately be able to alleviate any struggle there may be between the executive and the judiciary. In addition, it could build a much needed broader base of consensus since many elements in the reforms reach well beyond the judiciary. This broad based consensus is important for the success of the programs. In some countries, judicial councils have already been established and in others they merely have been created under law but not formed as in Argentina, Chile<sup>297</sup> and Ecuador. In such cases where the judicial council is not yet established but has been created under law, the government should be encourage its establishment prior to preparation of any judicial reform project. This will ensure some continuity through the process. In order to promote the participatory approach, ideally it is the judicial council that should develop the global

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<sup>292</sup> Buscaglia and Dakolias, Judicial Reform, *supra* note 3.

<sup>293</sup> See generally James M. Buchanan and Gordon Tullock, The Calculus of Consent-Logical Foundation of Constitutional Democracy (1962); William Niskanen, Bureaucracy and Representative Government (1971); Douglas North, Structure and Change in Economic History (1981).

<sup>294</sup> *Id.* at 18.

<sup>295</sup> USAID, *supra* note 107, at 22.

<sup>296</sup> *Id.* at 24.

<sup>297</sup> It appears that it will not be created due to a lack of consensus.

plan for judicial reform and the specific action plan in conjunction with the various other actors. One way to do this is through workshops and seminars. However, if there is no judicial council, a similar but informal committee could be established for project preparation as was done in Bolivia and Ecuador.<sup>298</sup> In either case, the committees should work closely with working groups of judges, court personnel, lawyers, and the public.

In order to have the necessary support for such reforms it is important that there be project ownership. Ownership can be achieved through a process of creating a global plan created by the various actors (including the judicial council or similar committee). This action plan has only been tried to date in Ecuador, and it has been successful in planning future reform efforts. Other methods have included holding workshops and town meetings in order to plan a project for reform. This method was employed in Costa Rica where over 6,000 people participated in the design of the Inter-American Development Bank Project. Sector reviews can provide the initial information necessary to begin such discussions with the actors involved and with the government. Among the many issues that should be included in such reports are those described in the elements above.<sup>299</sup> As a result, a plan can be developed together with the public and private sector. These efforts are important for building the necessary consensus prior to implementing any reform since judicial reform will affect the private sector, the public, the legal community, as well as the members of the judiciary.

Though it is ideal to have full consensus, it may not be realistic. Therefore, at some point it is important to begin some form of reform activity while at the same time continuing the consensus building. Prolonged discussions without concrete action can appear to lose value which can ultimately frustrate the actors involved. Given the constraints of time, resources and the country's political atmosphere one strategy for judicial reform that may facilitate the necessary consensus-building process and that does not require legislative changes are pilot projects. Judicial reform pilot projects should aim at creating courts from which lessons of experience can be drawn and subsequently applied to other courts. In this way, the judiciary is able to build the capacity to manage projects and implement reform on a small scale, later transferring those abilities to a much larger scale. In addition, successful pilot projects also serve to convince judges and court personnel that the changes and reforms are worthwhile. Such pilot courts should be evaluated, and the results should be disseminated throughout the country via seminars and workshops. The judiciary can verify the real needs of the courts in the actual pilot project

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<sup>298</sup> The supreme court delegated authority to the committee to prepare the judicial reform strategy and the project financed by the World Bank.

<sup>299</sup> Among these elements is gender. Such an approach coincides with the Bank's policy on gender issues. More specifically, the Bank's policy consists of a clear integration of gender-related objectives with overall project objectives, with gender issues being mainstreamed through regular lending. This can encourage constructive dialogue with the Borrower and strengthen the Borrower's commitment to gender issues. In fact, in Ecuador, the discussion led to the inclusion of several important project components. World Bank, "Gender Issues in Bank Lending: An Overview, June 30, 1994," Report No. 13246.

and later adjust the reform measures appropriately. Thus, the pilot courts may build a consensus that is necessary for widespread reforms and allow the courts to experiment and improve pilot projects in later phases of the overall program.<sup>300</sup> Therefore, initial pilot projects provide stepping stones upon which the public and the courts can develop a basis by which to judge the reforms and form opinions about what should be achieved.

Knowledge of the judiciary is essential and this knowledge can be enhanced through empirical research. Such research is beginning to be conducted on some aspects of judicial reform including on pilot courts. One important role for the Bank is to assist in providing more empirical information that can be used to evaluate and gain greater knowledge about an individual country's judicial system. This could include research similar to the procedural time study conducted under the preparation of the Bolivia Judicial Reform Project and the study recently completed identifying factors of delay in the judicial process in Argentina and Ecuador.<sup>301</sup> With the availability of empirical information performance standards can be developed by which to evaluate the success of judicial reforms.

This approach as outlined above has the potential to be successful in the Latin American and Caribbean Region. The objectives and methodology as set out in this paper distinguish these reform efforts from the law and development movement of the 1960s and 1970s which aimed to modernize the legal systems of developing countries by concentrating on legal education.<sup>302</sup> Today, legal education is only one element of the judicial reform program. The program is based on a holistic approach which is developed by the local legal communities. Legal communities are better informed than before about comparative law, regularly participate in international legal fora, and have a better understanding of how laws and the judiciary impact their society and what types of legal

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<sup>300</sup> It is important that courts choose pilot projects that they are interested in since this is an important element for success. Thus, focus on pilot projects is also conducive to demand driven fund projects. In Bolivia and Ecuador, such funds have been successfully encouraging courts to identify their needs and interests.

<sup>301</sup> Buscaglia and Dakolias, Delay Study, *supra* note 19.

<sup>302</sup> In the 1960s and 1970s, a significant amount of international development activity, funded by USAID and the Ford Foundation, focused on reforming legal education in Latin American countries. The different programs had varying amounts of success and/or failure. The Costa Rican project included support for research activities by the Law Faculty's Agrarian Law Project and scholarships for foreign study at American and European Universities. Currently, a project to set up post-graduate specialization is being sponsored in Costa Rica. In Colombia, the project provided methodology seminars; U.S. law professors taught in Colombia; Colombian law students received foreign scholarships; and the library was updated. In Brazil, the Center for Studies and Research in the Teaching of Law was created to implement the legal education reform project. The center provided postgraduate legal courses, revised teaching materials and encouraged professor/student interaction. Additional legal education programs were also established in Chile and Peru. For a critical analysis of these programs, see James A. Gardner, Legal Imperialism: American Lawyers and Foreign Aid in Latin America (1980). Gardner argues that the participating American lawyers were untrained and ethnocentric, therefore, making it essential to design programs for individual country's educational needs with qualified professionals.

and judicial reforms are likely to succeed given the country's cultural, political, social and economic environment.

The Latin American and Caribbean Region today is politically, economically and socially better suited for judicial reforms than in the 1960s and 1970s. There is greater economic stability in the region which has allowed these countries to begin the so-called second generation reforms discussed earlier. The economic reforms have also increased transactions with unknown actors and thus has increased the demand for formal mechanisms to resolve conflicts. In addition, society expects the improvement of the legal checks and balances on the government. Second, the reforms are a result of the local initiative and strong commitment: there is wide support among governments including across political parties, legal community, private sector as well as among NGOs for such reforms. Third, the programs include a wide variety of elements which are specifically designed for country needs.

Judicial reforms in the 1990s take into account local conditions as well as international standards. To determine the exact reform measures needed to achieve this goal the social, cultural and economic aspects of a given country are considered.<sup>303</sup> This can be assisted in part through Bank financed judicial sector reports consisting of a multidisciplinary and politically diverse team. In addition to the local considerations, reform measures also take into account the rights recognized by the international community.<sup>304</sup> These internationally recognized values provide some important standards for reform. For example, there are basic principles of judicial independence as defined by the United Nations<sup>305</sup> as well as the International Bar Association Code of Minimum Standards of Judicial Independence. These principles were developed to enhance the international principles on human rights<sup>306</sup> and cannot be ignored during such reform processes. When there is no "fair and public hearing by an independent and impartial tribunal" there is a violation of these human rights principles.<sup>307</sup> The elements of judicial reform as discussed earlier directly seek to attain these principles.

The objective of these projects today is to provide a service that is efficient and equitable as well as respected and valued by the community. In a market economy, an effective judicial system is expected and needed by citizens, the government and the private sector in order to resolve conflicts and order social relationships. As markets become more

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<sup>303</sup> David M. Trubek, "Law and Development: What We Know And What We Do Not Know," Paper prepared for a conference of Chinese and American Legal Scholars East-West Center, Hawaii May 29-June 2, 1989.

<sup>304</sup> Id.

<sup>305</sup> United Nations' Basic Principles on the Independence of the Judiciary. UN Doc. A/CONF. 121/22, ch. 1 D.2 (1985).

<sup>306</sup> National Commission, *supra* note 38 at 1462.

<sup>307</sup> Id.

open and transactions more complex, formal and impartial judicial institutions will be essential. Without such institutions, private sector development as well as public sector modernization will not be complete. Similarly, such institutions contribute to the economic efficiency and lead to growth which in turn alleviates poverty. Judicial reform should especially be considered in tandem when contemplating any legal reform because without a functioning judiciary, laws cannot effectively be enforced. As a result, comprehensive judicial reform can have a tremendous impact on the success of the modernization of the state as well as make an important contribution to the overall development process.

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