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**Access to
Information Program**

Access to Information and Transparency in the Judiciary

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THE WORLD BANK



ADC / Asociación por los
Derechos Civiles

WORKING PAPER

Access to Information and Transparency in the Judiciary

*A Guide to Good Practices from
Latin America*

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2010

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This work was carried out with the support of the Access to Information program of the World Bank Institute (WBI), through the financial support of the Spanish Government Trust Fund.

The analysis presented in this document does not reflect the official opinion of the World Bank or the Government of Spain, and is the sole responsibility of its authors.

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Foreword

For more than a decade, the Association for Civil Rights (*Asociación por los Derechos Civiles*, ADC) has been working actively to strengthen a legal and institutional culture that guarantees the fundamental rights of individuals in accordance with Argentina's National Constitution, international human rights standards and democratic values. Among other objectives, ADC aims to monitor and support the reform of those institutions of democracy of which an improved operation enables a greater protection of citizen's rights, such as the Judiciary.

At the beginning of 2008, ADC began a project to document various good practices and experiences from different Latin American countries related to access to information and transparency of the State, more precisely, innovative experiences relating to three areas; the Judiciary, Congress and Supreme Audit Institutions. This was all done thanks to the valuable support of the Access to Information Program of the World Bank Institute (WBI).

In addition to coordinating the project, ADC has been responsible for the particular research on good practices in the judicial systems

of Latin America. Our interest in this subject dates back several years. Since 2001, ADC has been working actively on the promotion of reforms intended to increase both the transparency and the participation of civil society in the operation of the Judiciary.

To conduct research on the other two areas—Supreme Audit Institutions and the Congress—ADC invited two expert organizations that are regional leaders in these matters: *Asociación Civil por la Igualdad y la Justicia* (ACIJ)—from Argentina—and *Fundación Pro Acceso*—from Chile.

The result of this project is reflected in this series of three documents that are intended to serve as a reference for NGOs in the region, government officials, members of academia, and public policy experts. The papers were written by Álvaro Herrero and Gaspar López (ADC); Ezequiel Nino (ACIJ); and Tomás Vial Solar (Fundación Pro Acceso).¹

Lastly, we wish to thank the internal and external reviewers of the World Bank Institute for their valuable comments on the three documents. Any errors and omissions, however, are the sole responsibility of the authors.

Executive Summary

This document includes a compilation of practices intended to promote access to information and transparency in the various areas of operation of the justice system, in particular the Judiciary, promoting an operation that is more democratic and open to citizens. To this end, we approached the analysis by taking into account two dimensions: access to information and transparency regarding the administrative functioning of the Judiciary, as well as its jurisdictional functions.

Sections 3 and 4 include an introduction to the context in which the Judiciary operates in Latin America, identifying the most relevant challenges it faces. Among other challenges, are the lack of public trust in judicial institutions and their distancing from society. The potential for access to information and transparency reforms to help reverse that situation are highlighted. Also, emphasis is placed on the contribution of these reforms to foster both the independence and the accountability of the Judiciary, and thus enhance its role in a broader governance context.

Section 5 analyzes access to various categories of information related to the administrative operation of the Judiciary. Among others, some of those highlighted include access to information and transparency in budget, procurement,

and expenses. There is also an analysis of the importance of providing access to judges' assets and income disclosure statements, and the publication of court statistics. Finally, we address an issue that has gained increased relevance in recent years: transparency and citizen participation in the process to appoint judges.

Section 6 deals with information categories related to the jurisdictional operation of the Judiciary. The publication of court sentences, access to case files in corruption cases and disciplinary procedures of judicial officials are examined, and innovative initiatives to foster the participation of civil society are described.

The categories examined in these last two sections are illustrated through a series of experiences that have been carried out in several countries in the region. These experiences were selected based on how well they meet publicity and participation standards. It is important to note that this document is not intended to provide a comprehensive list of experiences or of the ways in which such experiences are put in practice. The examples contained herein, however, may potentially be replicated and adopted by the Latin American states to make the operation of their Justice systems more open and transparent.

Introduction

The Judiciary is one of the three branches of government. As such, it has functions that extend beyond the traditional role of “impartial third party” in the resolution of conflicts. Its intervention in the political system could be profound, influencing—sometimes in a very sophisticated manner—the link between the state and citizens, as well as the relationships between the various social actors. Current research conducted from a political science and law perspective has documented a broad participation of the Judiciary in the process of public policy development,² in the recognition and protection of rights,³ and in controlling other state powers.⁴

In this context, and given the importance of the Judiciary in political and institutional terms, transparency and access to information reforms are relevant due to their potential impact on the administrative and jurisdictional operation of the judicial bodies themselves.⁵ In other words, the adoption by Judiciaries of transparency reforms could have a positive effect on their institutional capacity, increasing their legitimacy, their authority *vis-à-vis* other political players, and their relationships with citizens.

For example, in many countries in the region the courts are perceived by people to be very slow. Some recent empirical studies, however, indicate that the actual average time for the processing of cases is not as long as suggested by public perception surveys.⁶ The dissemina-

tion of court statistics would help citizens learn about the true performance of the courts and at the same time generate opportunities for academia and NGOs to analyze the challenges and to formulate reform proposals. In this case, a virtuous cycle is generated through the feedback between access to judicial information, monitoring and analysis by civil society, and accountability by the judicial institutions.

In turn, access to information and transparency reforms are also relevant since they can contribute to the improved operation of the Judicial Branch and hence foster inclusive governance. For example, the role of the Judiciary in the fight against corruption positions it as a key player that can help improve the use of public resources and the quality of public policies, and influence the way citizens perceive their government institutions.⁷ At the same time, in developing countries, judges are intervening with increasing frequency to repair or mitigate the failures of the State, improving the access to health, education, public services, and housing rights for vulnerable groups.⁸ A more transparent Judiciary, with greater legitimacy, will be better positioned to intervene in these matters.

It should also be taken into account that the Judiciary is a key actor for the consolidation of the Rule of Law. The importance of its role is reflected in various indexes and methodologies designed to assess the quality of public

institutions and governance. For example, Transparency International's National Integrity System recognizes the Judiciary as one of its pillars. Likewise, several diagnoses have identified the justice system as a relevant player in matters of governance. The Worldwide Governance Indicators include the Judiciary in the measurements for the category of "Rule of Law."⁹ The Judiciary is similarly relevant in worldwide assessments of the quality of democracy undertaken by organizations such as the Bertelsmann Foundation (Bertelsmann Transformation Index¹⁰).

Moreover, the Global Integrity¹¹ report specifically examines the level of access to information and transparency of the Judicial Branch, using variables such as the selection of judges, the justification of decisions, financial disclosure statements and access to the courts by citizens. This is illustrative of the ever-growing focus on access to public information and transparency in the Judiciary in the field of governance reforms.

The inclusion of the Judicial Branch both in the construction of the above-mentioned indexes on Rule of Law, quality of democracy and transparency of public institutions, as well as in the development of theoretical arguments on its growing incidence in democratic systems, demonstrates its major relevance in governance assessments. In turn, principles such as the transparency of judicial institutions, active participation in its processes and responsibility and accountability of the Judiciary are key indicators for the evaluation of democratic governance.

In the last decade, several organizations in Latin America have succeeded in driving reform processes geared to increase transparency and citizen access to public information. These efforts have had a widely varying impact depending on the case, and mainly focused on the Executive Branch, excluding other equally relevant players in the political system. It is only in recent years that the need to extend the reform

efforts to other areas, such as the Judicial Branch and other oversight agencies, has become evident.

In parallel, the Judiciaries in the region have been the target of numerous reform programs. Since the early 1990s, international financial institutions, especially the World Bank and the Inter-American Development Bank, but also several international donor agencies such as USAID, GTZ and UNDP, have provided multiple credit lines and grants to modernize the court systems. The objectives of the reforms have been varied, but they have focused mainly in improving infrastructure, implementing management and planning systems, incorporating technology into judicial management, introducing judicial training systems and fostering access to justice.¹² The reforms related to transparency and access to information, however, have received scant attention. It could be said that Latin American countries have made progress on various fronts, introducing different types of innovations in their judicial systems, but only in a handful of cases have the reforms been aimed at reversing the opacity of judicial institutions or putting in place arrangements which might lead to a better access to judicial information.

In that context, the initiatives of a small group of organizations that, for several years, have promoted a transparency agenda for Latin American judicial branches deserve recognition. The Due Process of Law Foundation (DPLF), for example, has conducted several research projects on transparency, access to public information and civil society participation in the region's justice systems.¹³ Likewise, the Center for Justice Studies of the Americas (Centro de Estudios de Justicia de las Américas, CEJA), an international agency operating within the structure of the Organization of American States (OAS) has supported numerous studies focusing on access to information as

Box 1. Regional: Index of Web-based Access to Judicial Information

Since 2004, the *Centro de Estudios de Justicia de las Américas* (CEJA) has been developing an annual report on the accessibility of judicial information on the Internet. The objective of this initiative is to analyze the progress, backsliding and current challenges to the justice systems in the countries of the Americas regarding the provision of different types of information via electronic means to citizens and the degree of transparency of the courts and public prosecutors' offices. The index is developed by examining 25 indicators to evaluate judicial branches and 19 indicators in the case of public prosecutors. This CEJA project has made it possible to monitor the degree of progress in web-based access to information provided by the judicial branches and public prosecution offices of the 34 member states of the Organization of American States (OAS), as well as to compare their evolution—and in some cases, devolution—over the past years. The indicators examined include aspects such as:

- Existence of a website.
- Publishing and updating of rulings and regulations.
- Publishing of statistics on cases filed, resolved and pending.
- Publishing of the Courts' agenda.
- Budget, salaries, background, assets and income, and disciplinary matters on relevant officials.
- Publishing of bidding and procurement information for contracts.
- Access and information regime.

The 2007 report lists Costa Rica, Brazil, Chile, Canada and Argentina at the top of the ranking, as the countries with the largest quantity of information in the Web. At the other end are Belize, Guatemala, Surinam, Guyana and Haiti, countries that in some cases have no information at all in the Internet. For more information, see www.cejamericas.org.

it related to the region's justice systems. Starting in 2004, CEJA has developed an annual index of web-based accessibility to judicial information.¹⁴ and has carried out comparative research on access to public information in countries in the region (See Box 1).¹⁵ Finally, several agencies such as the British Council and the Foreign and Commonwealth Office (FCO) have financed projects related to judicial transparency and access to information in Latin America. All these initiatives have contributed to the development of diagnosis, and the identification of possible lines of work to incorporate this issue into the agenda for state reform in the region.¹⁶

These types of initiatives need to be continued in order to more strongly establish the need to promote access to information and transparency reforms in the Judicial Branch. There are valuable opportunities to make this issue more prominent within the agenda of reform and modernization of the public sector that is promoted by international organizations and cooperating agencies. The investment made to date by some donors, in addition to the efforts by various NGOs in the region, have generated a promising scenario. It is time to take a further step and move ahead with comprehensive policy reforms in terms of transparency and access to judicial information.

3

Challenges in the Relationship between the Judiciary and Society

In Latin America there is an important divide between society and Justice, which, among other reasons, is explained by the culture of secrecy and opacity which has characterized the judicial branch, the population's lack of knowledge regarding the operation of the administration of justice, and a marked interference from other political powers in the work of judges. As a result, citizens in the region's countries have an increasing mistrust regarding the work of the Judiciary. According to Latinobarómetro data for 2007, only 31 percent of the respondents in Latin America believed that in their country the Judiciary worked "well" or "very well". In turn, merely 30 percent stated they trusted the Judicial branch "a lot" or "somewhat", while 75 percent of the population believed there was unequal access to justice.¹⁷ This is compounded by the fact that a majority of Latin American countries exhibit a poor performance in the corruption perception surveys that are conducted by Transparency International on an annual basis.¹⁸ In other words, the poor performance of the Judiciary is added to the generalized corruption problems in public administration, increasing citizens' lack of trust regarding the state's real capacity to enforce the laws and punish crime.

The information that citizens receive on the performance of the courts suffers from a double deficit of poor quality and—in some cases—high complexity. This situation, which contributes to

consolidating the existing gap between the judicial institutions and society, is caused by two key factors. On the one hand, there is a severe deficit in the media in terms of their capacity to report what is going on in the judicial system.¹⁹ In many cases, journalists and editors lack adequate training to cover the activity of the courts and—an even more complex issue—to explain to society the legal issues that they address in an understandable and simple way. On the other hand, courts make little effort to communicate the cases they resolve in an appropriate manner. This stems from the cultural heritage of the Latin American court systems, which have historically considered it not appropriate to provide explanations regarding their rulings or give interviews to journalists. The old judicial adage "judges speak but through their sentences" is a true reflection of the prevailing situation. Faced with this diagnosis, the region's NGOs have developed some fledgling initiatives to address the problem.

In this context, the implementation of transparency and access to information reforms attempts to contribute to reversing the generalized lack of trust in the judicial institutions, promoting a greater closeness between citizens and the justice system. For example, the implementation of public hearings for the Supreme Court's sessions, or the adoption of communication policies—be it by the media and civil

society or by the Judiciary—to disseminate and explain the court’s decisions, are potentially promising measures to generate links and trust. Likewise, initiatives geared towards improving access to judicial information related to the

judges themselves (assets and income disclosure statements) and to the operation of the courts (judicial statistics, budgetary information, procurement information) are intended to contribute in the same sense.

4

Elements for a Conceptual Framework: Access to Public Information and Transparency

Before moving on to the analysis of the relationship between transparency and court independence, on the one hand, and access to information and the Judicial Branch, on the other, it is necessary to provide a conceptual clarification of the terms “transparency” and “access to public information.”

Transparency is a fundamental value for modern democracies. The concept of transparency actually operates as a mechanism that should be the result of a way of governing, of administering and managing by the state, which allows for control and participation by citizens in public matters. In practice, this should include requests for access to public information (in the strict sense), the state’s obligation to generate information and make it available to citizens in manners that allow for broad access (*proactive* transparency), and the empowerment of citizens to demand that the state comply with its obligations.²⁰

In this context, although access to public information—understood as citizens’ right to request information (and the state’s corresponding obligation to provide it)—constitutes an essential element of a transparency policy, it is only

one of the components in said concept. Another concept frequently used in this document and which is also an element of a transparency policy is “publicity”. It should be understood as the various manifestations of a proactive policy whereby relevant information is made available to the public.

4.1 Transparency and Judicial Independence

Transparency reform of judicial institutions may contribute, among other things, to generating conditions for a greater judicial independence. The open operation of justice systems, for example, generates an increased flow of information from the Judiciary to society, enabling the public to learn about its performance, become involved in the processes and discussions related to cases of great institutional import, and even participate in different ways (e.g. public hearings, consultation processes, etc.). Thus, the lifting of the veil of opacity that frequently covers court activities, compounded with a

greater social interest in the operation of the justice system generates a doubly positive effect. On the one hand, greater transparency and the increased flow of information eliminate the margins for discretionality, corruption and arbitrariness in the behavior of the judicial system and interest groups. On the other hand, they result in groups of citizens concerned with the operation of the Judiciary, who intervene in support of its work (constituency). Thus, judges find in society a source of legitimacy that confers onto them greater authority to make decisions that can have a high institutional impact, or run against the preference of powerful interest groups.

The previously mentioned Latinobarometro statistics underline the low levels of trust in the courts held by the population in Latin America. Historically, Latin American Judiciaries have been the target of undue influence and pressure by the Executive Branch, political parties and other powerful actors. At the same time, the recurrent interruptions in democracy gave rise to constant changes in the composition of the courts, be it through purges, mass dismissals, or impeachments, which eroded the credibility and legitimacy of judicial institutions.²¹

The democratic wave of the 1980s and 1990s has brought a shift to the region. Judiciaries have slowly initiated some reforms designed to improve their performance, while the government and civil society have promoted changes to optimize their relationship with the institutions of the political system.²² In light of this, in a democratic system it is fundamental for judges to maintain their independence from other government branches, exercising their functions without any type of interference.²³ The measures to ensure such independence need to be promoted from the initial stages of the judicial function, beginning with the processes to select and appoint judges, which are generally subject to the pressures and influence

of interest groups, especially political parties. Likewise, it is important for guarantees of independence to be maintained during the exercise of the judicial function, in particular at those times where a greater interference of the political powers may be most evident: definition of promotions, payments and compensation, appointment of court authorities and so forth.²⁴

However, it is important to clarify that judicial independence should not be understood as a value of its own, preventing an adequate oversight of the judges' performance.²⁵ Independence should not be equated to isolation or to the nonexistence of the duty of accounting for the work a judge carries out. On the contrary, the notion of independence should be conceived as the precondition for impartiality in judicial behavior and as a guarantee for better service to the public. Judges should not be exempt from the controls that are applied to other state institutions. Such independence entails a responsibility²⁶ that demands adopting mechanisms for transparency and accountability in order to guarantee that judges are held accountable for their decisions and/or for the due use of the resources assigned to them.²⁷ Thus, the starting point for accountability is responsibility on the part of officials based on information and justification of their decisions (answerability), but it further implies sanctioning public officials' improper behavior (enforcement).²⁸

Such arrangements are not only useful to evaluate the judges, control the Judiciary, detect errors and generate accountability, but they also strengthen the Judiciary, grant it legitimacy and, to a large extent, ensure the trust of citizens. It is therefore important to understand judicial transparency as a *proactive opening*, which not only comprises enabling access to information, but also includes judges disseminating and publishing information related to the exercise of their functions.²⁹

Moreover, transparency policies have a positive impact on citizen's access to justice. The exercise of access to public information, for example, contributes to making the administration of justice more accessible to citizens. This improves the effectiveness of judicial intervention, in addition to strengthening the legitimacy of the courts before citizens.

4.2 Access to Public Information in the Judicial Branch

The right to access public information has become a key instrument, albeit not the only one, to foster transparency in the state's activities, promote accountability, and fight corruption. It is also a valuable instrument to allow for a greater involvement of citizens in the management of public affairs. This right stems from the republican system of government and its exercise constitutes an essential tool to strengthen institutions, since having adequate and timely information is a key element in scrutinizing the authorities to whom government has been entrusted on behalf of the people.³⁰

In a democratic society, the administration of justice cannot be isolated from the political and social contexts in which its operators act, or take place without effective arrangements for the publicity both of its administrative operation and its jurisdictional work. In that sense, a majority of the information produced by the Judiciary, like that generated by the other government branches, may be requested by any individual under the right to freely access public information, and to control the exercise of public powers in the performance of their functions.³¹

In view of this, Judiciaries should adjust their operation, fostering the right to public information and transparency, especially given the negative image of the Judicial Branch held by

citizens, explained by a generalized perception that links the courts to corruption, political favoritism, and inefficiency; which perception is partly increased by the Judiciary's opacity.

Hence, the adoption of policies that guarantee access to information could not only become an important tool to improve oversight and to fight corruption in the courts, but it could also contribute to opening up the Judiciary to citizens, with the aim of including the debates about the Judiciary in a broader context, providing information that enables society to understand its operation, challenges, and limitations. In addition, citizen's active participation in substantial aspects of the workings of the justice system has the potential to contribute to an improved efficiency of judicial institutions. Thus, the contribution of a policy of transparency and access to public information in terms of the level of trust and legitimacy of judges and others operating in the justice system in the eyes of society is fundamental.

To conclude, it should be noted that access to public information, as with any other right, is not absolute. Its limits are generally set by two types of exemptions: a first group corresponding to cases in which the dissemination of information could cause damages to a public interest that enjoys legal protection, such as public security; and the second type of exemption is justified by the need to protect the privacy of individuals. Each group of exemptions is based on a different rationale, and implies a different assessment with regards to its application to concrete cases.³²

But beyond any restrictions that may be established, it is important that they meet certain parameters.³³ In a special study on access to information,³⁴ the Rapporteur for Freedom of Expression of the Inter-American Human Rights Commission understood that the restrictions to this right should meet certain requirements. Firstly, they should be established by

law. Secondly, they should be well founded, temporary, reasonable, and proportional. Finally, the ultimate purpose of the restrictions should be legitimate.³⁵

The right of access to public information has also been recognized by the Inter-American Court of Human Rights as a fundamental human right, which became the first international tribunal to do so. In the case *Claude Reyes*,³⁶ the Court held that any restrictions of access to information need to be based on satisfying an im-

perative public interest, and if there are several options to attain that objective, the one which poses least restrictions to the protected right should be selected. Therefore, state authorities should be ruled by the principle of maximum disclosure, on the assumption that all information should be accessible, limited only by a restricted system of exemptions. In those cases, the state bears the burden of proving the legitimacy of the restriction.

5

Access to Information and Transparency Practices Related to the Internal Operation and Administrative Aspects of the Judiciary

This section will examine categories of information and tools (such as laws, assets and income disclosure statements, Internet sites, procurement portals, etc.) related to the administrative operation of the Judiciary, using several Latin American experiences as a basis.

Information regarding a justice system's administrative operation is that which is connected with the internal work of the various agencies within that system. It should be eminently public, with limited exemptions founded generally in the need to guarantee protection for sensitive data, the publicity of which could affect the right to privacy.

The practices and experiences described below focus on: information on the management of public funds administered by the Judiciary; information on the appointment of judges and other officials; information on assets and income disclosure statements; information on meetings held by senior officials; and access to statistics.

5.1 Information on the Management of Public Funds (Budgets, Expenditures and Procurement)

In Latin America, Judiciaries have traditionally been reluctant—or, at best, insufficiently proactive—regarding the dissemination of information related to their budget management, procurement and purchases, human resources (for example, personnel rosters), and some of the procurement transactions they carry out in the course of exercising their administrative prerogatives. In some cases, this situation has contributed to generating a perception of lack of transparency among users and citizens. As in other state institutions, the lack of publicity and transparency in procurement are factors that, together

Box 2. Chile: Public Procurement Law

Chile's Public Procurement Law (Law 19.886) became effective in 2004. The law includes the three government branches and may be applied to the execution of support actions, implementation of works, public works concessions, the contracting of studies, and advisory and consulting services, among others.

Furthermore, the law set up the Public Procurement Directorate, to manage the electronic procurement system "ChileCompra" (www.chilecompra.cl). All state agencies (including the Judiciary) have the obligation to publish announcements of intended purchases and service contracts in this portal. Likewise, starting in April 2007, all bidding processes related to the Judiciary are published and updated on its website, www.poderjudicial.cl.

Finally, the law regulates conflicts of interest in government procurement, requiring that officials participating in the system file an assets and income disclosure and interests statement.

with others, create spaces for discretionality and irregularities in the management of public funds, fostering opportunities for corruption. In other cases, the lack of disclosure with regard to the recruitment of personnel and the roster of the existing staff has enabled the hiring of relatives of judges and officials, resulting in a perception of nepotism and excessive discretionality.

The transparency and probity requirements that are applied to the administrative management of any other state agency should be equally valid for the administrative work and management of the Judiciary and, in that sense, the possibility of accessing public information on budgets, procurement and expenses should make it possible to control the efficiency of its management.

Although budgetary information does at least have some level of disclosure since the budget is adopted by means of a law that is at least published in the official gazette, it is also important to have information on the execution of the budget through procurement records, which are generally scarcely available. Thus, it is important for transparency to be promoted in the four budget phases—formulation, approval, execution and evaluation.³⁷

The transparency of procurement and contracting processes is highly relevant when it comes to the prevention of corrupt practices. Corruption is not simply limited to incidents of bribery or undue interference in the context of a court ruling, since the manipulation

Box 3. Guatemala: Information on Procurement Processes

Guatemala's Judicial body publishes information on procurement processes on its website (www.oj.gob.gt). This includes updated information on direct purchases, public auctions, competitive bids, and expressions of interest.

Likewise, the site www.guatemcompras.gt displays the statistics, with the number of transactions conducted by the Judicial Branch in the last four years. They are broken down into current bids, bids in the process of evaluation, bids awarded, annulled, and declared deserted. There is also information on the barring of suppliers and complaints from the procurement system users.

Finally, the website allows users to subscribe to a bulletin that reports on public procurement in the Judiciary.

Box 4. Mexico: Budget Information

Pursuant to section 7 of the Federal Transparency and Access to Government Public Information Law,[†] Mexico's Supreme Court of Justice publishes in the "Transparency" section of its website all the information regarding budget execution over the last five years. It includes information on budget allocations, increases and reductions, the portion of the budget that has been executed, and that part still pending execution. This information is broken down according to the various budget items, which make up the sections: personal services, materials and supplies; general services; fixed and real assets; public works; financial investments; grants; pensions and retirement benefits; and other expenses. See www.scjn.gob.mx/PortalSCJN/Transparencia.

[†] Section 7: "With the exception of the reserved or confidential information considered by this Law, the parties under the law shall make available to the public and update, in accordance with the Regulations and guidelines issued by the Institute or the equivalent instance to which Section 61 refers, among others, the following information: IX. Information on the budget allocated, as well as the reports on its execution, in the terms established by the National Budget. In the case of the Federal Executive, said information will be provided with regard to each agency and entity by the Finance and Public Credit Secretariat, which shall also report on the economic situation, public finances and public debts, according to the terms established in the budget."

of a court's funds, nepotism in the recruitment of staff, and irregularities in the procurement of goods and services, among others, also constitute instances of corruption.

It is therefore fundamental to have this type of information frequently updated and readily accessible. In some countries, for example, it is published on the Judiciary's website, while in others it is published on a website especially devoted to making public opportunities for procurement and contracting with the various government branches. Beyond the mechanisms that are used to make the right of accessing this type of information effective (such as electronic portals or information bulletins), what is important is for the information to be available to the general public in an accessible format and with a low level of complexity.

5.2. Information on the Appointment of Judges and Officials

The process used to appoint judges has long been identified as a defining piece in the relationship between politics and the Judiciary. The growing interference of political actors and the

use of clearly subjective criteria for the selection of candidates to cover judicial vacancies has created an increased perception among citizens of a lack of court independence. At best, there exists a perception that many judges are liable to receive pressure or improper requests from those who supported them in their respective appointment processes.

In this context, the arrangements to appoint judges are intimately related to the principle of judicial independence. The use of transparent and open processes contributes to keeping judges isolated from undue external influences that may be exerted by the other branches of government or from various interest groups. Likewise, transparency helps in selecting candidates that meet the requirements and qualifications in professional standing, technical experience, and a commitment to uphold democratic values and political, economic and social rights.

Even though there are no uniform mechanisms for the selection of judges,³⁸ comparative experience shows that increased transparency in the process, the possibility of citizen participation, and the prior preparation of a profile for the position are key elements that foster judicial independence.³⁹

Box 5. Argentina: Transparency and participation in judge appointment arrangements

In 2002, in the midst of a deep institutional crisis in Argentina, the Supreme Court of Justice was severely questioned—both by political actors and citizens—because of its irregular performance over the previous decade during President Carlos Menem’s administration. At that time, the Court had been expanded, with the number of Justices increasing from five to nine (it is worthwhile noting that Article 99 in the Argentine Constitution grants the President of the Republic powers to appoint the members of the Supreme Court of Justice).

Shortly after taking office in 2003, President Néstor Kirchner asked Congress to impeach the President of the Supreme Court and several of its members. At the same time, through Decree 222/03, he implemented a series of measures that restricted his powers to appoint new Supreme Court justices. The reforms implemented by President Kirchner may be divided into three groups. First, he limited his discretionality in the selection of candidates to fill vacancies in the Court; provided for diversity, in gender, specialization and regional affiliation; and made it mandatory for candidates to fulfill objective guidelines regarding qualifications. Secondly, he defined a series of requirements linked to nominations, such as: a) the establishment of time limits to cover the vacancies in the Court; b) the obligation of publicly disclosing the background of the candidates; and c) a greater ethical scrutiny of the candidates (requiring a statement of financial disclosure, professional, commercial, and taxpaying background). Finally, an opportunity for participation was introduced, allowing citizens to provide their input and opinions regarding the proposed candidates.

Subsequently, Decree 588/03 extended the application of the above rules to the appointments of the National Attorney General and National Public Defender (Ombudsman), and for the appointment of judges to head the lower federal courts.

In line with the reforms implemented by the Executive, the Senate reformed its rules to improve the process whereby it approves judicial appointments. Mainly, they established that: a) hearings should be held during these processes with public participation; b) civil society involvement in the process should be promoted; c) once the hearings are completed, the Appointments Committee is required to issue an opinion; and d) senators’ individual decisions are disclosed through nominal voting.

The enforcement of these changes in the appointment of new judges caused a major impact, which was most evident in the case of the National Supreme Court. It resulted in an improved image of the Court *vis-à-vis* society, granting it greater legitimacy derived from the broad consensus on the appointed candidates. Additionally, the changes contributed to consolidating the Court’s institutional strength, giving its members more authority and independence. This was reflected in decisions that were often divergent from the interests of the Executive, breaking with the general trend of agreement with the Executive that had characterized the body when it was formed by judges appointed through the previous procedure.

Finally, it may be noted that several provinces echoed these reforms and modified their own procedures to appoint judges to their higher courts, replicating to a greater or lesser extent the evolution of the national justice system.

It is important that appointments be merit-based, result from public competition, and satisfy requirements for technical qualifications. The selection criteria need to be clear and widely advertised, so that there is an unequivocal understanding of the selection stan-

dards and the profile of the judges required. The assignment of scores must be made pursuant to objective evaluation guidelines. Additionally, it is important for the appointment process to be widely disseminated at all stages, from the call for candidates, up through the

final selection of the candidate, and new technologies should be used allowing for immediate and free access to information about the process. Furthermore, there should be broad dissemination (through the media, official gazette, and the Internet) of the list of applicants and their backgrounds.

Finally, it is fundamental for these processes to be open to the participation of civil society groups, including the professional associations related to judicial activities, so that they may provide opinions on the merits of the candidates. A greater involvement by civil society in the judge appointment process enables the scrutiny of citizens.

Although these guidelines cannot fully guarantee the independence of the courts or eliminate corrupt practices, they partly reduce the politicization of appointments, as well as the co-opting of the Judiciary by other government

branches. Their application generates greater transparency in appointment processes, thus investing the new judges with greater legitimacy for the performance of their duties as a result of public participation, social consensus and qualifications review.⁴⁰

The responsibility for implementing the reforms described here falls to various actors, depending on the respective institutional arrangements. In general, the rules for the selection of judges are included in the Constitutions, which are difficult to modify because of the majorities required. However, the bodies responsible for the nomination and appointment of judges can easily self-limit their powers and thus generate instances of participation and improve transparency. The example below regarding the Argentine case poses some interesting and simple ideas on the subject.

Box 6. Colombia: Participation in the appointment of judges to the Constitutional Tribunal

The Constitutional Tribunal is the senior constitutional law court in Colombia. It has nine members who serve for eight years and cannot be reelected. In early 2009, six of the current justices will have completed their term. Each of the six new members will be selected by the National Senate, from a list of three candidates submitted by Colombia's President, the Supreme Court of Justice and the State Council.

Given the impact that the Constitutional Tribunal has had in recent years, a group of Colombian private organizations created *Elección Visible* (Visible Election), as a citizen oversight coalition to provide monitoring and social oversight for the process of selecting the new justices. Their main objective is to demand from the nominators and elector that the eighteen candidates which form the six three-member slates have the best qualities, probity, and independence in exercising judgment; that political agreements play no role in their selection; that there be no filler candidates and that they are all the best possible candidates to fill their positions. Using dynamic resources on their website, the coalition provides citizens with information on the process to select the judges, the importance of the Constitutional Tribunal and the profile and background of the new candidates, among other issues.

Elección Visible will play a role both at the stage of identification and nomination of candidates by the President, the Supreme Court of Justice and the State Council as well as in the phase of election of the candidates by the Senate. Within the framework of the project, the signing of "ethics covenants" with the nominating agencies has been promoted, in order to ensure transparency in the process of nomination of the candidates and enable society to participate. The Supreme Court, for example, agreed to adopt the transparency measures proposed by the coalition.

For more information, see www.eleccionvisible.com.

5.3 Information on assets and income disclosure statements

Over the last two decades, the growing number of illicit acts committed by officials in the new democratic governments has affected many

countries in Latin America. In some cases, the scandals reached such magnitude that they involved the removal and even imprisonment of presidents, such as in the cases of Collor de Mello (Brazil), Fujimori (Peru) and Menem (Argentina). In that context, some states, international agencies, NGOs, and international financial institutions conceived initiatives to fight corruption.

Box 7. Argentina: Access to Judges' Financial Disclosure Statements through the Public Ethics Law

Argentina passed the Public Ethics Law (No. 25.188) in 1999, regulating the exercise of public office. In the Argentine system it is possible to access data such as personal assets by viewing publicly available financial disclosure statements, and in this way also learn the income of public officials. The Public Ethics Law is applicable to all state officials but for several years the Supreme Court considered that it did not apply to the members of the Judiciary. In 2000, the Court issued Ruling 1/2000, excluding the enforcement of the Public Ethics Law from the area of the National Judicial Branch.

It was only in 2005—by means of resolution 562/05—that the Judicial Council decided to enforce the law with the members of the National Judiciary. That same year, the Supreme Court issued Ruling 30/05, adopting the resolution of the Judicial Council. Nonetheless, access to the financial disclosure statements filed by judges remained extremely difficult, since the rules were not enforced. Finally, in 2007, the Judicial Council regulated the Public Ethics Law (Resolution 734/07), establishing by rule the disclosure of income and asset disclosure statements filed by members of the Judiciary.

According to the existing regulations, those interested in learning about the assets of judges are required to apply to the chair of the Judicial Council and will gain access to them, with no further proceedings required. The new resolution removed the existing restrictions, which established that the request needed first to be considered by the judge whose assets were being reviewed and it was then decided whether to accept or reject viewing applications in light of any objections raised by the filer.

It is now provided that “any individual [...] will be able to consult and obtain copy of the Public Annex of the Comprehensive Financial Disclosure Statement before the Chair of the National Judicial Council. Applications must be answered in a period of no more than ten business days, without possibility for extension.” The ruling adds that “once the applicant has made the inquiry, the Chair of the National Judicial Council will inform the judge or official that an application regarding their statement has been processed, also revealing the identity of the applicant.”

Furthermore, once a year the Council is required to produce a list of the officials and judges required to file financial disclosure statements; publish an updated list of those who have filed their statement or failed to do so; and keep records of the applications for access to assets and income information that have been received. Finally, a list of the information in the statements that would be exempted from disclosure was considered, but it was decided to include this data as part of a reserved annex, because it is considered “sensitive data.” Among this sensitive data are the names and surnames of spouses, partners, or minor dependent children, including their relationship and occupation; the names and surnames of the creditors or debtors in the section referring to the detail of debts and credits; the name of the bank or financial institution in which they hold deposits; the numbers of checking accounts, savings accounts, safe deposit boxes, and credit cards and their extensions; their income tax returns for any extra salary income they receive or personal assets not incorporated in the economic process; the detailed location of properties and information of registration or identification of registrable fixed assets.

Some of these initiatives involved developing treaties to adopt strict ethics and transparency standards (for example, the Inter-American Convention against Corruption), creating government agencies specializing in corruption issues, or citizen oversight of government procurement.

In recent years, one of the most widely used tools has been requiring public officials to file assets and income disclosure statements, something which emerged as a prominent ethical issue in the fight against corruption. The goal of these statements is to control the undue accumulation of assets and thus prevent crimes such as illicit enrichment. While in principle the requirement for assets and income disclosure targeted the members of the Executive and Legislative branches, it was later extended to the members of the Judiciary.

The implementation of preventive tools, such as the assets and income disclosure statements, supplemented with the exercise of the right to access public information, allows for oversight of the behavior of the members of all government branches, including the Judiciary. The main purpose of this type of tool is to detect and prevent illicit enrichment, as well as potential conflicts of interest for individuals who hold public office.

Internationally, there are two fundamental instruments that establish the need to implement such prevention mechanisms: the above-mentioned Inter-American Convention Against Corruption and the United Nations Convention Against Corruption. Although many countries have implemented such mechanisms, comparative law lacks a precise rule to establish the items that need to be included in financial disclosure statements. However, it is possible to assert that these mechanisms should maintain a balance between financial transparency and the right to access to information, on the one hand, and the security and personal privacy of judges, on the other.⁴¹

Nevertheless, in spite of the different criteria in existence, it is accepted that certain items are essential in these declarations. Among them, income derived from professional activities; business investments; real property owned by officials and members of their families; fixed assets; banking information (bank names and account numbers; debts); and gifts or services received free of charge in excess of a certain value.⁴² Likewise, it is fundamental for the information contained in the statements to be kept updated and readily available. It is important to establish as a minimum requirement the obligation to file a financial disclosure statement at the start of the term in office and another at the end, updating the information on an annual basis. Said obligation should be mandated by law, although there is no reason why judges and judicial officials could not make their financial disclosure statements public on a voluntary basis.

Although the obligation to file financial disclosure statements is commonly required by law, nothing prevents Judiciaries from issuing their own rules in this regard. Making use of their administrative, self-governing powers, Supreme Courts and Judicial Councils can establish requirements for the members of the Judiciary related to the disclosure of their assets.

5.4 Information on Meetings held by Senior Officials

Generally, the region's governments have not adopted measures intended to guarantee access to information from meetings held by senior officials. If we examine the majority of laws that regulate access to information, in terms of comparative law, we can see that almost all guarantee access to the results of processes, but not much more than that. This means that generally access

is allowed to the information and/or statistics on which the ultimate decision or result is based. This means it is not possible to learn about the *how* or the *why* of certain decisions—who met, to what end and under what circumstances. Allowing access to information on the issues that are dealt with in such cases is an essential factor in the transparency of meetings, which could have institutional relevance and deserve to be known by society.

For this reason, it is important to have specific information available on the meeting: site, date and time, reason for the meeting, participants, and issues to be addressed. It is also essential to later gain access to information on the issues that were discussed, the positions held, agreements, and conclusions. This information can be readily disseminated through the Internet or information bulletins. The obligation to disclose these aspects can be established by means of a law by Congress that deals with issues of transparency in all government branches, but also by means of resolutions from the Supreme Courts or Judicial Councils themselves, who have broad powers to issue these types of measures.

It is to be noted that there is a lack of regulations with regard to these practices (including in the sphere of the Executive), and a consequent absence of information. In spite of this, two cases related to this issue bear mentioning; those of Argentina and Peru. In the first, Resolution 7/2004 by the Argentine Supreme Court states that the hearings and meetings with judges should always be held in the presence of the two parties involved to provide transparency to the proceedings; and Resolution 36/2003 of the same court establishes that when examining cases that deal with matters of institutional import, the date on which the matter will be addressed by the court has to be established and made public. In the case of Peru, there has been progress in terms of the publicity surrounding official meetings, as a result of the passing of the

Transparency Law that applies to the public administration and the Judiciary, but in order to gain real access to this information it is necessary to contact the officials in charge of this issue.⁴³

5.5 Access to Statistics

One of the most important ways to assess the work of a court is by using statistical information on its operation. Such information makes it possible to analyze performance, identify achievements, detect problems and, eventually, design strategies to solve them. For example, learning about a tribunal's caseload, the average time to process cases and the rate of confirmation of its sentences makes it possible to evaluate the back-up in the courts and the quality of their decisions. It is therefore indispensable to have some basic information on court performance, such as, for example, data on the number of new cases, cases pending and completed during a certain period; the duration of cases; and the number of sentences per subject.

In that context, the Judiciaries have the duty of generating statistical information and making it available to citizens. This will not only contribute to improved transparency of justice systems but will also give rise to an interaction between the courts and civil society, since there are numerous organizations that can help in analyzing the performance of the courts, and it allows citizens to learn about the operation and limitations in the work of judges. It also makes it possible to have reliable information to assess such systems, helping to detect the existing problems and to develop potential solutions.

Such statistical data is also essential for the Judiciary itself, to be able to carry out an appropriate planning of their work and investment of resources. Judicial statistics serve, for example, as a way to detect the geographical distribution of the demand for judicial services, and shifts in that demand, thereby allowing for ju-

Box 8. Costa Rica: Annual and Quarterly Statistical Reports

Currently, Costa Rica's Judiciary publishes statistics on the work of the courts on its website. This information is later compiled in an Annual Statistical Report.

This publication reports quantitative information on the work flow in all of the country's judicial and Public Ministry offices and is organized to analyze developments in three areas: the Superior Instance, the Criminal Area, and the Non-Criminal Area. In addition, there is also an assessment of Judicial Management Indicators for the various sectors, with the purpose of conducting a technical assessment of the Judiciary's management performance. They include:

- Inputs, staffing and degree of use;
- Level of litigation and case load;
- Production and productivity;
- Duration and delays;
- Quality of Service.

In addition to the Annual Report, the Judiciary issues quarterly documents with relevant data to maintain an updated level of information on the statistical trends present in judicial offices, and in anticipation of the publication of the Judicial Annual Report.

dicial public policy decisions to be made that address this situation. Unfortunately, not all Judiciaries generate such information. In some cases in which they do, it is not used for the above purposes. In many countries, Supreme Courts

compile information, even if it is not complete or does not comprise all the courts in the country. In countries with a federal structure, many provincial Supreme Courts show no interest for this kind of data.

6

Access to Information and Transparency Practices Related to Jurisdictional Functions of the Judiciary

This section analyzes practices related to access to information and transparency in the Judiciary in terms of its jurisdictional operation. It focuses on the actual administration of justice, addressing issues such as the publicity of sentences; access to court files in cases of corruption of public officials; information on the operation of Supreme Courts; transparency in the court's sessions and mechanisms for civil society participation.

Such practices are illustrated with experiences that show different institutional arrangements for providing transparency in the operation of the courts and promoting citizen participation. These experiences make use of mechanisms such as television channels and radio stations to broadcast court sessions, public hearings, and civil society participation arrangements such as judicial observatories or *Amicus curiae*, among others.

6.1 Publicity of Superior Justice Court Sentences

As head of one of the three branches of government, the decisions of the Supreme Court of Justice transcend the cases at issue and affect the institutional nature of a country in several fundamental ways. Superior courts resolve, on a daily basis, matters related to the rights of individuals or the obligations of the state. In that sense, their decisions have a decisive influence in regulating the way in which the protection of citizen rights is enforced. Additionally, the decisions made by such bodies are vitally important, since they set guidelines for the operation of the lower courts. Hence, the jurisprudence set by Supreme Courts has an “ordering” role that provides consistency and certainty to the justice system.

In this context, it is an indispensable requirement for superior courts to publish their

Box 9. Mexico: Publication of Sentences in the Website

The Federal Law on Transparency and Access to Public Governmental Information (Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental, LFTAIPG) requires sentences handed down by the Judiciary to be published. The jurisprudence coming out of the Court's various chambers is published on the website (www.scjn.gob.mx/PortalSCJN) as well as in the Judicial Weekly Gazette (Semanao Judicial.) This is updated information readily available through its Coordination Unit for the Compilation and Systematization of Decisions. Furthermore, the Supreme Court publishes CDs and DVDs for public distribution containing a compendium of decisions, organized by period, in addition to the updated website postings of relevant cases.[†]

[†] DPLF 2007a

decisions, thus making them readily accessible to citizens in general, law professionals and lower courts. It is surprising that there are still countries where the national or provincial supreme courts fail to publish their rulings, and that they only become known to the parties in a case. This failure not only affects the principle of publicity that rules the democratic functioning of institutions, but also detracts from the legitimacy and efficiency of the court's performance, since its work does not become known by society or the lower courts in the justice system.⁴⁴

Furthermore, the publicity of sentences assists in citizen oversight (mainly through the media, civil society organizations, academia, and other parties interested in the workings of justice) of the operation of the courts,⁴⁵

As previously indicated, one problem in the region is the lack of an adequate coverage of the Judicial Branch issues, particularly sentences, by the media. Given the importance of the Judiciary's rulings, and in light of the broad lack of trust by society in the work of the courts, it is necessary for journalists to address this issue.

However, as already mentioned, this problem has two well-differentiated roots that are related to one another. Judicial branches lack communication policies and specialized officers to deal with communications and press relations, nor has the media made adequate efforts to cover subjects that are technical in nature. Frequently,

journalists and editors lack the necessary training to explain to society, in a simple and understandable manner, legal issues that are dealt with by the courts. Even so, there are experiences in the region (and outside of it) that suggest possible lines of action to remedy this situation.

6.2 Access to Court Files in Corruption Cases involving Public Officials

One of the major obstacles in the fight against corruption in Latin American countries is the recurrent failure by the Judiciary to successfully conclude criminal investigations and punish offenders.⁴⁶ This situation, which affects the region in a relatively consistent manner, has various causes: chronic inefficiency of the justice systems, political interference with the Judiciary, lack of training to investigate complex crimes, absence of leadership by judges, and opacity in court proceedings. This last element, the lack of transparency in judicial activity, can be mitigated through concrete measures that allow for access to judicial investigations or case files.

Currently, judges do not provide NGOs or journalists with access to trial information in corruption investigations. The reasons cited are

Box 10. Experiences Developed by Civil Society

Argentina: "Court Rulings Within Citizens Reach"

Since 2006, *Asociación por los Derechos Civiles* (ADC) has prepared an annual supplement regarding the most prominent Supreme Court rulings that is published by over twenty national and regional newspapers, with an average total run of 700,000 issues. The main objective is to familiarize readers with the operation of the Supreme Court and learn about the impact of its decisions on citizen rights. This initiative, sponsored by Argentina's Association of Press Entities (ADEPA), also contains an editorial on the performance of the Supreme Court in that year, and graphics on the issues resolved, major data regarding the court, and how its members vote. For more information, see www.adc.org.ar.

United States: Coverage of Court Cases

The prominent work of journalist Linda Greenhouse, from *The New York Times*, is one of the best examples of a good coverage of a Supreme Court. Recently retired, for many years Greenhouse wrote in-depth articles detailing the relevant and controversial aspects of the issues before the Court. It should be noted that her work was made easier by the fact that at the beginning of every year, the U.S. Supreme Court announces the list of cases it will examine during the period, which allows for study and analysis of the issues beforehand. Her notes not only covered the political and constitutional angles of the cases, but also the human stories behind each of them. Her work was supplemented by the excellent use of images and graphics that contributed not only to capturing the attention of readers, but to explaining in a simple way issues such as the position of each judge regarding the legal and ideological controversies behind the cases, or how the thinking of the Court had evolved over time.

Regional: Justice and the Media

The relationship between the Judicial Branch and the media is a phenomenon that in recent years has received growing attention in many Latin American countries. The failure of judges to communicate their decisions, especially in cases that are complex or have a major public impact, is compounded by the lack of capacity among much of the media to cover judicial issues. This combination of deficits affects the legitimacy of the Judicial Branch and the citizen perception of the justice system. In Peru, for example, the Association of Judges for Justice and Democracy and the Peruvian Press Council supported a project designed to establish communication channels between the justice system and journalists, enabling the media to understand how the Judiciary operates, but also opening up spaces for judges to better understand the work of the media. For more information see www.justiciaviva.org.pe.

In Argentina, similar initiatives were started which involved NGOs focused on the justice sector and journalists, and as well as various Judiciaries. Poder Ciudadano, FORES, CIPPEC and ADC have each developed different programs of action oriented toward improving the relationship of the media with the Judiciary. These activities include conducting research, developing manuals on the Judicial Branch for journalists, and organizing discussion workshops. In 2007, the Argentine Journalists Forum (*Foro de Periodismo Argentino*, FOPEA) signed an agreement with the National Supreme Court to improve citizen's access to judicial information. The agreement includes developing joint training activities and seminars to analyze the journalistic and communications issues involved in disseminating the work of the courts. For more information, see www.poderciudadano.org, www.foresjusticia.org.ar, www.cippec.org, www.adc.org.ar and www.fopea.org.

diverse and in practice they seriously hinder citizen scrutiny of the most important corruption cases. This impediment needs to be weighed in light of the important delays experienced in court proceedings. Such investigations are usu-

ally conducted with little or no participation of non-state actors. In other words, the procedures are lead by judges, prosecutors and, in some cases, agencies specializing in corruption issues. Procedural rules in Latin America usually prohibit the

intervention of journalists, NGOs, and academic centers, arguing that they lack any standing to play a role in the court proceedings, despite the existence of a clear public interest related not only to the right of access to information but also to a citizen's right to demand probity from their officials and representatives.

This situation reveals the need to set in motion alternative oversight mechanisms driven by civil society and others. Such initiatives need to seek to gain access to the court files where corruption crimes are investigated and, having obtained access to the case files, ensure an ongoing intervention in the proceedings to provide additional oversight regarding the progress of the investigations. It may be noted that any involvement of NGOs and journalists in court investigations should not interfere with the investigations, or substitute for the role of judges or prosecutors during the process. On the contrary, the purpose of such intervention is to contribute to greater transparency and, indirectly, reduce the discretionality with which the investigations of crimes of corruption are managed. This is because sometimes such cases can reach a state of paralysis due to the inaction of those within the justice system.

6.3 Information on the Workings of Supreme Courts

By virtue of their jurisdictional position above national or provincial judiciaries, the work of Supreme Courts holds greater weight than that of lower courts. Their precedents, for example, serve to order jurisprudence for the remaining courts and set standards that have to be respected by all the instances of the judicial system. For that reason, Supreme Courts have to lead in promoting transparency and citizen participation, setting guidelines for their own practice that are extensively applicable to the remaining tribunals.

In this context, Supreme Courts need to disseminate information related to their jurisdictional activity. Because they are a tribunal composed of multiple judges, for example, they need to make available to the public *information related to the circulation of case files*. It is worth noting that when a case reaches the Court, and until a sentence is handed down, the case file circulates through the offices of each of the members of the tribunal so that they may examine the circumstances of the case and prepare a draft opinion. Through its website, the Argentine Supreme Court reports on which judge has the case file. This provides transparency with regard to the circulation of case files and avoids unjustified delays.

In Costa Rica, the Supreme Court has launched a transparency program that includes the Internet posting of the minutes of the Court Plenary and the Superior Council, as well as *information on the disciplinary procedures against judges and officials*.⁴⁷ The Supreme Court of the Province of Buenos Aires publishes not only the sentences but also the administrative resolutions and decisions that are issued in the plenary agreements of the tribunal using its web-based enquiry system (JUBA). Likewise, the IT system that the Court uses to handle cases makes it possible to learn about the order in which the judges have voted in all the cases and which judge is processing the cases. Unfortunately, the latter information is not accessible to the public.

6.4 Transparency in Tribunal Sessions and Mechanisms to Stimulate Civil Society Participation

One of the historical problems of Latin American Judiciaries has been their isolation with re-

Box 11. Argentina: Participation of NGOs in Corruption Cases

Over the last fifteen years, the Argentine courts have received hundreds of complaints linked to acts of corruption by public officials of various administrations. Still, very few have ended with convictions for those involved. This has contributed to a sense among citizens that there is an unspoken impunity that protects those who get rich in government at the expense of taxpayers. In that context, the ineffectiveness—and in some cases, connivance—of the Judiciary in resolving such crimes has led to a loss of trust by citizens in judicial institutions.

In the face of the above scenario, the Civil Association for Equality and Justice (*Asociación Civil por la Igualdad y la Justicia*, ACIJ) and the Center for Research and Prevention of Economic Crime (*Centro de Investigación y Prevención contra la Criminalidad Económica*, CIPCE) launched an initiative designed to gain access to judicial investigations of corruption of national government officials being processed by the Federal Courts of the City of Buenos Aires, where around 80 percent of these types of cases are concentrated. First, they conducted a study of a sample of fifty corruption cases. The preliminary results were alarming: the study found that the average duration of a corruption investigation is fourteen years, counted from the date in which the complaint is filed until its conclusion. Of even greater concern, it was also detected that only a few cases reached the final phase of oral trial, which demonstrates the limited effectiveness of the justice system to handle corruption investigations.

Secondly, ACIJ and CIPCE tried to gain access to the case files of investigations into corruption crimes, since one of the main problems is that courts systematically deny journalists and NGOs access to such information. The purpose of gaining access to the court files is twofold. On the one hand, the objective is to establish jurisprudence that recognizes such a right for NGOs and journalists. In the event these practices cannot be reverted by means of simple requests to the court authorities, one available resource is strategic litigation on access to information. This needs to be carried out by NGOs and the media.

On the other hand, having obtained access to the case files, the intention is to gather and analyze all relevant information in order to identify the structural failures by the Judiciary and oversight agencies in carrying out investigations of corruption cases. Simply knowing that the investigations take on average fourteen years is an indicator of the existence of delays, training problems, bottlenecks, and/or other structural problems that prevent their satisfactory processing.

Although the project is still being executed, it has already achieved some promising results. Recently, the Second Division of the National Criminal and Correctional Federal Appellate Court decided to accept the requests for access to files made by ACIJ and CIPCE, based on the provisions of the international treaties signed by the Republic of Argentina. In effect, the American Convention on Human Rights establishes the publicity of the whole criminal process as a rule, and the United Nations and Inter-American Conventions against Corruption, in turn, stipulate that civil society organizations should be ensured an active role in the fight against corruption. This precedent is a valuable first step towards NGOs and journalists gaining effective access to information in cases of investigations of corruption. For more information, see www.acij.org.ar and www.ceppas.org/cipce.

spect to the other sectors of society. As already indicated, judges and tribunals usually operate behind closed doors, using very complex processes in terms of procedure, and with limited communication to citizens on the development of the investigations under way. This arrangement becomes of special concern when

the justice systems need to address the challenges generated by swings in the region's political dynamics.

In recent years, Latin American courts have examined cases with great political, economic and social impact, such as serious corruption cases involving public officials, environmental

pollution, the situation in prisons, human rights violations, the limits to the state's punitive power, and sexual and reproductive rights, among many others. The high degree of complexity of such cases does not facilitate a rapprochement between the Judiciary and society. In this context, the discussions prior to decisions and the various aspects connected with the decision-making processes—and their later dissemination—could greatly benefit from and be enriched by a greater openness and participation of society. What follows are a number of noteworthy initiatives that help to illustrate this assertion.

6.4.1 Opening and Dissemination of Court Sessions

The dissemination of the processes and discussions that take place before the courts is an important way to address the double challenge of making the work of the courts known as well as strengthening citizen trust in judicial institutions. The use of tools to achieve that publicity, such as the recording of sessions, is beneficial for the transparency and legitimacy of justice systems. While in some cases some rules and provisions regarding the publicity of judicial processes have been set by law,⁴⁸ in general it is the higher

Box 12. Mexico: TV Channel on Judicial Issues

In July 2006, the Judicial Branch in Mexico began broadcastings from the Judicial Channel, a TV signal that is broadcast by cable providers to the whole country. This innovative initiative emerged in response to requests made by several sectors of society in the National Consultation on a Comprehensive Reform of the Justice System of Mexico, carried out in 2004 and 2005. The findings of this consultation showed that the Federal Judiciary needed to find a better way to ensure transparency in its decisions.

The creation of the channel was seen by the judicial authorities as a crucial way to reflect, in simple and understandable terms, what the Judiciary is, what it does, and how and to what end it performs its duties through the bodies that make it up. For this reason the Judicial Channel was created, with the objective of disseminating directly and without intermediary the daily workings of the various agencies that make up the Judiciary, such as the Supreme Court of Justice of the Federation, the Federal Judicial Council, Collegiate and Unitary Circuit Courts and the Electoral Tribunal of the Federation's Judicial Branch, and thus contribute to the strengthening and renewal of a strong legal culture in the country.

The Judicial Channel has diverse programming, including the live broadcast of the plenum of the Supreme Court Justices, some sessions of the Electoral Tribunal and relevant hearings that are held by various lower courts. There are also segments dedicated to Law schools, and programs with news and interviews related to the judicial profession. Among other major discussions, the Judicial Channel carried the debate on the constitutionality of the Federal Telecommunications (LFT) and Radio and Television Laws (LFRT).

Box 13. Brazil: Radio Station on Judicial Issues

In 2004, the Federal Supreme Tribunal in Brazil created a radio station devoted exclusively to justice issues: *Rádio Justiça*. Its programming, which can also be received via satellite and the Internet, focuses on an in-depth analysis of current issues related to justice, and tries to avoid the superficial treatment that prevails in many mass media outlets. The broadcaster has correspondents in all the states of Brazil and its own team of researchers and journalists to develop content. For more information, see www.radiojustica.gov.br/home.

Box 14. Peru: TV Broadcasting of the Fujimori Trial

The trial in Peru of President Alberto Fujimori for repeated human rights violations and charges of corruption was broadcast on TV daily. Although the rooms had a restricted capacity (less than fifty seats), the TV broadcasting of the proceedings guaranteed compliance with the publicity principles enshrined in the Peruvian Code of Procedures. The hearings of human rights cases (*La Cantuta*, *Barrios Altos* and *Sótanos del SIE*) were transmitted in full on State and cable TV channels. Also, the Judiciary provided a room that had Internet-connected computers, telephone, fax, and sufficient technical facilities for TV channels and radio stations to get audio and images of the developments in the session, which operated as a Press Room.

courts themselves that set the standards on transparency and accessibility that govern the operation of the various judicial bodies.

6.4.2 Publicity of Hearings in Cases with Public Relevance

Another important practice refers to the publicity of the hearings held in trials with broad public relevance.

The press has a fundamental role to play in promoting the publicity of judicial processes, because citizens do not typically go to the courts to attend a trial. Thus, access by the press to courtrooms is one way to guarantee the principle of publicity of these processes. It is justified not only from the point of view of citizens in general (they can learn about the operation of the courts in these cases by observing the Judiciary in action), but also in the interest of the

Box 15. Costa Rica: New Code of Penal Procedure

The new Code of Penal Procedure in Costa Rica represents a model of penal procedure with accusatory characteristics. The applicable provisions establish, in principle, a reasonable regulation of the right of television coverage during a trial while also taking into account the protection of other interests that may be in conflict with coverage. Article 330 establishes the principle of publicity of the trial as the rule but also allows the total or partial holding of the trial behind closed doors in the event that a number of situations present themselves: a) when coverage directly affects the privacy or physical safety of any of the parties involved; b) when it seriously affects state security or the interests of justice; c) when it places in danger an official, private, commercial, or industrial secret, the undue disclosure of which is penalized; d) when contemplated in a specific rule; and e) when deposing an individual and the tribunal deems publicity inconvenient, particularly in the cases that involve of sex offenses or statements by minors. Once the cause for not making public the proceedings is no longer relevant, the rules expressly stipulate that the public will again be allowed to enter the room and the chairperson of the proceedings will briefly report what has transpired if the tribunal so decides it. What is innovative is the content of the following article, which regulates the relationship between the principle of publicity and the presence of the media in the courtroom: Art. 331-Participation of the Media: "To inform the public of the events in the courtroom, radio and television broadcasters may install in the courtroom equipment for recording, photography, radio broadcasting, filming or other mediums. The court will determine, in each case, the conditions under which such powers will be exercised. It will, however, through a well founded resolution, have the power to prohibit such installation when it hinders the development of the debate or affects any of the interests mentioned in the previous article."

If the offender, the victim or somebody who has to provide evidence expressly request that these companies not record their image and voice, the tribunal will uphold their rights.

defendants (in terms of the fairness of the trial) and of the state itself (the public is able to see how state agencies operate under the assumption of a violation of criminal law).

Nevertheless, it is important to mention that at times there may be tension between the publicity principle and the protection of the right to privacy of the individuals involved in the trial. Thus, we may find that there are cases in which publicity may reasonably be restricted, in order to safeguard essential rights. This can be the case when there are minors involved in the process, protected witnesses or whistle blowers, or when the case is related to sex offenses, among others reasons.⁴⁹ However, different court sentences show that the protection of the privacy of high profile individuals is not admitted in cases

where the general interest at stake is connected with the public functions fulfilled by the defendant. This lower degree of protection provides for the free recording or dissemination of images connected with the activity that has made the individual publicly known. The right to privacy of those who participate on a voluntary basis in activities that place them in the public sphere becomes secondary in cases of general interest, by virtue of the *freedom to criticize officials based on their actions in government*, which is an aspect of citizens' freedom of expression.⁵⁰

6.4.3 Public Hearings

Public hearings are an ideal mechanism for the involved parties and the judges to interact with

Box 16. The Use of Public Hearings in Cases of Great Institutional Relevance

Mexico

Between April and July 2008, Mexico's Supreme Court of Justice conducted a series of six public hearings in the framework of a case that examined the constitutionality of abortion. In a process that stirred a major debate in Mexican society, the Court analyzed the reforms introduced in 2007 by the Federal District's Legislative Assembly, allowing free access to abortion at the simple request of women in Mexico City during the first quarter of pregnancy. The hearings were held to hear the positions of the groups in favor and against the law. Both the hearings and the sessions of the Court were recorded and are available—not only in video format but also as transcripts and summaries—on a website set up by the Supreme Court to allow for an adequate monitoring of the case by citizens. Using this mechanism, the Court adequately informed society of the development of the process that was followed in order to resolve a sensitive issue in accordance with the constitution. (See <http://informa.scjn.gob.mx>).

Argentina

Based on a complaint filed by a group of neighbors affected by the serious pollution of the Matanza-Riachuelo river basin, the Argentine Supreme Court decided to become involved in a conflict that affects the life and health of over four million inhabitants. Given the case's dimension and complexity—there are three levels of government involved in its solution and it comprises the population of the two most highly populated districts in the country—the Court resorted to public hearings to gather information from the various stakeholders, listen to the damaged parties, and analyze possible solutions. A series of meetings were held between 2006 and 2008, where, for example, the Court ordered the development of education and public information programs on the issue, and studies of the environmental impact produced by all the companies operating in the affected areas were required. Likewise, the Court requested that the 44 companies publish details regarding what substances they are discharging into the river, whether systems were in place for the treatment of pollutants, and whether the companies held insurance to guarantee the redress of potential damages. In all cases, the public and the media filled the courtroom. Finally, in July 2008, the Court handed down its sentence, ordering a long list of comprehensive measures to repair and prevent environmental damage.

the purpose of defining the circumstances and the issues of a case, to delineate with clarity the central matter in the case to be resolved, to discuss the most relevant aspects, and to discover new perspectives on the analysis of the case. At the same time, the importance of hearings extends beyond the parties in the case, and benefits society at large. They help to further the understanding of the general public by demonstrating the application of constitutional principles to concrete cases. Thus, holding hearings can help to offer the community a sort of civic lesson in the ongoing process of interpreting the Constitution and on its importance for citizens' daily life. This can be a way of bringing the higher courts closer to society and helping the public to learn and understand about the courts' operation.

Given the large number of cases before the superior courts, they are not expected to hold hearings for each of them. Rather, it is convenient to use hearings in a small number of strategically selected cases depending on the importance of the legal issue to be examined. In many coun-

tries they are a common practice (for example, Germany, the United States, Canada, South Africa and India).

6.4.4 *Amicus curiae*

Many mechanisms exist that give citizens the opportunity to provide their views on an issue being debated and its potential solution. One of them is an *Amicus curiae* brief (also known as *friends of the court brief* or *third party presentation*), consisting of the presentation of a document by a third party expert who is independent from those involved in the case, and who provides the judge with an additional perspective on the issue at hand. This addition to the legal arguments is a citizen participation mechanism that turns the search for justice into a collective activity, not circumscribed to the judge's decision and the arguments by the lawyers for both parties. Moreover, the opportunity to add these presentations to the case file operates as an oversight check on the court itself, since it cannot overlook—without appropriate explanation—the

Box 17. Argentina: The Use of *Amicus Curiae* by the Supreme Court

This mechanism, which also exists in some superior courts of a number of Argentine provinces—such as, for example, the Superior Tribunal of the Autonomous City of Buenos Aires (Section 22, Law 402)—was accepted by the National Supreme Court in 2004. Basing its application on national and international rules, the Court underlined that “it considered appropriate that, in the pending cases before its court and in which matters of institutional import or public interest are examined, intervention should be authorized as Friends of the Court, to third parties that have a recognized competence on the issue examined and demonstrate an unequivocal interest in the final resolution of the case” (Resolution 28/2004).

Given the great number of cases that, generally, are heard by the provincial higher courts, it should be noted that the use of the *Amici* is not recommended for all cases, but only in those that deal with groundbreaking issues because of their legal, social, economic, or political implications.

Publicity and transparency in the operation of the courts is a fundamental requirement for the effectiveness of the concept of *Amicus curiae*. The Argentine Federal Court, for example, has, since 2006, published on its website the cases which, due to their constitutional significance, are eligible for a third party presentation. This is a simply implemented system. In this case it was provided by means of a resolution (an administrative rule issued by the Court itself) although it should be noted that in other cases (for example, in the Argentine province of Río Negro) it has been implemented by a law passed in the local Legislature.

arguments provided by community members, individuals, or non-governmental organizations with a recognized record of knowledge in the subject being addressed.

This practice has a twofold positive impact. It generates an obvious space for citizen participation, whether through NGOs, professional associations, or academic institutions. In addition, the opening up of the legal discussions (that usually take place inside courtrooms, behind closed doors) to the presentation of “external” arguments contributes decisively to increasing the transparency of judicial work.

Amicus curiae can be regulated in two ways, by courts or by the legislature. Courts can define and initiate regulation through administrative resolutions or court decisions. That is the case, for example, with the Argentine Supreme Court. The use of the *Amici* can also be regulated by the Legislature, who can approve an adequate legal framework within which they can operate. Some believe this is the best path, since the use of such tools implies nothing less than the definition of rules of procedure before a court, a role that is traditionally the purview of legislative branches.

6.4.5 Civil Society Initiatives to Monitor the Judiciary

The transition to democracy that the countries in Latin America experienced beginning in the 1980s was accompanied by the appear-

ance of an increased number of civil society organizations. These actors played a valuable role in the transition to democratic regimes, the promotion of Rule of Law and an accountable government, subject to constitutional rules. In these processes, the Judiciary acquired special relevance due to the multiple challenges countries were dealing with, such as trying human rights violations, controlling public corruption and, broadly, laying the ground for an effective and sustainable Rule of Law.

In that context, civil society organizations became increasingly interested in the operation of the courts, given to their relation to political processes and the need to build Judiciaries capable of enforcing the rules of the game in the nascent democracies.⁵¹ Gradually, NGOs became prominent players, not only to monitor, assess, and scrutinize the performance of the Judicial Branch, but also to contribute significantly with proposals for reform and modernization intended to improve, among others, its transparency, effectiveness and accessibility.

The judicial observatories and citizen oversight organizations are only a few of the numerous initiatives driven by civil society to monitor the operation of the justice system in the region.⁵² The existence of long term projects designed to monitor the Judiciary has the double role of establishing a sort of ongoing “control” over its performance and generating specific information about it. For example, the monitoring of a supreme court makes it possible not

Box 18. Peru: Institutional Consortia

The Legal Defense Institute and the Law School of The Catholic University of Peru joined efforts to create the Consortium *Justicia Viva* (Live Justice), an endeavor designed to monitor the situation of the Judiciary in order to be better equipped to advocate for the fundamental changes necessary to rehaul the justice system in this Andean country. The Consortium conducts a comprehensive monitoring of the operation of all the instances of the Judiciary, combining the research typical of academic institutions with proposals for political and institutional reforms. It also has a website that contains a large number of publications and documents analyzing the justice system. For more information, see www.justiciaviva.org.pe.

Box 19. Judicial Observatories

Currently, judicial observatories are a tool designed and used by civil society to exercise oversight of the region's Judiciaries. They operate under different formats and their composition is heterogeneous. There are observatories created by civil society groups, universities and research centers, or by a coalition of a number of these groups. They also differ in terms of objectives. While some are aimed at overseeing all the activities of the Judiciary, others only cover a specific judicial body. Their thematic coverage also varies, since they may focus on a concrete area—for example, family courts—or comprise all law specialties.

Below is a brief summary of some of the initiatives in the region:

- Constitutional Justice Observatory (Colombia): Promotes the dissemination of constitutional rights and the content of the sentences of Colombia's Constitutional Court and the Inter-American Human Rights Court. Website: www.defensoria.org.co.
- Observatory of the Judicial System (Uruguay): Focuses on children and adolescent justice issues. Website: <http://observatoriojudicial.blogspot.com>.
- National Observatory of Democracy and Governance (Nicaragua): Monitors the justice administration system, among other areas. Website: www.observatorionacional.org.ni.
- The Commission of Andean Jurists (Andean Region): Devoted to contributing to the defense of democracy and human rights in the Andean countries. Website: www.cajpe.org.pe.

only to assess the performance of the court but also to learn about its decisions. This type of project can be carried out in connection with the Judicial Branch in general, a type of court

in particular (civil, criminal, family, etc.), or a particular tribunal or jurisdictional body (for example, the Supreme Court of Justice or the Defense Office).

Box 20. Peru: Social Audit of the Judiciary

Since 2005, The Commission of Andean Jurists (*Comisión Andina de Juristas*, CAJ) is developing a Social Audit project in the nine main Supreme Courts of Justice in Peru, with the purpose of strengthening judicial independence and improving the legitimacy of the bodies responsible for the administration of justice. This project promotes an open and transparent justice system that includes citizens in its activities, especially in the processes of evaluation of judicial decisions. In addition, it hopes to generate a flow of consistent and ongoing information from the Judicial Branch towards citizens.

The project was implemented by creating Justice System Social Audit Committees (*Comités de Auditoría Social al Sistema de Justicia*, CASSJ), operated mainly by university students with the logistic and infrastructure support of public and private universities. The CASSJ were trained to make contact with judges willing to be audited by civil society (known as “transparent judges”), who, on a voluntary basis, agreed to disclose both personal information as well as information relating to professional performance in their jurisdiction. Currently, approximately 65 judges at various levels (first instance, appeals and superior court) have joined the project.

Among the main outcomes of the project is the development of a databank containing information on the background of the judges who supported the initiative; publication on the Internet of copies of all the sentences and resolutions they have passed; and the creation of discussion forums on the most important issues of the justice system.

For more information, see www.auditoriajudicial.org.pe.

Collective action is an effective strategy, since coordination maximizes the potential of the various individual actors. This mode of action generates opportunities to join the efforts of different organizations (such as universities, NGOs, professional associations, and communication media), building lasting cross-sectoral working partnerships.

Many of these modes of activity constitute real social audits. These are processes whereby citizens influence the public administration, with the aim of achieving a more satisfactory delivery of services according to their needs.⁵³ In this case, the objective pursued is to improve the quality of the administration of justice. The fundamental elements of these initiatives are citizen participation, the generation of specific information, and transparency and accountability by the institution that is audited.

Conclusions

The right to public information is a fundamental right that the State must enforce and guarantee. The Judiciary—as a branch of government—is not only obligated to disseminate the information it generates in the course of its daily operation, but also plays a prominent role in the effective enforcement of this right. In that sense, judges should respect the same standards in terms of access to information as the other branches of government. Although there has been some resistance or lack of interest on the part of judicial institutions in accepting said standards, there is a broad consensus around the concept that the same requirements apply to them as to the public administration, and therefore they have the obligation to provide access to information both in connection with their administrative operation and their jurisdictional functions. The same is true with regards to transparency, since the Judiciary has to comply with the same requirements as other state bodies. A clear example is the requirement that judges submit assets and income disclosure statements, or of the requirement to disclose statistical information regarding their jurisdictional performance.

In spite of the previously mentioned resistance, it should be noted that some Judiciaries in the region have adopted measures that have contributed—with various levels of depth and success—to improving their relationship with society, and in some cases their achieve-

ments have surpassed those of other government branches. The implementation of arrangements to allow for the participation of society at various levels of the justice system not only generates opportunities for social scrutiny of judicial performance but also encourages a positive interaction that enriches the jurisdictional role of the courts. For example, the use of *Amici curiae* and holding public hearings to deal with cases of great institutional import allow civil society organizations to participate in the decision making process, enriching the debate with their opinions, but at the same time allowing the issues debated to reach the whole of society. Nevertheless, we need to underscore that the implementation of transparency reforms has frequently been limited to pilot experiences or initiatives restricted to certain bodies within the judicial apparatus.

With respect to the political economy of the reform processes, it is important to note that the justification of changes does not always necessarily have to be normative. In other words, although there exists constitutional and international law, as well as jurisprudence from international tribunals, that manifestly establish the Judiciary's duty to respect transparency standards, there are also very basic and practical reasons to convince judicial leaders of the importance of promoting these reforms, such as the lack of citizen's trust in the Judiciary, the low

credibility of judges, and the core role of judicial institutions in governance and the consolidation of democracy. Tools such as access to information and transparency reforms may contribute to reversing the worrisome situation of the Latin American Judiciaries in terms of their relationship with society.

7.1 The Status of Reforms

This research started off with the premise of identifying good practices or positive experiences in the region. The previous sections have described initiatives from several parts of Latin America that are promising. In that sense, a first finding is that there already exist a series of valuable and potentially replicable practices, so those interested in reform need not start from zero. Also, many of the experiences identified are very sophisticated, revealing not only well-thought out ideas but also a growing desire on the part of judicial authorities to take the first steps to improve transparency and access to information in the justice system.

The purpose of this work was not, however, to document in detail the entirety of the vast deficit that still exists in Latin America in terms of transparency reforms. On the contrary, we deliberately focused on the achievements, the good practices and the opportunities to promote transformations both in the daily function of the Judiciary and in the conceptual constructions around its obligations in terms of transparency and access to information.

In that sense, focusing exclusively on the remarkable practices in the region has probably given this piece an excessively optimistic tone regarding the impact of the described reforms. The truth is that, despite the achievements, a review of the status of reforms in Latin America, as suggested by the experiences identified in the

previous sections, shows that there are still major challenges. Although some Judiciaries have made efforts to adopt transparency and access to information policies, others instead have only made a few isolated reforms. Precisely, a significant gap is the absence of a comprehensive policy, implemented in accordance with a reform strategy, under the leadership of the superior courts, taking into account the political economy of the changes, the costs and benefits, and the impact on the work of the Judiciary.

Unfortunately, in some countries there is a total lack of transparency and/or access to information initiatives. This, however, is not exclusively a failure of the Judiciary, but often affects government in general. This might suggest that the institutions of the justice system are not fully isolated from the reform process that takes place in other areas of government. In any case, there still remain information gaps related to the identification of the obstacles and barriers for the implementation of transparency reforms in the region.

It should be noted that, as illustrated by the cases described in this research, in those countries where reforms have been effectively implemented, the impact has been positive. However, their potential to reverse situations of lack of transparency generated by cultures profoundly embedded in the judicial institutions for decades should not be overestimated. Transparency reforms need to be part of a comprehensive process of change in the management of justice systems, in the behavior of judges and in the relationship of the Judiciary with society.

7.2 Opportunities

International organizations and international donor agencies still have fertile ground ahead to promote transparency reforms in the Judiciary. Still, although the challenge is a major one, the approach will not be totally new. Many of the issues described in this document have already

been addressed—for example by the IADB and the World Bank—in some of their judicial reform projects in the region. Initiatives related to management reform, for example, have promoted the adoption of information systems to allow for the monitoring of court performance. Without solid and reliable statistical information it is not possible to assess management problems or identify the inputs and strategies required to solve them. In other words, there already exists a valuable universe of knowledge and capacity developed by the international organizations that can be reused to promote reforms from the optic of transparency and thus leverage their synergy with management reforms.⁵⁴

One of the first findings of this research is the lack of systematized information at the regional and international level on transparency and access to public information standards in the Judiciary. Also lacking are efforts designed to assess judicial systems based on their degree of compliance with said standards. In that sense, perhaps once objective indicators and parameters have been defined, it will be possible to carry out regional studies with the purpose of generating a “status review” or ranking of Judiciaries, identifying those which have introduced greater reforms and comply with “good practice” in these matters.

The absence of information on this issue is compounded by the scarce documentation that exists on some of the examples described in this report. Little is known, for example, about the impact of using the media to disseminate the work of the Judiciary (as in the case of Mexico and Brazil), or on the results of implementing public hearings to resolve cases with significant institutional impact (Argentina). Along the same lines, some issues merit greater research efforts; for example the relationship between justice, the mass media and citizens.

Likewise, there is a deficit in terms of dissemination of materials such as manuals, toolkits or

handbooks, documenting successful reforms—especially with regard to implementation—so that experiences can be replicated in other countries. Many of the practices identified in this report had not been previously described, thus limiting the possibility of multiplying the effect of the efforts made by the Judiciaries that implemented them. There is an important space in this area of dissemination of materials for a synergy of efforts across donors and non-governmental organizations in the region.

It is also worth mentioning that some of the good practices in terms of transparency and access to information have not yet been applied by international tribunals with regard to their own operations. Some of the problems of opacity described in previous sections also affect regional or international courts. For example, the processes for the appointment of judges to the Inter-American Court of Human Rights have little transparency, involve complex political negotiations, and lack formal instances for the participation of the region’s civil society organizations. It would therefore be extremely important to be able to conduct a comprehensive study of the challenges and opportunities for promoting transparency reforms in the various regional and international tribunals.

With regard to opportunity, it is well known that many countries in the region, such as Argentina, still lack access to information laws. Moreover, in those countries where legal frameworks have been adopted, it is not frequent for such rules to apply to the Judiciary. In principle, it would be desirable for all countries to have legal frameworks, approved by Congress,⁵⁵ recognizing and guaranteeing the right to access public information at all levels and branches of government, from municipalities to provinces, and including the Legislative and the Judicial branches of government. In that sense, there still remain major efforts to disseminate and raise awareness in order to position

the issue on countries' agenda and achieve the legal recognition and the specific regulations required to ensure full access to public information.

Likewise, these legal frameworks should include the Judiciary among those required to provide information. Once again, it is necessary to strike an appropriate balance between respect for the independence of the justice system and its obligation to be accountable to citizens. As a minimum, access to public information laws must ensure access to the information related to the administrative aspects of the operation of the judicial institutions: budgets, financial management, procurement, personnel roster, etc. It remains to be determined what should be done regarding the information that relates to the ju-

risdictional operation of the Judiciary (publicity of sentences and other decisions; access to case files; publicity of the processes within courts, among others). This is a sensitive issue that has generated debate among specialists. The situation in which political systems are currently found in Latin America, however, offers a complex scenario. In light of the situation of Judiciaries in the region, the transparency problems described in this report, and the lack of credibility of judges and tribunals in the eyes of citizens, it is necessary for access to information laws to impose high standards that result in effective policies to ensure a broad recognition of citizens' right to access information generated by the justice systems, including that which results from its jurisdictional activity.

Table/Summary

	Categories	Tools	Experiences
Access to information and transparency, related to the internal operation/administrative aspects of the Judiciary	Information on the management of public funds	<ul style="list-style-type: none"> – Access to information on procurement. – Access to bidding documents. – Access to budgetary information. 	<p>Chile: Public Procurement Law.</p> <p>Guatemala: Information on procurement processes.</p> <p>Mexico: Budgetary information on the Internet.</p>
	Information on the appointment of judges and officials	<ul style="list-style-type: none"> – Civil society participation in the mechanisms to select judges. – Publicity of the various stages in selection and removal mechanisms. – Broad dissemination of the list of applicants and their background. 	<p>Argentina: Transparency and participation in the mechanisms to appoint judges.</p> <p>Colombia: Participation in the election of Constitutional Tribunal Justices.</p>
	Information on assets and income disclosure statements	<ul style="list-style-type: none"> – Access to income and assets disclosure statements. 	<p>Argentina: Public Ethics Law.</p>
	Information on meetings of high level officials	—	—
	Access to statistics	<ul style="list-style-type: none"> – Statistical information in the Internet and in official publications (Annual Statistical Reports etc.). – Information on number of cases filed, pending and completed over a period of time; duration of cases; number of sentences per subject; budget and costs; number of staff; etc. 	<p>Costa Rica: Statistics on the work of the Judiciary. Annual Statistical Reports.</p>

(continued on next page)

	Categories	Tools	Experiences
Access to information and transparency practices related to jurisdictional functions of the Judiciary	Publicity of the sentences of the Superior Courts of Justice	<ul style="list-style-type: none"> – Sentences available on the Judiciary’s website. – Dissemination of the work of the Superior Courts through the mass media. 	<p>Mexico: Publication of sentences on the website.</p> <p>Argentina: “Court Rulings within Citizens Reach”.</p> <p>United States: Coverage of court cases.</p> <p>Regional: Justice and the media.</p>
	Access to case files in case of corruption of public officials	<ul style="list-style-type: none"> – Consultation and access to court case files 	<p>Argentina: Participation of NGOs in corruption cases.</p>
	Information on the internal working of Supreme Courts	<ul style="list-style-type: none"> – Information on the flow of files within the courts. – Information on disciplinary procedures against judges. 	<p>Costa Rica: Publication of the minutes of the Court Plenum and the Superior Council, and information on disciplinary proceedings against judges.</p>
	Transparency in court sessions and mechanisms to enhance civil society participation	<ul style="list-style-type: none"> – Regulation of <i>Amicus Curiae</i>. – Establishment of hearings to examine major cases. – Dissemination of court sessions. – Creation of judicial observatories. – Publicity of oral hearings in trials with public relevance. 	<p>Argentina: Use of <i>Amici curiae</i> by the Argentine Supreme Court.</p> <p>Mexico: Use of public hearings in cases of institutional relevance.</p> <p>Mexico: TV Channel on judicial issues.</p> <p>Brazil: Radio channel on judicial issues.</p> <p>Colombia: Observatory of Constitutional Justice.</p> <p>Peru: TV broadcasting of Fujimori’s trial.</p>

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Endnotes

- ¹ The original version of this paper was published, in Spanish, in 2009.
- ² Shapiro 1981; Dahl 1957; Jackson and Tate 1992; Feeley 2000; Tate and Torbjorn 1997.
- ³ Epp 1998; Sieder et al. 2005.
- ⁴ Schedler 1999; Maravall and Przeworski 2003.
- ⁵ Throughout the text we will often use a broad concept of “transparency reforms”, including tools such as access to information and publicity of the actions of state actors.
- ⁶ Hammergren 2005.
- ⁷ Additionally, these policies operate as mechanisms to allow for the internal control of corruption within the Judiciary itself. It is difficult to imagine that corruption may be controlled and fought against using a state punitive scheme that suffers from the same problem that it is designed to solve.
- ⁸ Mendez and Pinheiro 1999; CELS 2007; Bergallo 2005.
- ⁹ Rule of Law is defined as the degree of trust bestowed by agents on a society’s rules, and the extent to which they behave accordingly, including the quality of contract and property rights enforcement, police and courts, as well as the incidence of crime and violence. Available at www.govindicators.org.
- ¹⁰ See www.bertelsmann-transformation-index.de.
- ¹¹ See <http://report.globalintegrity.org>. These variables are mentioned in the section on “Accountability of the Judicial System.”
- ¹² Biebesheime and Payne 2001. See also Angell and Faundez 2005. According to these authors, “since 1993 and until the end of 1999, there were 23 loans and 46 technical assistance operations designed to promote legal reforms in 18 of the 26 IDB member countries, with a total investment of US\$435 million.” See also Dakolias 1996.
- ¹³ Among DPLF’s most relevant publications on the subject, are: “Iniciativas de la sociedad civil para la transparencia en el Sector Judicial” (Civil Society Initiatives for Transparency in the Judicial Sector) 2003; “El acceso a la información judicial en México” 2005; “Comparando transparencia” 2007; and “Disclosing Justice” 2007.
- ¹⁴ See, for example, CEJA 2007.
- ¹⁵ Solano 2004. This work was carried out together with the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights.
- ¹⁶ For more information, see: www.dplf.org, www.cejamericas.org and www.britishcouncil.org.
- ¹⁷ Corporación Latinobarómetro 2007.
- ¹⁸ See for example, the last reports of Transparency International, among them: Transparency International, “Informe Global de la Corrupción 2007: Corrupción en sistemas judiciales”, Editores del Puerto, Buenos Aires, Argentina, 2007.
- ¹⁹ Transparency International, “Enhancing Judicial Transparency: Policy Position”, N° 1, Berlin, Germany, 2007.
- ²⁰ López Ayllón addresses “explanation and justification of actions” as a component of transparency, referring to the state’s obligation specifically to make sense of information, providing a thorough justification of actions, and enabling a dialogue between society and the public powers. See López 2007b.
- ²¹ See, for example: Prillaman 2000; Ungar 2001; Helmke 2004; and Hammergren, 2007.
- ²² See, for example, Hammergren, 2002; and Popkin, 2002.
- ²³ The basic principles relating to the independence of the Judiciary declared in 1985 (UNHCHR) foresee that “the independence of the Judiciary will be guaranteed by the state and enshrined in a country’s constitution or legislation.” Various international instruments address the issue of judicial independence. Among them: International Covenant on Civil and Political Rights (1966); European Convention on Human Rights (1951); American Convention on Human Rights (1978); African Charter of Human and Peoples’ Rights (1986); United Nations Basic Principles on the Independence of the Judiciary (1985); Beijing Statement of Principles of the Independence of the Judiciary (1995); Bangalore Principles of Judicial Conduct (2002); Inter-American Convention Against Corruption (1996); United Nations Convention against Corruption (2003).
- ²⁴ In some cases, the fact of presiding over a court entails some privileges or additional special functions. For example, in the province of Buenos Aires (Argentina), the presidents of the appellate courts of the city of La Plata (the provincial capital) serve as members of the province’s Electoral Board on a rotary basis. This is an agency with a great strategic value for political sectors, since it is responsible for the settlement of disputes related to the local electoral processes. Likewise, the president of the Supreme Court

of Justice of said province, besides being a member of the Electoral Board, is also the chair of the Judicial Council, the agency responsible for the appointment of judges, public defenders, prosecutors and other judicial officers (Herrero 2005; ADC 2006).

²⁵ Popkin 2004.

²⁶ For more information on the balance between independence and accountability, see Vargas Viancos 2002.

²⁷ In González de Asís 2006, the author illustrates this point with the case of Brazil, where, thanks to the 1988 Constitution, the independence and autonomy of the Judiciary had reached unprecedented levels (with full control of administrative, disciplinary, budgetary and staffing matters), far from any potential political interference. In this case, the problem did not arise from a lack of independence but, precisely the opposite: an excessive autonomy with no external oversight or accountability mechanisms and, even worse, with this independence making the implementation of internal changes particularly difficult. The main challenge consisted in finding a balance between independence and accountability that would allow for an oversight of the work of judges, reducing corruption opportunities. See: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/AnticorruptionReform.pdf>.

²⁸ Schedler 2004.

²⁹ Aguilar Rivera 2006.

³⁰ By access to public information we understand the right of every individual to seek, request, and receive the information that is held by state agencies.

³¹ Laws on access to public information recognize a broad access to the information generated and gathered by the state, that can only be denied in specific and well-founded situations that fall within the established legal framework.

³² Lopez and Posadas 2007.

³³ One of the first documents in this the field is the document which delineates the Lima Principles on Access to Information. Its section 8 establishes the exemptions to access to information. [[Please provide the name and date of the publication, and add it to the reference list at the end of this document.]]

³⁴ Inter-American Human Rights Commission 2007.

³⁵ Colombia's Constitutional Tribunal, in its ruling C-491 of 2007, established that a restriction to access to information is legitimate "only if: i) it is authorized by law or the Constitution; ii) it is clear and precise; iii) public servants state their decision in writing; iv) the reserve is temporary; v) there are adequate systems to safeguard information; vi) there is administrative and judicial oversight of the reserved decisions or actions; vii) reserve is strictly subject to the principles of reasonability and proportionality; and viii) there are legal means to challenge the decision to maintain certain information secret."

³⁶ IAHR Court, Case *Claude Reyes and others vs., Chile*, Sentence from September 19, 2006, Series C, No. 151, par. 90, 91 & 92.

³⁷ Athie, Alicia, "Rendición de cuentas, acceso a la información y transparencia en los presupuestos públicos", *Collectivo por la Transparencia*, Vol. 5, 2005.

³⁸ The arrangements to appoint judges vary from country to country. Even within a country there may differences between the appointment of lower court judges or Supreme Court Justices. In Latin America, the agencies that nominate candidates to cover judicial vacancies vary considerably. In some cases, this is the responsibility of the Executive Branch (Argentina, Brazil, Mexico, Panama), while in others it is the remit of the Supreme Court (Chile, Ecuador), Judicial Councils or similar institutions (Bolivia, Colombia, Paraguay), or special committees (Guatemala, Honduras). Once the nominations have been made, the power to select and appoint judges falls on a different agency. Although it is in general the Legislative Branch (Argentina, Brazil, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Guatemala, Panama, Paraguay, Uruguay), in some cases this responsibility falls to the Supreme Court (Colombia) or the Judicial Council (Peru, Dominican Republic) (UNDP 2004, 94–95).

³⁹ Popkin 2004.

⁴⁰ Good practices in terms of judicial independence reform suggest that it needs to be balanced with changes that generate greater accountability of judges. A very independent Judiciary that lacks the obligation to be accountable to society may encourage corporatist behaviors, corrupt practices or increased opacity in its conduct (USAID 2002).

⁴¹ Elena and Autheman 2004.

⁴² It is important to clarify that although many times there is a requirement to disclose this information, part of it is not accessible to the public. This exception is founded in the need to safeguard certain sensitive data, the publication of which could affect the right to privacy of the filer, such as the location of the real estate, bank account numbers, and so forth.

⁴³ DPLF 2007a.

⁴⁴ The publication of sentences is an obligation that applies to judges at all levels, including those at the first and the second instances, higher courts and specialized courts. Given that the publicity of sentences is very limited in Latin America, for strategic reasons this document emphasizes the courts with the greatest impact (higher courts), with the expectation that judges at the lower levels will later replicate such practices.

⁴⁵ According to the due process rules and the standards set by the Inter-American Court of Human Rights, the publicity of sentences, including when they are not firmly established, does not impinge on the not-guilty principle. In some cases it can give rise to conflicts in terms of the right to privacy, but that can be remedied—under exceptional circumstances—by limiting the identification of the parties to the case, for example by replacing names with their respective initials.

⁴⁶ Pérez Tort 2007. *Corrupción en sistemas judiciales*, 2007. See also ACIJ 2006.

⁴⁷ Gregorio 2005, 275.

⁴⁸ México. Instituto Federal de Acceso a la Información Pública/Ley de Acceso a la Información Pública.

⁴⁹ Art. 13.2 of the American Convention on Human Rights limits the right to exercise freedom of expression with respect to the "rights or the reputation of others."

Therefore, the audiovisual broadcasting of a criminal trial should take into account the honor, privacy, and the right to their own reputation of those who participate in the process, a matter that is especially sensitive in the case of sex crimes, crimes against minorities, or when the protection of witnesses or whistle blowers is required.

⁵⁰ On this last point, the jurisprudence of the IACHR in this regard is especially applicable. According to that court, the statements relating to public officials, politicians, and private individuals who engage in activities that are subject to public scrutiny merit a different level of protection. The reason is that these are people who voluntarily decided to submit to a more rigorous scrutiny by citizens, which includes the duty of being accountable and receiving criticism (IHR Court *in re Canese*, par. 103. See,

likewise, *Herrera Ulloa*, paragraphs 127 and 128; *Palamara Iribarne*, paragraph 83).

⁵¹ McClymont and Golub 2001.

⁵² On judicial observatories, see Marinero 2008.

⁵³ Acuña-Alfaro and González de Asís, nd.

⁵⁴ See, for example: “Gestión Judicial y Administración de Tribunales.” *Sistemas Judiciales* Año 3, Número 5. CEJA-INECIP, Buenos Aires; Angell and Faundez 2005; Biebsheimer and Payne 2001; and Dakolias, 1996.

⁵⁵ Some countries have created arrangements that recognize the right to access public information by means of presidential decrees or similar instruments. Although these are important steps forward, their impact is limited since they are not implemented by laws of Congress, which would ensure a broader scope and application.

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