

Access to Justice, Good Governance, and Civil Society

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Justice Reform, Democratic Governance, and the Poor Credibility of Justice Systems

Since the latest round of donor-supported justice reform efforts began in the 1980s, the notion that an adequately functioning justice system is essential for the establishment of democratic governance has been widely accepted. In its recent Declaration of Santiago, the General Assembly of the Organization of American States reiterated this premise:

The commitment to democracy, the strengthening of the rule of law, and access to effective justice, respect for human rights, the promotion of shared national values, and integral development are the foundations of progress, stability and peace for the people of the Americas and are essential to democratic governance.¹

Yet, after almost 20 years of justice reform efforts that have entailed enormous financial investments by donors, most justice systems in Latin America continue to be seen as highly deficient. Many changes have been introduced, particularly in terms of institutional design, increased budgets for the judiciary, and major reforms of criminal justice to move from a written inquisitorial system to a more adversarial oral process. Nonetheless, and despite a significant increase in the social demand placed on the justice system, the overall impact of these changes has been fairly limited.² Justice systems throughout the region are still plagued by limitations in their coverage and serious backlogs. Judicial resolutions remain uneven in quality and lack consistency. Complaints of corruption and a lack of transparency are still prevalent throughout the region. Courts often appear to lack the capacity or the will to enforce rights and obligations or effectively prosecute and impose sanctions, thus contributing to growing citizen insecurity.

Public perception of these problems leads to notoriously poor evaluations of justice systems. Moreover, recent poll results indicate that confidence in the judiciary has actually declined in recent years, reaching a low of 25% this year.³ As the Inter-American Development Bank has noted:

¹ Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas, AG/DEC 31 CXXXIII-0/03 (Adopted at the fourth plenary session held on June 10, 2003).

² Luis Pásara, *Justicia y Sociedad Civil, El papel de la sociedad civil en la reforma judicial: estudios de casos en Argentina, Chile, Colombia y Peru* (Ford Foundation-Justice Studies Center of the Americas, 2003), p. 31.

³ Latinobarometro has published results of annual public opinion polls in 17 countries in the region. Responding to the question, "How much confidence do you have in the Judiciary?" only 25% polled in April and May of 2003 said they had "much" or "some" confidence in this institution. In 2002, reported confidence in the judiciary was slightly higher, at 27%; in 1999 and 2000, 34% of respondents expressed confidence in this branch of government. Details of the poll can be found at: <http://www.latinobarometro.org>

All countries in the region have launched comprehensive programs of judicial reform not only as a means of judicial effectiveness but as an instrument to improve the quality of governance, but surveys, ratings and quantitative data have shown that 15 years of significant reform have not yet produced greater confidence in the criminal justice system, nor reduced rates of crime and impunity.⁴

The continuing criticism of justice systems reflects a larger disappointment with the outcome of “democratic transitions” in Latin America, which have not yielded the anticipated results. As the situation has deteriorated in various countries in the region, justice systems have come in for particular criticism. In Argentina and Paraguay, for example, members of the Supreme Court have faced calls for impeachment, which have led some to resign. In Colombia, the massive backlog of cases continues to grow, and president Alvaro Uribe has called for the dissolution of the Colombian judicial council. And in Guatemala, the Constitutional Court allowed General Efraín Ríos Montt to run for the presidency despite a constitutional provision that prohibits those who have taken power through coups from running for president. The Guatemalan justice system has come in for heavy criticism in the wake of this decision and appellate court rulings that continue to uphold impunity by arbitrarily overturning lower court rulings that held military officers responsible for human rights violations.⁵

Of course, positing that weaknesses in the rule of law are responsible for the far-from-consolidated democracies in Latin America would be a risky conjecture. In part, rule-of-law-reformers may have contributed to the view that reforms have failed by creating unreasonable expectations of what reforms in this area might achieve. The contention that strengthening the rule of law leads to economic growth has come under increasing scrutiny.⁶ Likewise, as Luis Pásara points out, promises that criminal procedure reforms would lead to a reduction in crime have not materialized.⁷

⁴ Fernando Carrillo Flórez, “The Need for Judicial Reform,” presentation at the Center for Strategic and International Studies, Washington, DC, Jan. 22, 2003.

⁵ Thus, a recent decision of Guatemala’s Fourth Appeals Court (*Sala Cuarta de Apelaciones*) reversed the conviction of Colonel Juan Valencia Osorio, for the 1990 murder of anthropologist Myrna Mack Chang. Achieving justice against one of the intellectual authors of the crime had required an intensive 12-year effort during which the prosecution had to overcome a series of obstacles, as well as threats and intimidation. The Lawyers Committee for Human Rights and the Center for Justice and International Law (CEJIL) expressed shock at this decision and described the appeals court’s reasoning as “opaque and problematic.” Lawyers Committee for Human Rights and Center for Justice and International Law (CEJIL), Analysis of Appeals Court Decision in the Myrna Mack Case, June 16, 2003, available at: http://www.lchr.org/defenders/hrd_guatemala/hrd_mack/Mack_Analysis.pdf. In Spanish: http://www.lchr.org/defenders/hrd_guatemala/hrd_mack/Mack_Analysis_sp.pdf.

⁶ See, e.g., Richard E. Messick, “Judicial Reform and Economic Development: A Survey of the Issues,” *The World Bank Research Observer*, Vol. 14, No. 1 (February 1999), 117-36.

⁷ Luis Pásara, “Hacia una agenda futura de la reforma del sistema de justicia: siete observaciones,” commentary presented as part of the panel on Access to Justice, Good Governance, and Civil Society,

In a recent paper, Thomas Carothers notes that democracy “usually co-exists with substantial shortcomings in the rule of law.”⁸ In some Latin American countries, however, democracy appears less stable today than it did ten years ago. Grinding poverty, massive inequalities in the distribution of wealth, and the lack of economic opportunity for most of the population are usually more pressing problems than the justice system. While the weakness of democracies in Latin America poses questions far beyond the scope of justice reform, it does point to the continuing exclusion of large sectors of the population from the benefits of democracy and, more specifically, the possibility of access to justice, equality before the law, or even the recognition of their human dignity.

Recent discussions have focused considerable attention on the sobering realities of the slow pace of justice reform and the continuing lack of credibility enjoyed by justice systems in the region. It has become increasingly clear that reforming justice systems is a particularly daunting undertaking, in part because of the variety of institutions involved and the complexity of the normative framework. Moreover, justice systems cannot be viewed in isolation from the political systems in which they function. As Fernando Carrillo has noted, “Good and reliable legal systems are usually found where the political system is stable and strong... A country with a weak political system and grave inequalities of wealth and power will not develop a legal/judicial system capable of redressing deficiencies.”⁹ Over time, it has become obvious that many problems need to be addressed in the conception, design, and implementation of justice reform projects.

There is now widespread recognition of the serious lack of empirical studies about the functioning of justice systems and the impact of reforms.¹⁰ Evaluating how a justice system functions and the impact of justice reforms is not a simple matter.¹¹ Evaluations that rely on quantitative indicators (e.g., the speed of judicial resolutions) may be highly misleading if they do not also assess the quality of justice being dispensed. Of course, the results to be measured also depend on the goals of the reform process. For example, does increased access to the justice system necessarily mean fair treatment within that system that takes into account gender, ethnic, and linguistic differences? Are new justices of the peace who have been deployed at a national level properly trained and adequately sensitive to the needs and customs of the community in which they serve? Do new conflict resolution mechanisms serve to guarantee fundamental rights?

⁸ Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Rule of Law Series, Democracy and Rule of Law Project, Number 34, Jan. 2003, p. 6.

⁹ Fernando Carrillo Flórez, “The Need for Judicial Reform.”

¹⁰ See, e.g., Luis Pásara (coordinator), *Justicia y Sociedad Civil: El papel de la sociedad civil en la reforma judicial: estudios de casos en Argentina, Chile, Colombia y Peru* (Buenos Aires: Ford Foundation and Justice Studies Center of the Americas, 2003); Fernando Carrillo Flórez, “The Need for Judicial Reform,” Carothers, *Promoting the Rule of Law Abroad*; Christina Biebesheimer and J. Mark Payne, *IDB Experience in Justice Reform: Lessons Learned and Elements for Policy Formulation*, Sustainable Development Department, Technical Paper Series (Washington, DC: Inter-American Development Bank, Nov. 2001).

¹¹ For a discussion of some of the complexities involved in evaluations, see Linn Hammergren, “Latin American Criminal Justice Reform: Evaluating the Evaluators,” *Sistemas Judiciales, Reformas Procesales en América Latina* (Justice Studies Center of the Americas) Año 2, No. 3.

The widely shared conclusion that justice reform has not yielded the anticipated results, has led to some important new initiatives. These include a greater focus on the issue by states in the region, as evidenced in the recent Summits of the Americas (Santiago and Quebec City) and more serious efforts at regional cooperation, including the Organization of American States' action in establishing the Justice Studies Center of the Americas, and innovative civil society initiatives, some of which are described below, to increase transparency, evaluate the implementation of reforms, undertake monitoring efforts, increase demand for justice, recommend improvements, and, in some cases, involve the disenfranchised in efforts to improve their own situation through "legal empowerment."

These new initiatives can build on significant, if insufficient, advances, which include the following:

- The need for justice reform is now widely accepted.
- In general, the lack of resources for the justice sector has been addressed and is no longer a valid excuse for not carrying out reforms.
- Most judges are now selected through public competitions and, in a number of countries, civil society now scrutinizes Supreme Court selection processes.
- Increasing numbers of judges, prosecutors, and public defenders are committed to changing the justice system, interested in constructive criticism from outside the justice system and in proposing changes.
- Most countries in the region have undertaken criminal justice reform.
- In a number of countries, civil society organizations have a vision of constructive criticism, are prepared to improve their technical capacity, form coalitions and strategic alliances to promote transparency in the justice sector.
- Supreme Court presidents in a number of countries now express interest in promoting citizen participation in justice reform.
- Many initiatives have been undertaken to improve access to justice or conflict resolution mechanisms for vulnerable sectors, who often formerly had no such access.
- Initiatives are under way to carry out evaluations of the impact of reforms and to develop meaningful indicators to assess access to justice in different countries.

Efforts to Improve Access to Justice

Access to justice is a broad concept that refers to the right of all citizens, without regard for race or ethnic group, gender, economic status, age, or disabilities, to have access to mechanisms for dispute resolution and the enforcement of their rights through legally binding decisions, at a reasonable cost, in a reasonable amount of time, at a reasonable distance, in a language they can understand, and without bureaucratic obstacles. Access to justice cannot depend on the status of the person seeking to vindicate a right or the status of the person accused of violating a right. As the recent Declaration of Santiago makes clear, access to justice is not just a quantitative right, but also involves qualitative issues: citizens have a right to access to *effective* justice.

To improve access to justice, donors have funded a variety of programs designed to ensure that citizens can have their disputes settled by an authority empowered to make legally binding decisions, at a reasonable cost, and through a process that is within their reach. Initiatives in this area have included modernizing judicial procedures to reduce barriers and access costs, designing and executing outreach programs, promoting alternative and complementary dispute-resolution mechanisms, strengthening justice at the local level, creation of (commercial) arbitration and mediation mechanisms, establishing and strengthening public defenders offices and human rights ombudsman's offices, and promoting basic civic and legal education in this area. In some cases, legislative reforms have been designed to improve access to justice for disadvantaged groups such as juveniles (juvenile justice systems), women (notably victims of domestic violence), and indigenous groups (recognition of special indigenous jurisdiction).

A recent Inter-American Development Bank publication refers to a “consensus that justice systems in developing democracies must address demands from recently enfranchised citizens for fairness, transparency and access.”¹² Indeed, the Bank has funded many projects in this area designed to provide support to trial courts, justices of the peace and other local judicial institutions, establishing small claims courts and consumer complaint hotlines, making court and case information available to the public, providing translators, organizing public defense and legal aid offices to provide lawyers to represent indigent clients, providing civic education about justice institutions, the judicial process and citizens' rights; and providing opportunities for dispute resolute through mediation or arbitration.¹³

Despite donor commitments to access to justice programs, large sectors of the population -- often isolated by a combination of linguistic limitations, geography, disenfranchisement, and poverty – still do not even perceive the possibility of vindicating their rights through the national justice system. In some countries, fees for court services, even if considered minimal, pose a serious obstacle to access to justice.¹⁴

In general, justice reform programs have focused far more on criminal justice than other areas such as labor law or land rights. Similarly, while measures to protect women and children from violence have been instituted widely in the region, the rights of the disabled, migrants, and indigenous populations have received far less attention.

The political decision to exclude whole categories of serious crimes from the reach of the justice system in the name of “national reconciliation” has also sent a stark

¹² Christina Biebesheimer and J. Mark Payne, *IDB Experience in Justice Reform: Lessons Learned and Elements for Policy Formulation*, Inter-American Development Bank, Sustainable Development Department, Technical Paper Series, p. 11.

¹³ *Ibid* at p.14. According to this paper, IDB and Counterpart funds have provided over \$86 million to access to justice projects, which constituted 38.55% of IDB projects and account for 27.6% of total funds (based on the period from 1993 – March 2001).

¹⁴ See, e.g., Farith Simon C., “Investigación sobre Acceso a la Justicia en la República del Ecuador,” in José Thompson, ed., *Acceso a la Justicia y Equidad: Estudio en Siete Países de América Latina* (San José, Costa Rica: Banco Interamericano de Desarrollo y Instituto Interamericano de Derechos Humanos, 2000) p. 79.

message about limits on access to justice and equality before the law. The most striking examples of this situation can be found in countries that have undergone periods of armed conflict or authoritarian rule. While a number of countries have now engaged in “truth seeking” processes, presenting horrific findings of the scope and nature of the human rights violations, few have found ways to provide reparations, much less justice. Contributing to this situation, in many countries, lower court judges continue to refrain from exercising constitutional control, despite constitutional provisions giving them that authority, often based on fears that decisions will be overturned or result in repercussions that could affect their job tenure.

These issues have not been in the forefront of donor-funded justice reform efforts, which have tended to be forward-looking, preferring to avoid the politically sensitive terrain associated with justice for past human rights violations. Nonetheless, allowing impunity for serious human rights violations would appear to have serious consequences for the possibility of achieving equality before the law and developing a belief that all citizens have a right to access to justice. This situation is aggravated further because those known to be responsible for crimes against humanity enjoy impunity and may even continue to play a role in political leadership, while someone accused of a minor theft may languish for months, or even years, in jail. In countries such as Guatemala, El Salvador, and Peru, the vast majority of victims of political violence have come from the poorest sectors of the country. In Guatemala and Peru, poverty has been compounded by linguistic and geographical isolation.

According to Juan Méndez, former president of the Inter-American Commission on Human Rights, the failure to address past human rights abuses undermines efforts to construct or consolidate democracy:

The heavy legacy of past abuses obliges new democracies to address them. If impunity is permitted to reign, the political system that is being constructed will be formally democratic, but will lack an essential ingredient of democracies: accountability.[...] In a true democracy, the majority can not ignore the rights or the dignity of its most vulnerable citizens. It is not possible to build the rule of law on the notion that some crimes, regardless of their seriousness, can be ignored, if they were committed by men in uniforms.¹⁵

The Relationship Between Judicial Independence and Access to Justice

At the 2001 Quebec City Summit of the Americas, regional leaders reaffirmed “the importance of an independent judiciary and our determination to ensure equal access to justice and to guarantee its timely and impartial administration,” while committing themselves to increase transparency throughout government. The Plan of Action from this Summit specifically calls for mechanisms to:

¹⁵ Juan E. Méndez, “La Justicia Penal Internacional, la Paz y la Reconciliación Nacional,” in Juan Méndez, Martín Abregú, and Javier Mariezcurrena, *Verdad y Justicia: Homenaje a Emilio F. Mignone* (San José, Costa Rica, Instituto Interamericano de Derechos Humanos, 2001) p. 313.

- Support public and private initiatives to educate people about their rights; and
- Promote measures that “ensure prompt, equal and universal” access to justice.

The inter-relationship among different justice system reforms has been increasingly recognized. As a study on access to justice in Guatemala notes, “there is no point in talking about access to justice until the system as a whole functions impartially, independently, and effectively.”¹⁶ Thus, judicial decisions that are seen to be plainly contrary to the Constitution inevitably undermine efforts to improve access to justice. In the wake of the Guatemalan Constitutional Court’s recent 4-3 decision, reversing the judgment of the Guatemalan Supreme Court which had affirmed a lower electoral court’s decision barring General Rios Montt from running for President pursuant to article 186(a) of the Constitution, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, stated:

This decision also goes counter to all efforts made by civil society in Guatemala and the international community to restore constitutional order and respect for human rights and the rule of law in Guatemala. That the highest Court whose essential function is the defense of the constitutional order of Guatemala could come to such a decision, inconsistent with its own previous decisions, is beyond belief. It certainly calls into question the Court’s independence, impartiality and integrity.¹⁷

While having access to a justice system that is not capable of making impartial decisions in a timely fashion may be of little use, it would be a mistake to think that the successful implementation of these reforms necessarily has a significant trickle-down effect on the disenfranchised. Judicial independence and impartiality may be necessary pre-conditions for access to justice and the achievement of equality before the law, but they are not sufficient.

According to Jorge Correa,

[O]ne could give a general description of the most important reforms of judicial systems in Latin America, analyzing their causes and goals, without ever referring to the poor as relevant actors. A preliminary and not very optimistic conclusion would be that judicial reforms in Latin America are definitively linked more with the opening of markets than with any other factor. They are not provoked by underprivileged groups, and they do not have those groups as targets. One should only hope for some minor side effects that may benefit underprivileged groups. Yet, such a conclusion has to be qualified; there is too much focus on judicial

¹⁶ Aylín Ordoñez, “El acceso a la justicia en la República de Guatemala,” in José Thompson, ed., *Acceso a la Justicia y Equidad: Estudio en Siete Países de América Latina* (San José, Costa Rica: Banco Interamericano de Desarrollo y Instituto Interamericano de Derechos Humanos, 2000) p. 173.

¹⁷ United Nations press release, July 17, 2003, “Rights Expert Says Decision of Guatemalan Court in Rios Montt Case Calls into Question Its Independence, Impartiality and Integrity.”

reform and probably too little attention to the changes that such reforms may ultimately produce.¹⁸

As Correa notes, the concept of using the judiciary to protect the underprivileged is new in Latin America, and it opens the possibility of using the justice system to advance socioeconomic rights. In some countries, such as Argentina, Costa Rica, and Colombia, this is already happening. Thus, if reforms lead to a stronger judiciary, with more independent judges better attuned to democratic values, “then the underprivileged of Latin America may find a new forum to advance their interests.”¹⁹

The Role of International Standards in Improving Access to Justice

The decisions of the Inter-American system of human rights protection are having an increasing impact on justice systems in some countries in the region, notably Peru and Argentina. In different countries, decisions of the Inter-American Court have led to compensation awards, to the reopening of trials, to the reinstatement of Constitutional Court judges, and to the nullification of an amnesty law. Recommendations of the Inter-American Commission on Human Rights (IACHR) have led to the reinstatement of Supreme Court justices and others arbitrarily dismissed, reparations to victims of human rights violations, law reforms, and to the release of prisoners. Judges in Argentina have relied on jurisprudence of the Inter-American system to find that country’s amnesty laws null and void. Argentina and Costa Rica have led the way in incorporating the jurisprudence of the Inter-American system into their national justice systems; most other countries lag far behind.

In Peru, the decisions of the Inter-American system have had a profound impact in supporting judicial independence and providing access to justice for victims of human rights violations. The Inter-American Court of Human Rights issued a landmark decision in the *Barrios Altos* case, which rejected as contrary to the American Convention on Human Rights the application of a 1995 amnesty law in Peru to prevent the investigation of a 1991 mass killing linked to the military. Peru’s *Coordinadora Nacional de Derechos Humanos* (National Human Rights Coordinator) made a strategic decision to bring this particular case before the Inter-American system. By the time the Inter-American Court heard the case, the transition government of President Valentín Paniagua was also interested in obtaining a ruling from the Court on this issue. The Court’s ruling not only resolved the case in favor of the victims’ right to seek justice, but also declared that Peru’s 1995 Amnesty Law was inconsistent with the American Convention on Human Rights and, therefore, could not have any legal effect.²⁰

The novelty of the Court’s decision was that it went beyond finding the amnesty law contrary to Peru’s obligations under the American Convention by finding that Peru was

¹⁸ Jorge Correa Sutil, “Judicial Reforms in Latin America: Good News for the Underprivileged?” in Juan E. Méndez, Guillermo O’Donnell, and Paulo Sérgio Pinheiro, eds., *The (Un)Rule of Law & the Underprivileged in Latin America* (Notre Dame: University of Notre Dame Press, 1999) p. 268.

¹⁹ *Ibid.*, p. 270.

²⁰ Sentence of the Inter-American Court, March 14, 2001.

obliged to deny effect to the amnesty law in its national law. Subsequently, in response to a petition from the government of Peru, the Court issued an interpretive sentence clarifying that its resolution was not limited to the Barrios Altos case, but was applicable to all other cases involving violations of human rights.²¹ Following the decision of the Inter-American Court, the case was reopened for investigation. As David Lovatón puts it, “the implementation of the recommendations and decisions of the Inter-American system is forcing the internal justice system to take action in cases involving human rights.”²²

The effectiveness of these regional and international protections has depended on civil society initiatives to use the Inter-American system of human rights protection in a strategic way and to ensure that new regional and international protections are given effect in national justice systems and institutions. Adequate implementation of decisions and recommendations from the Inter-American system requires having government officials – from the executive branch, the legislature, the prosecutor’s office, the human rights ombudsman’s office, and the judiciary – who are familiar with the Inter-American system, understand the obligations assumed by states upon ratification of the American Convention on Human Rights, and are prepared to use the recommendations from the system to improve protections in their national justice systems.

New regional human rights instruments are also having an impact on access to justice. Thus, while full implementation of the Inter-American Convention on the Prevention, Sanction and Elimination of Violence Against Women (Convention of Belém do Pará) remains a distant goal, there have been dramatic changes in the understanding and handling of domestic violence cases in many countries in the region following its implementation in 1995. The changes that have taken place suggest the potential impact of such regional protections.²³ These advances would not have occurred without the crucial work of women’s organizations throughout the region that had taken up these issues and called for legislative and institutional changes. Regional initiatives received impetus from the Beijing Declaration and Platform for Action that came out of the Fourth World Conference on Women in 1995, which set forth the main elements of a global strategy to end violence against women.

²¹ Interpretive Sentence of the Inter-American Court, Sept. 3, 2001; Juan E. Méndez, “El Caso *Barrios Altos*, Perú,” and Renzo Pomi, “El combate contra la impunidad: El caso de la Corte Interamericana de Derechos Humanos,” in Fundación para el Debido Proceso Legal and Instituto de Derechos Humanos de la Universidad Centroamericana “José Simeón Cañas,” *Justicia para las víctimas en el siglo XXI* (San Salvador, 2002).

²² David Lovatón Palacios, “Cambios en el sistema de justicia y sociedad civil en Perú (1990-2002)” in *Justicia y Sociedad Civil*, p. 408.

²³ See International Centre for Criminal Law Reform and Criminal Justice Policy, ILANUD – Women, Justice and Gender Program, and Inter-American Commission of Women (CIM), *Violence in the Americas: a Regional Analysis, Including a Review of the Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women* (Final Report, July 2001).

Improving Women's Access to Justice for Cases of Gender-Based Violence

In several countries, including Peru and Ecuador, advocacy by the women's movement has led to the creation of special police stations (*comisarias*) to facilitate women's access to justice in cases of domestic violence. Because of their experience in assisting the victims of domestic violence, women's organizations realized that women needed to be able to present their complaints and have access to justice in a situation where they could feel secure and where they would receive support.²⁴

In 1997, Ecuador approved plans for the creation of 31 *comisarias* throughout the country. These special police stations provide integrated attention to the problems of domestic and sexual violence against women and children, through the provision of legal, psychological and forensic medical services. With official sanction, women's organizations provide technical support to the police stations and those who use them. Working in the *comisarias* has led the NGOs to improve their own technical capacity. Evaluations of these efforts found that they provide an efficient mechanism for access to justice for women victims of domestic violence. This experience has also demonstrated the potential benefits of joint state-civil society initiatives.²⁵

The World Bank, through a Law and Justice Fund, has supported women's legal service centers in Ecuador. These centers handle primarily cases involving child support, child custody, domestic violence and sexual violence against children.²⁶ The centers are designed to ensure access to justice and also provide dispute resolution proceedings. In addition to legal aid, they provide psychological counseling and medical advice. Maria Dakolias points out, "The limited experience in Ecuador thus far clearly demonstrates that attending to issues of family violence and the related adverse effects on both women and their children is an indispensable prerequisite for any efforts to enable these women to enter the work force, provide proper care for their children, and in general improve their economic status."²⁷

Women's organizations in a number of countries have accompanied and monitored the implementation of legal protections addressing violence against women. In Peru, after passage of the *Ley de Violencia Familiar* in 1993, the women's movement, the ombudsman's office, the congressional commission on women, and international human rights organizations monitored application of the law. They found problems in the use of forced mediation in this context. As a result, a reform of the law on mediation, published in January 2001, excluded domestic violence from its reach.²⁸ Women's groups throughout the region have also worked to educate police, prosecutors, and judges about

²⁴ See, e.g., Farith Simon "El Acceso a la Justicia en la República del Ecuador," p. 98, citing Rocío Rosero Garcés and Ariadna Reyes Avila, *Políticas públicas para la equidad de género. Proyectos y modelos de gestión*. CONAMU, 1998.

²⁵ *Ibid.*, p. 99.

²⁶ Maria Dakolias, "Legal and Judicial Reform: the Role of Civil Society in the Reform Process," in Pilar Domingo and Rachel Sieder, eds., *Rule of Law in Latin America: The International Promotion of Judicial Reform* (London: Institute of Latin American Studies, 2001).

²⁷ *Ibid.*, p. 88, footnote 17.

²⁸ David Lovatón Palacios, *Cambios en el sistema de justicia y sociedad civil en Perú (1999-2002)*, p. 436.

domestic violence and to overcome traditional attitudes that tend to discount women's claims. Based on studies and efforts to monitor the implementation of domestic violence laws, women in countries such as El Salvador are proposing changes in these laws and in institutional practices.

Public Interest Litigation

In South America, recent efforts involving public interest litigation have achieved some noteworthy results. In Argentina, CELS was successful in petitioning the administrative court for an order obliging the Minister of Interior to release information on the number of people detained by the Federal Police in Buenos Aires. The police then complied and provided all the information requested.²⁹ In April 2002, Colombia's Constitutional Court struck down as unconstitutional the Law of National Defense and Security. Colombia's Constitutional Court has also upheld the rights of vulnerable groups, such as prisoners and the displaced. Colombian authorities have not, however, fully implemented all of the Constitutional Court's decisions. Moreover, in recent months, the government of President Alvaro Uribe has proposed limiting the scope of the Constitutional Court's jurisdiction so that it cannot rule on questions of national defense or social and economic rights.

In the Southern Cone and in Guatemala, litigation of human rights cases has served not just to seek justice on behalf of specific victims, but also to educate the public about the human rights abuses that occurred during periods of authoritarian rule or armed conflict and to encourage the justice system to act independently and provide access to justice to victims of state violence. Even when these cases are not successful, they serve an educational role, although they may reinforce the conviction that the justice system is not independent.

Public interest litigation is designed to educate the judiciary about the concept of public interest law and judicial decisions from other countries that apply new collective rights, including the right to a clean environment, consumer protections, and socioeconomic rights.³⁰ Litigation can take a long time and require substantial funding. The unreliability of justice systems in the region also limits the potential effects of litigation as a public accountability strategy. Along these lines, a recent study carried out by FESPAD in El Salvador found that the Constitutional Chamber of the Salvadoran Supreme Court rarely admits *amparos* to enforce social and economic rights. Still, in combination with other strategies, at least in some countries, public interest litigation is seen as a powerful tool.

In Peru, for example, civil society organizations currently envision the possibility of taking on new kinds of cases in areas such as: access to information, freedom of

²⁹ Hugo Fruhling, "From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America," in Mary McClymont and Stephen Golub, eds., *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World* (The Ford Foundation, 2002), p. 75.

³⁰ *Ibid*, p. 76.

expression, corruption, and discrimination. The Institute of Press and Society (IPYS) has opened an office on Access to Public Information, which offers representation and advice to those seeking public information from the government. Javier Casas notes that public education will be necessary to create citizen consciousness about their right to public information so that they will exercise it and use it as a mechanism to make justice more transparent and fair.³¹

The Role of Criminal Justice Reforms in Enhancing Access to Justice

Criminal justice reforms should have a direct impact on the disenfranchised. The introduction of orality with more adversarial systems replacing the traditional inquisitorial written systems is meant to ensure a more transparent, fair, and efficient process. Under the new systems, case backlogs should diminish, defendants should spend less time in pre-trial detention, and both defendants and victims should have greater protections in and access to the proceedings. Some countries have implemented programs to provide support to victims as they present their cases and go through the criminal justice process.³² Some reforms provide victims or, in some cases involving human rights or the public interest, nongovernmental organizations with a formal role in the proceedings. Since most victims and defendants come from the disadvantaged sectors of society, these reforms should have a favorable impact on their access to justice.

Criminal justice reforms have led to the establishment or expansion of public defender programs. Despite their many limitations, these programs constitute an important advance in providing representation to indigent defendants. In most Latin American countries, public defenders offices lack adequate resources and staffing. Usually the newest institution in the justice sector, the public defender's office is likely to be the institution that receives the least national and international support during implementation of criminal justice reforms, which tend to give priority to the judiciary and to prosecutors. Nonetheless, in some countries, public defenders have taken an active role in advocating for due process rights for those accused of crimes.³³ The recent Justice Studies Center of the America study of the implementation of criminal procedure reforms in different Latin American countries suggests, however, that the presence of a public defender does not necessarily mean a vigorous defense.³⁴ In many cases, legal representation continues to be more of a formality than a guarantee of a serious defense.

Civil society organizations have played an important role in preparing proposals, providing information, winning legislative approval, and implementing criminal

³¹ Javier Casas, "Los periodistas y el acceso a la información judicial (Perú)" in *Iniciativas de la Sociedad Civil para la Transparencia en el Sector Judicial*, p. 170.

³² See, e.g., María Gabriela Fernández Pacheco, "La Experiencia del Centro de Atención a Víctimas en Panamá: la Incorporación Activa de las Víctimas dentro del Sistema de Justicia," in Fundación para el Debido Proceso Legal and Fundación Esquel, *Implementando el Nuevo Proceso Penal en Ecuador: Cambios y Retos* (Washington, DC: Due Process of Law Foundation, 2001).

³³ See, e.g., Alvaro Ferrandino, "La Experiencia de la Defensa Pública en Centroamérica," in *Implementando el Nuevo Proceso Penal en Ecuador*, p. 124-125.

³⁴ Cristián Riego, Informe Comparativo: Proyecto "Seguimiento de los Proceso de Reforma Judicial en América Latina," *Sistemas Judiciales* (Justice Studies Center of the Americas) Año 2, No. 3, p. 56-67.

procedure reforms. In Chile, for example, the NGO Paz Ciudadana, which focuses on citizen security issues, joined the efforts of the Corporación de Promoción Universitaria, a group made up of prominent Chilean academics, and the Center for Legal Research of the Diego Portales University law school, to distribute the proposals for reform, seek consensus, and undertake various studies, including one focusing on costs. These three institutions were instrumental in keeping the reform process moving forward in Chile.³⁵

Defensorías del Pueblo and Access to Justice

The establishment of *Defensorías del Pueblo* or human rights ombudsman's offices in countries throughout the region has also contributed to providing greater access to justice for vulnerable groups. Designed to oversee the actions of state institutions and protect human rights, *Defensorías* have become involved in efforts to protect the rights of vulnerable groups such as: children, women, prisoners, workers, indigenous communities, migrants, the disabled, and individuals suffering from HIV/AIDS. In a number of countries, the *Defensorías* have managed to establish a nationwide presence through regional offices and local networks.³⁶

Networks established by *Defensorías* constitute an important advance in overcoming geographical isolation, a major obstacle to access to justice in countries throughout the region. *Defensorías* often work closely with nongovernmental organizations, drawing on their experience, expertise, and contacts.

Some *Defensores* have become deeply involved in efforts to strengthen or reform the justice system. Peru's *Defensor del Pueblo* played a key role during the Fujimori regime, maintaining its independent stance and protecting citizen rights. The Peruvian *Defensoría* worked with NGOs to identify individuals wrongly convicted of terrorism and to ensure that their cases would be considered for pardons. Ultimately, over 500 people wrongly convicted on charges of terrorism were pardoned and released. In Honduras, Dr. Leo Valladares, the first National Commissioner for Human Rights, took up the issue of individuals forcibly disappeared during the 1980s, conducted an investigation, and called for the justice system to act. His actions led the human rights prosecutor's office to undertake prosecutions based on his report. The Honduran Commissioner also focused on the issue of judicial independence, issuing a powerful report on the deficiencies in this area and playing an active role in the effort to achieve constitutional reform and a transparent process for election of the new Supreme Court.

³⁵ Patricio Valdivieso and Juan Enrique Vargas, *Cambios en el sistema de justicia en Chile (1990-2002)* in Luis Pásara, coordinator, *Justicia y Sociedad Civil: El papel de la sociedad civil en la reforma judicial: estudios de casos en Argentina, Chile, Colombia y Peru* (Buenos Aires: Ford Foundation and Justice Studies Center of the Americas, 2003), p. 202-207.

³⁶ In El Salvador, for example, the Procuraduría para la Defensa de los Derechos Humanos created *defensorías municipales*, members of the community trained to record and follow human rights violations and provide assistance and orientation in cases that did not constitute human rights violations. See Francisco Díaz Rodríguez, "Investigación sobre Acceso a la Justicia en El Salvador," in José Thompson, ed., *Acceso a la Justicia y Equidad*, p. 131.

In various countries, *Defensorías* have established systems to oversee the treatment of prison inmates and individuals in administrative detention. For a *Defensoría* to carry out adequate oversight, it must have an appropriate mandate and sufficient authority. Oversight mechanisms often encounter obstacles in terms of full and free access, which is essential for adequate monitoring of the treatment of prisoners.

While the establishment of *Defensorías* reflects official recognition of the need for a state agency to protect human rights, governments do not always provide necessary support. In some countries, *Defensoría* staff face harassment and threats. The situation in Guatemala is particularly serious: the Chimaltenango representative of the *Procuraduría para los Derechos Humanos*, was murdered in June 2003, and other staff have been threatened.

The mandates of these institutions also present a number of problems: for example, they may lack sufficient authority to carry out unannounced prison inspections at any time; they may have limitations in their authority concerning actions of the judiciary (e.g., Mexico's National Human Rights Commission); and other agencies of the state may simply ignore their recommendations. El Salvador and Guatemala have demonstrated how the poor selection of the head of the office, based on political considerations, can have a devastating effect on the institution. Budget cuts, which may result from government unhappiness with the actions of a *Defensor*, can also cripple the institution's capacity to carry out its oversight function and protect citizen rights. Despite their limitations, in a number of countries these institutions are already playing a vital role in the protection of citizens' rights.

Alternative Dispute Resolution, Justice at the Local Level, and Legal Empowerment

Alternative dispute resolution (ADR) mechanisms have been widely introduced throughout the region both to reduce court caseloads and as a means to increase access to conflict resolution mechanisms, particularly for individuals who would be unlikely to have access to the justice system. In this context, ADR mechanisms can provide a conflict resolution service that the state is unable to provide through its court system.³⁷ In some cases, they are also seen as mechanisms of conflict prevention designed to promote community participation and peaceful co-existence. Those implementing community ADR mechanisms developed at the national level have found that they need to develop an educational and consultative process that takes into account local traditions and conflict resolution practices to ensure that the proposed ADR mechanisms are appropriate to and accepted by communities.

In Colombia, a decision to create participatory mechanisms to facilitate the resolution of conflicts led to a 1991 law establishing Equitable Conciliation (*Conciliación en Equidad*) and the inclusion of Justices of the Peace (*Justicia de*

³⁷ Various articles discussing ADR mechanisms in the Americas are included in **Sistemas Judiciales** Año 1, No. 2, Resolución Alternativa de Conflictos.

Paz) in the 1991 Constitution. The initial motivation for establishing community justice mechanisms had more to do with reducing the burden on the courts than with promoting community participation in the resolution of conflicts.³⁸ Obstacles to the successful development of the equitable conciliation program included divergent views of its objectives, inconsistent economic and technical support for conciliators, insufficient dissemination of information to the communities, and, in some regions of the country, insufficient effort to integrate the traditions, practices, and existing local conflict resolution mechanisms into the equitable conciliation program. Even though the program was designed to contribute to a transformation of violent practices and foment citizen participation, greater emphasis was placed on the formal aspects. In 1999, the Justice Ministry carried out an evaluation of the process in order to learn from its errors and accepted the need to make adjustments to focus on the strategy of community participation and the recognition of different cultures as a means to promote peaceful co-existence.

In February 1999, the Colombian Congress approved legislation to implement the constitutional provision (article 217) authorizing the establishment of “Justices of the Peace charged with the equitable resolution of individual and community conflicts.” This legislation gave local civil society the responsibility of selecting justices of the peace and thus finding nonviolent solutions to its conflicts; it also encouraged NGOs and government organizations to work together. The law posed many challenges, for example: the risk that an inadequate implementation without adequate community education and community ownership of the undertaking would become an imposition from outside; the question of whether those within a “community” necessarily shared the same criteria about justice; the risk that creating justices of the peace in a situation of armed conflict could inadvertently reinforce the power of armed groups; and the lack of research in communities to see whether they actually considered justices of the peace to be necessary for conflict resolution in their communities.

To try to address these concerns, the Center for Legal and Social Research of the Law Faculty of the Universidad de los Andes (CIJUS) recommended the establishment of justices of the peace on a pilot regional basis to ensure the quality of the process, to better identify strengths and weaknesses, to allow timely changes to address problems, and to ensure better communication with communities participating in the program so that the methodology could be improved as implementation proceeded. CIJUS emphasized that the program needed to be sustainable and could not be dependent on the initiative of a specific government. Its success would depend on providing opportunities for community participation to share ideas, make modifications, and adapt proposals to their needs and reject the state’s proposal if it were not considered appropriate. Further, the implementation process should emphasize training in the communities and regular follow-up and evaluation. Thus, a serious and sustained educational effort

³⁸ Information about these new mechanisms is drawn from, Betsy Parafán, “La justicia comunitaria dentro de la informalización de la justicia en Colombia durante la última década,” en **Sistemas Judiciales**, Año 1, No. 2, p. 59.

would be required, always with the understanding that the justices of the peace should see themselves as building on autonomous community processes.³⁹

In Peru, civil society organizations have worked on strengthening community-level justices of the peace. The *Instituto de Defensa Legal* and Diaconia began working with these judges during the Fujimori regime. While the Fujimori government undertook a series of judicial reforms, its attention was not focused on the justices of the peace, who address problems at a community level. The civil society organizations provided training to these judges and worked to involve the superior courts in providing them with greater support. According to Lovatón:

The changes that have occurred in the situation of justices of the peace during the last five years reflect the form in which civil society –through nongovernmental organizations – has influenced the legislation and the perception that the higher levels of the judiciary have of this sector. Now many Superior Courts demonstrate interest in improving justice of the peace courts in their respective jurisdictions.⁴⁰

Guatemala has adopted a different model for its justice of the peace courts. The Commission to Strengthen Justice in Guatemala, established under the peace accords with significant civil society participation, emphasized the need for constitutional recognition of legal pluralism and indigenous law. The Commission warned of the danger of a conflict between efforts to modernize the judiciary, which included extending the coverage of justices of the peace, and the need to recognize customary law, concluding that both issues should be addressed simultaneously and in harmony.⁴¹ It stated that this constitutional recognition would need to be developed in laws and noted the need for a systematic and thorough study of the practices that constitute customary law (*derecho consuetudinario*), the importance of a broad national discussion about the issue of finding reasonable and widely accepted formulas to harmonize the country in terms of justice, based on authentic respect for cultural diversity, and stressed that the indigenous population should be the principal protagonists in this discussion.

Despite the window of opportunity opened by the peace accords and the work of the Commission, advances in the recognition and strengthening of indigenous law and practice have been limited. Guatemala has experimented recently with community justices of the peace (*juzgados de paz comunitarios*) based on legislation approved in 1997 that authorized the Supreme Court to name justices of the peace, strictly for criminal matters, in five municipalities that had no justices of the peace. Candidates selected were to be individuals renowned for their honesty and ties to the community who could communicate in the dominant local language and in Spanish. During the selection process, the Supreme Court was to carry out consultations with the different community

³⁹ Ibid., 59-64.

⁴⁰ Lovatón, at p. 451; see also, David Lovatón and Wilfredo Ardito, *Justicia de Paz: Nuevas tendencias y tareas pendientes* (Lima: Instituto de Defensa Legal).

⁴¹ Informe Final de la Comisión de Fortalecimiento de la Justicia, *Una nueva justicia para la paz* (Guatemala, 1998), pp. 117-123.

authorities.⁴² The five community justices of the peace began work in January 1998 in five municipalities.

Following the peace accords, the judiciary expanded the geographic coverage of professional justices of the peace, who are not necessarily familiar with the customs or the language of the communities in which they serve. Geographic access has been greatly improved, but questions about the extent to which the new justices of the peace understand indigenous customs and their limited connection to the communities they serve, suggest the need for an evaluation of this model and its real contribution to access to justice in indigenous communities. The models introduced in Guatemala thus far suggest more of an effort to assimilate indigenous justice into the national justice system than a focus on recognizing and strengthening traditional conflict resolution mechanisms.

In Ecuador, community mediation has been established through an initiative of the Center on Law and Society (CIDES), working with two indigenous federations, the Indigenous-Peasant Federation of Imbabura (FICI) and the Federation of Indigenous Organizations of Napo (FOIN).⁴³ The challenge was to provide forms of community conflict resolution that would be compatible with the indigenous population's own culture and with the state's legal norms. Community mediation was designed to improve access to conflict resolution in rural indigenous communities in a timely and fair manner and to introduce democratic practices through active citizen participation in the resolution of conflicts. The effectiveness of the mediators, who are members and residents of the community, is very closely linked to their understanding of the local culture and knowledge of traditional practices. In analyzing the success of this model, Farith Simon notes that the combination of technical elements of mediation with cultural mechanisms for conflict resolutions ensures that the results are closer to the reality of each community. Moreover, because the communities have adopted this mechanism, it appears to be sustainable at a low cost.

In Chile and in Argentina, the NGOs FORJA (Corporación ONG de Desarrollo Formación Jurídica para la Acción) and FAVIM (Fundación Familiares Víctimas Inocentes de Mendoza – Acción Ciudadana) have developed a community paralegal program (*extensionismo jurídico*) that involves training community members so that they can play an important role in local conflict resolution. Through several studies, FORJA demonstrated the majority of legal problems affecting the poor can be resolved out of court with adequate, timely and accurate information, orientation, and advice – which is precisely the role of an *extensionista*.⁴⁴ These successful initiatives are designed to increase citizen participation in the resolution of community problems.

These kinds of initiatives foster “legal empowerment” or “the use of legal services and related development activities to increase disadvantaged populations’ control over

⁴² Decree No. 79-97, modifying the Criminal Procedure Code, art. 50, Sept. 10, 1997.

⁴³ See F. Simon, “El acceso a la justicia en la República del Ecuador,” pp. 85-91.

⁴⁴ FAVIM, “Extensionismo: Una herramienta de participación ciudadana,” **Sistemas Judiciales**, Año 1, No. 2, p. 29.

their lives.”⁴⁵ Issues selected and strategies employed are based on the evolving needs of the poor, focusing on processes and institutions that can be used to advance their rights, rather than a pre-determined part of the justice sector; civil society partnership with the state when governments and agencies show genuine openness to reform; reliance on domestic ideas and initiatives, and experience from other developing countries, particularly those in the region. Legal empowerment can contribute to good governance by involving civil society in building the capacity of state institutions and personnel.⁴⁶ In Ecuador, the international NGO CARE undertook the Sustainable Use of Biological Resources Project (SUBIR) with local Afro-Ecuadorian groups. The Project succeeded in generating national reforms and local benefits, as the communities were successful in lobbying for recognition of Afro-Ecuadorians in the Constitution, including protection of their collective rights as indigenous peoples. Moreover, these groups were able to convince the government to prohibit the division of communal land into individual lots, a practice they considered threatening to their identity and way of life.⁴⁷

This kind of focus requires seeing the disadvantaged as partners, and calls for lawyers who can both teach and learn from the poor. It requires sensitivity and an ability to analyze problems from a cultural, gender, and political perspective, as well as an understanding of how law can be used to effect social change.

Civil Society Involvement in Justice Reform

Before turning to the current state of civil society involvement in justice reform and perspectives for the future, it is worthwhile to remember that less than 20 years ago, the issue of citizen participation was simply not addressed. Judicial reform projects were planned and carried out in conjunction with the Ministry of Justice and/or the Supreme Court. The political realities of the era contributed to the tendency not to consider the importance of involving civil society in reform projects that sought to strengthen judicial independence, improve judicial administration, and reform criminal justice.

Judicial reform projects often appeared to be the property of specific political or judicial elites. In El Salvador, for example, a concerted effort to reform the criminal and criminal procedure codes began to move forward in the last years of the armed conflict. It was a purely governmental effort, carried out by a unit within the Ministry of Justice. While consultation meetings were held with different sectors to ask for their input on proposed reforms, the sectors consulted did not generally see themselves as part of the reform process. Because of the polarization in El Salvador during the armed conflict and the role of the United States, which was closely allied with one of the parties to the armed conflict, the U.S. was not inclined to offer support to any civil society organizations that opposed U.S. policy in El Salvador, nor would those civil society organizations have considered accepting funding from the U.S. government at that time. When those

⁴⁵ See Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, (Washington, DC: Carnegie Endowment for International Peace, Rule of Law Series No. 41, Oct. 2003), p. 25.

⁴⁶ *Ibid*, p 28.

⁴⁷ *Ibid*, p. 33.

working on the reform project sought broader support, some sectors discarded the idea of becoming involved because they saw the reform effort as “theirs,” not “ours.” This situation has gradually changed in subsequent years, and not just in El Salvador, but it may be useful to remember the former situation and the evolution that has taken place.

During the peace negotiations in El Salvador, in 1990-1991, the topic of the “justice system” was specifically included in the negotiating agenda, but there was very little consultation in El Salvador about the issues involved. An inter-party commission held meetings and made some important recommendations to the negotiators. The constitutional reforms that were enacted based on the peace accords gave a formal role to bar associations in the selection of members of the Supreme Court⁴⁸ and to law faculties in the conformation of the judicial council, but these reforms could not be attributed to civil society initiatives. The peace accords ensured important constitutional reforms to change the formula for selecting the Supreme Court and strengthen the judicial council. The accords called for incorporating a representative of a sector outside the legal community, but this recommendation was never implemented by the legislature.

Recognition of the Need for Greater Civil Society Involvement

In their critique of the World Bank’s first (1993) loan (in Venezuela) to be devoted solely to judicial reform, the Lawyers Committee for Human Rights and the Venezuelan Program for Human Rights Education and Action (PROVEA) emphasized the need for broad participation through which issues of concern to the “consumers of the judicial system” and not just the interests of the service providers would be taken into account. Participation should thus ensure that programs address the “right problems” in an appropriate manner. “And, perhaps most importantly, participation encourages the development of a broad social base for reform programs, giving the society at large a role in the transformation of its system of justice, a role that may help broad reform projects survive unexpected political and economic crises.”⁴⁹ As Christina Biebesheimer and Mark Payne point out in their recent report, without stakeholder participation, it is nearly impossible to design a project aimed at expanding access to justice, because “this requires consulting those who do not have access to determine what they perceive to be the obstacles to access.”⁵⁰

Along these lines, the World Bank supported a 2001 study of public opinion about justice in low-income sectors of two Venezuelan states. This study was designed to complement another investigation about access to justice for low-income individuals in the Caracas metropolitan area, which was based on data provided by justice sector

⁴⁸ The legislature elects Supreme Court justices based on a list prepared by the judicial council; half of the names on the list are to come from the most representative associations of Salvadoran lawyers. Constitución de la República de El Salvador, art. 186.

⁴⁹ Lawyers Committee for Human Rights and Venezuelan Program for Human Rights Education and Action, *Halfway to Reform: The World Bank and the Venezuelan Justice System* (1996) at p. 115-116.

⁵⁰ Biebesheimer and Payne, p. 42.

institutions. The two studies led to a series of recommendations for possible reforms and further research.⁵¹

The Guatemalan peace accords recognized the justice system as a key public service that, in its existing form, was one of the “major structural weaknesses of the Guatemalan State.” The peace accords emphasized that the judicial process should be “an instrument for ensuring the basic right to justice, which is manifested in a guarantee of impartiality, objectivity, universality and equality before the law.” Priority was to be given to the “reform the administration of justice in order to put an end to inefficiency, eradicate corruption and guarantee free access to the justice system, impartiality in the application of the law, judicial independence, ethical authority and the integrity and modernization of the system as a whole.”⁵²

Unlike El Salvador, Guatemala did not succeed in implementing constitutional reforms as part of its peace process, but it did establish a Commission to Strengthen Justice (*Comisión de Fortalecimiento de la Justicia*), whose members came from civil society organizations and state institutions (all members participated as individual citizens rather than in representation of their institutions). The Commission’s mandate was to produce “through a broad discussion about the justice system, a report and a set of recommendations that could be rapidly implemented.” To encourage broad discussions, the Commission carried out more than 50 meetings and ten public hearings, in Guatemala City and in other parts of the country. Despite significant citizen participation in this process and a report with important recommendations, political will and consensus have not been strong enough to carry out many of the proposed reforms.

Different Forms of Civil Society Involvement in Justice Reform

Civil society involvement in justice reform can refer to very different phenomena, some of which have been discussed above. Luis Pásara has recently focused on the lack of significant involvement of civil society in justice reform noting that organizations representative of specific sectors (e.g., labor, business) rarely associate themselves with these processes. On the other hand, nongovernmental or civil society organizations may focus on specific aspects of the justice system or on justice reform as a whole, but are unlikely to be seen as representative and have limited political clout.⁵³ As a result, Pásara concludes that organized and representative civil society has not participated in processes of judicial reform.

⁵¹ Carmen Luisa Roche, Coordinator, *Los excluidos de la justicia en Venezuela: Dos Estudios* (Caracas: Tribunal Supremo de Justicia).

⁵² Agreement on the Strengthening of Civilian Power and the Role of the Armed Forces in a Democratic Society.

⁵³ See, e.g., Luis Pásara, coordinator, *Justicia y Sociedad Civil: El papel de la sociedad civil en la reforma judicial: estudios de casos en Argentina, Chile, Colombia y Perú* (Buenos Aires: Fundación Ford and Centro de Estudios de Justicia de las Américas, 2003); Justicia Viva - Instituto de Defensa Legal, Pontificia Universidad Católica del Perú, and Jueces para la Justicia y Democracia, *Cambios en el sistema de justicia: Entre la expectativa y la incertidumbre* (Lima: 2003), p. 185.

The Ford Foundation-Justice Studies Center of the Americas study of the role of civil society in judicial reform in Argentina, Chile, Colombia and Peru, describes the involvement of a variety of civil society organizations – e.g., human rights NGOs, victims’ associations, citizen participation groups, civil society organizations that include business sector involvement (in the Dominican Republic, Colombia and Chile), and feminist organizations, in areas such as: proposing legislative changes, providing civic education and training of justice sector actors, providing technical support, undertaking public interest litigation (national and before the Inter-American system of human rights protection), strengthening community level courts and conflict resolution mechanisms, implementing arbitration and mediation mechanisms, establishing special police stations for women who are victims of violence, and ensuring more transparent processes of judicial selection. Civil society organizations have recently become involved in efforts to evaluate justice sector institutions and the implementation of criminal procedure laws (notably in Chile) and domestic violence laws.

In various countries, civil society organizations are undertaking or proposing new initiatives to educate citizens about the justice system and how they should be able to access it to guarantee their rights as well as monitor its performance, with the goal of developing strategies to pressure the justice system to respond adequately to this new demand.

While the incorporation of organized and representative civil society into the process of justice reform could certainly strengthen justice reform efforts, politically pluralistic and credible civil society coalitions capable of forming strategic alliances with reform-minded politicians, members of the judiciary, and communications media, have already shown that campaigns for transparency in judicial selection can have a significant impact. Before turning to these recent experiences and the lessons they provide, it may be helpful to review briefly some of the ways not already addressed in which civil society has been incorporated in or has taken on issues related to justice reform.

Formal Incorporation of Civil Society in Evaluation and Judicial Selection Mechanisms

In various countries, justice sector institutions have sought to involve civil society in efforts to evaluate or improve their work. For example, El Salvador’s *Procuraduría General de la República*, which provides legal assistance to citizens in such areas as establishing paternity rights, child support, domestic violence, employment issues, and public defense in criminal cases, recently began working closely with women’s organizations. Joint efforts led to the passage of legislation requiring those elected to the legislature to provide evidence that they are up to date on their child support payments. The *Procurador* also involved civil society in an effort to upgrade the services provided by the institution, provide oversight, and participate in the preparation of a participatory work plan. A new NGO project seeks to monitor the *Procuraduría’s* enforcement of laws related to the recognition of paternity and payment of child support.

The Salvadoran *Fiscal General de la República* formed a special commission made up of representatives of civil society to carry out an overall evaluation of the institution. A serious evaluation effort, carried out in close consultation with the staff of the institution, led to a series of recommendations.⁵⁴ Because civil society has not been involved in monitoring the institution's efforts to implement these recommendations, it is difficult to gauge the impact of this promising initiative.

During recent years, a number of countries in Latin America have established judicial councils with varying mandates and compositions. They may have a role in the selection of Supreme Court justices, lower court judges, judicial evaluation and discipline, training of judges, and the administration of the judiciary. Judicial council members may include representatives of one or more branches of government, bar associations, law faculties or other academic institutions, and the Public Ministry.

The creation of judicial councils or other institutions designed to play a role in judicial selection processes, and the inclusion of different sectors in these entities, has created an opportunity for civil society involvement and for transparency campaigns. Indeed, in several countries the establishment of a judicial council has been seen as an important step towards creating a more independent judiciary, with greater civic involvement.

Whether or not civil society has been formally incorporated into the judicial selection process and whether or not reforms have been undertaken, recent experience suggests that the selection process is much more likely to be transparent if a civil society coalition organizes an effective campaign to ensure this. Occasionally, an institution is able to reform itself, but, realistically, most institutions make changes in response to outside pressure. If none of the branches of government is accustomed to making decisions in a transparent fashion, greater involvement of different branches of government in a selection process is not likely to guarantee transparency, although it may enhance political pluralism. Unfortunately, as Guatemala's experience has shown, bar associations and universities cannot be counted on to follow transparent practices in selection processes nor will their representatives necessarily guarantee transparency. The inclusion of different sectors of civil society in an unregulated process to select candidates for high judicial posts does not ensure the transparency of the process or the selection of highly qualified candidates.

In some countries, the judiciary has fallen into such discredit, largely because of the its overly close ties to political parties or reputation for corrupt practices, that diverse sectors of civil society have come together in transparency campaigns, particularly in connection with the selection of Supreme Court justices. Because of the hierarchical nature of most Latin American justice systems, reformers have identified the selection of the Supreme Court as an indispensable element in any effort to improve a justice system. A corrupt or undemocratic Supreme Court, responsible for appointing, promoting and

⁵⁴ See, e.g., Ricardo Córdova Macías, "La experiencia de la Comisión Especial para una Evaluación Integral de la Fiscalía General de la República de El Salvador," in *Iniciativas de la Sociedad Civil para la Transparencia en el Sector Judicial*.

disciplining other judges, can block other changes designed to ensure a more independent, impartial, accessible, and effective justice system.

Recent transparency campaigns in Argentina, the Dominican Republic, Guatemala, and Honduras have demonstrated the potential impact of these efforts, especially when they are broad-based, with the common goal of a more independent, transparent, and accessible justice system.

The Dominican Republic: Civil Society Coalition for an Independent Judiciary

In the Dominican Republic, the judiciary was known for its traditional dependence on the country's leading political players. Electoral fraud in 1994 led to constitutional reform including a provision that Supreme Court justices would be appointed by the new judicial council. It was not until 1997, however, that the President convened the council to name the new Supreme Court justices.

The Dominican Republic created a judicial council with a highly political composition, which convenes only when it needs to select new Supreme Court justices. The country's president heads the council, which also includes the president of the Senate and three other legislators, the president of the Supreme Court, and one other Supreme Court justice. Although this composition would not seem to favor a transparent selection process, a broad civil society coalition was successful in persuading the council to carry out an unusually transparent process during its first Supreme Court appointment process in 1997.⁵⁵

The Coalition for an Independent Judiciary was led by the Foundation for Institutionality and Justice, FINJUS, and included the civic movement Citizen Participation, the National Association of Young Businessmen, the Dominican Association of Corporate Lawyers, the Juan Montalvo Center, and the Dominican Center for Social Assistance and Research. The Coalition sought to create a broad alliance of civil society organizations that included community organizations, professional, civic, and bar associations, and social movements (such as youth, women, and the disabled). The Coalition emphasized that the administration of justice is not the exclusive property of the state: "As the main users of the justice system, citizens have a clear and legitimate interest in ensuring that it plays by democratic rules and that the conduct of its officials can be evaluated against pre-established parameters and standards."⁵⁶

The Coalition created a set of qualifications (*perfil*) for Supreme Court nominees, which was then used to vet candidates proposed by civil society. Some 800 names were presented. At first, the judicial council declined to hold public sessions. After the Coalition sponsored two televised events in which the candidates with significant support

⁵⁵ For a description of this process, see Carlos R. Salcedo C., "Transparency in the Selection of Supreme Court Justices in the Dominican Republic," in *Civil Society Initiatives for Transparency in the Justice Sector* (Washington, DC: Due Process of Law Foundation, 2003).

⁵⁶ Carlos R. Salcedo C., *Transparency in the Selection of Supreme Court Justices in the Dominican Republic*, p. 47.

publicly voiced their positions and interacted with the public, the President, as head of the council, decided to televise its proceedings, including the final selection. The results of this campaign were impressive: of the 16 justices appointed, 12 came from the Coalition's nominations and the qualifications of the other four were consistent with the Coalition's proposed criteria. The actions of the new Supreme Court have largely reflected this transparent process, and the Court has been considered among the most open government institutions in the Dominican Republic. It has exercised care in judicial appointments, generally relying on a competitive, merit-based, public process, and publishes a monthly budget report and reports on its activities.

Despite this promising initial campaign, a second campaign organized during the subsequent, 2001, Supreme Court appointment process to fill three vacancies on the Court was much less successful. The member organizations of the Coalition regrouped for this effort, but limited their activities almost exclusively to the media, where they relied heavily on the written press. Unlike their earlier campaign, they did not try to build a broader alliance or organize events or forums. When the Coalition proposed that the Council follow the same procedures it had used four years earlier, the president rejected the idea of televising the Council's proceedings. Disappointingly, the Supreme Court itself failed to encourage civil society's activities or insist on transparency in the appointment process.

Argentina: Citizen Monitoring of the Judicial Council and Improving the Supreme Court Selection Process

In 1997, less than 10% of Argentines expressed confidence in the justice system, according to public opinion polls.⁵⁷ Against this background, Citizen Power (*Poder Ciudadano*) initiated its "Citizens for Justice" program in 1997. The Citizens for Justice program established a data bank on judges, which included information about their professional and educational background, judicial career, family financial situation, involvement in legal actions, and opinions about specific aspects of justice in Argentina. At the outset, very few judges were willing to provide this information.

In 1994, Argentina enacted a constitutional reform establishing a federal judicial council, but no implementing legislation was enacted. The new Citizens for Justice program began a campaign urging the establishment of the council. Congress finally adopted implementing legislation in December 1997, although the terms of the law came from a political agreement reached in the face of international pressure.⁵⁸ Citizen Power's efforts were then directed at ensuring the transparency of the new council. All candidates to represent the different sectors included in the judicial council were asked to respond to a questionnaire for a data bank, and all who were ultimately selected as councilors agreed

⁵⁷ The information about Citizen Power's Citizens for Justice program comes from Maria Julia Pérez Tort, "Iniciativas de la Sociedad Civil para la Transparencia del Consejo de la Magistratura," in *Iniciativas de la Sociedad Civil para la Transparencia en el Sector Judicial and Poder Ciudadano, Monitoreo Cívico Consejo de la Magistratura* (Buenos Aires, 2003).

⁵⁸ The 20-member council includes the chief justice of the supreme court, 4 judges, 8 congressional representatives, 4 lawyers, 1 representative from the executive, and 2 academics.

to respond. This constituted an important step in institutionalizing the practice of providing public access to information of public interest.

Citizen Power developed a proposal for the judicial council's internal regulations designed to ensure transparency in its activities. Once the council published its proposed regulations, Citizen Power prepared a critique, which was published in a leading newspaper and focused on the council's proposal to have closed plenary and committee meetings, thereby undermining guarantees of transparency and democracy in the council's activities. This article provoked an unprecedented citizen debate about the internal regulations of an institution in the justice system. Ultimately, the council abandoned its position and agreed to open its plenary and committee meetings to the public.

As part of its activities, Citizen Power sought to educate the public about the importance of the Council and its activities for their lives. It established a civic monitoring project, created public databases, carried out joint actions with NGOs, prepared periodic public reports detailing the strengths and weaknesses of the council, engaged in congressional lobbying, held public forums, sought to engage council members in efforts to build alliances. These activities increased citizen understanding of the role of the council. While the monitoring process undertaken by Citizen Power greatly increased the council's transparency and prevented the most egregiously political selection of judicial candidates, it could not overcome defects in the design of the council that made it bureaucratic and inefficient, with over-representation from the political branches of government, nor ensure selection of the best-qualified candidates.

Citizen Power describes its monitoring effort in the following terms:

...keeping a close eye on the functioning of the judicial council to obtain rigorous information and undertake actions that can correct the weaknesses detected and build on the strengths. In this way, we aspire to excellence in administration, full access to justice, and the absolute independence of the judiciary.

Building on the experience in Argentina, in 2002, Citizen Power and the Institute for Comparative Studies in Penal and Social Sciences (INECIP) initiated efforts to monitor judicial councils in Bolivia and Peru. In addition, INECIP recently completed a comparative study of judicial councils in Argentina, Bolivia, El Salvador, Paraguay, and Peru, that examines the appropriateness of their structure, faculties, and functioning to strengthen the transparency and independence of the judiciary.⁵⁹

Argentina's current institutional crisis led to citizen demands for a change in the Supreme Court. Realizing that simply changing the membership of the Supreme Court would not be sufficient to address the multiple problems of the Court, six civil society organizations concerned with the justice system from varying perspectives came together to identify the most serious problems affecting the functioning of the Supreme Court,

⁵⁹ "Consejos de la Magistratura: Los Consejos de la Magistratura de Argentina, Bolivia, El Salvador, Paraguay, y Perú," *Pena y Estado, edición especial*, mayo 2003.

propose solutions to these problems, and identify the specific responsibilities of those with the power to carry out these changes.⁶⁰

In June 2003, the Minister, Vice Minister, and Secretary of Justice met with these organizations to discuss their proposals. On June 19, 2003, President Nestor Kirchner, relying largely on the recommendations included in the civil society documents (*Una Corte para la Democracia I y II*), issued a decree that voluntarily imposed limitations on the executive's power to appoint the Supreme Court. This decree established that the names and professional background of nominees would be published for three days in the *Boletín Oficial* and at least two nationally circulated newspapers. The citizenry, nongovernmental organizations, professional associations, academic and human rights entities would have a five-day period after the last publication in the *Boletín Oficial* to present to the Ministry of Justice, Security and Human Rights their written and documented opinions, comments and observations about the proposed candidates. The Decree also requires that candidates present a sworn statement listing their property, that of their spouse and minor children according to the terms of the *Ley de Ética de la Función Pública*. Candidates must also submit another statement that lists the civil society organizations and commercial enterprises in which they participate or have participated during the past eight years, the law firms in which they are current or former members, the name of their clients or contractors during the same eight-year period (to the extent permitted by existing rules of professional ethics), and any commitment that could affect their impartiality because of their own activities, their spouse's activities, or those of their parents or children, all with the goal of allowing an objective evaluation of the existence of incompatibilities or conflicts of interest.⁶¹ After consideration of the comments received, the Executive is to make a reasoned decision as to whether to submit the name of the nominee to the Senate for ratification.

Guatemala: Civil Society Campaigns for Transparency

Faced with a stalled judicial reform process after the failure to ratify constitutional amendments agreed to as part of the peace process, the Myrna Mack Foundation sought to breath new life into justice reform efforts. Only with judicial leadership fully committed to justice reform, they reasoned, would it be possible to move forward on peace accord commitments related to access to justice, recognition of indigenous law, and efforts to eradicate corruption and overcome impunity.⁶²

To undertake its first campaign for transparency in the appointments of Supreme Court and Appeals Court judges, the Mack Foundation sought out other organizations comprised of consumers of the justice system, Relatives and Friends against Crime and

⁶⁰ See Asociación por los Derechos Civiles, Centro de Estudios Legales y Sociales (CELS), Fundación Poder Ciudadano, Fundación Ambiente y Recursos Naturales (FARN), Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP), and Unión de Usuarios y Consumidores, "Una Corte para la Democracia I," and "Una Corte para la Democracia II," available at www.abogadosvoluntarios.net.

⁶¹ Decree 222/03, art. 5.

⁶² The description of this campaign is based on: Carmen Aida Ibarra Moran, "Citizen Action against Impunity and the Lack of Transparency in the Administration of Justice in Guatemala," in Due Process of Law Foundation, *Civil Society Initiatives for Transparency in the Justice Sector*.

Kidnapping (*Familiares y Amigos contra la Delincuencia y el Secuestro* - FADS) and Anguished Mothers (*Madres Angustiadas*). The members of both organizations are victims or relatives of victims of organized crime, particularly kidnappings. Coming from different social strata, these organizations, like the Mack Foundation, had established credibility in public opinion and the media. In conjunction with the Commission to Strengthen Justice,⁶³ to explain the campaign and the proposed candidate profile and selection procedures, the Movement convened civil society organizations, political party leadership and members of congress. Those participating supported the proposals and made some suggestions to improve them, such as including a gender focus and the need for ethnic equality. The only organization to remain actively engaged throughout this campaign was the Guatemalan Workers Central (*Central de Trabajadores de Guatemala*).

As the Coalition in the Dominican Republic had done, the Movement prepared a set of proposed qualifications (*perfil*) with indicators for candidates and proposed procedures for their selection. During the course of this process, the Movement developed evaluation instruments and submitted these to the nominating committees, which were to present slates of candidates to Congress.⁶⁴

The Movement believes that the combination of political and technical issues, and particularly the development of serious proposals worthy of consideration, contributed significantly to the level of impact achieved. In other words, the value of participation increases to the extent that it goes beyond activism to operate at levels requiring technical and political skills critical to articulating proposals and demands.⁶⁵

The campaign stressed the importance of the judicial selection process and its impact on justice reform and justice over the next five years. It also emphasized the importance of avoiding political or ruling party control of these high posts and the need to end the influence of organized crime and powerful military groups implicated in human rights violations. These principles attracted considerable attention and support from a variety of sectors and the media. Because of the nominating committee structure, the Movement explained these positions to all the individuals and institutions directly and indirectly involved in the selection process for Supreme and Appeals Court judges. The Movement also interviewed members of the nominating committees, political party leaders, and congressional leaders; all were provided with copies of the proposed set of qualifications and procedures. The nominating committees indicated that they would implement these proposals.

⁶³ This Commission was established in the Peace Accords and consists of civil society representatives, justice sector institutions, and the bar association.

⁶⁴ The nominating committee consists of representatives of Guatemala's universities, deans of law schools, the bar association, and the assembly of appeals court judges. This committee receives judicial nominations and, following an unregulated internal procedure, prepares a slate of candidates for submission to Congress. A similar procedure is used for nominating and appointing appeals court judges.

⁶⁵ Ibarra, p. 24.

Two of the country's leading newspapers became crucial and strategic allies in the campaign, providing substantial coverage and galvanizing public opinion. Both papers donated space to publish the Movement's proposals, encouraged articles analyzing the appointment process and its implications, and investigated the background and qualifications of each candidate; this type of media engagement was unprecedented. The Movement received key support from the president of Congress who pledged to follow the proposed guidelines and provided congressional facilities for a forum organized by the Movement on the selection process. During this event, the president of the nominating committee presented the slate of Supreme Court nominees to the President of the Congress.

Based on this positive experience, the Pro-Justice Movement reconvened in early 2000 to plan a campaign for the selection of Constitutional Court judges. The Guatemalan Workers Central did not participate actively in this campaign; however, the Guatemala Institute for Comparative Research in Criminal Sciences (*Instituto de Estudios Comparados en Ciencias Penales de Guatemala*) joined the Movement. This time, the Movement had to present its proposed qualifications and procedures to five distinct electoral entities, each of which selects and appoints a Constitutional Court judge and an alternate.⁶⁶

While this campaign was ultimately less successful than the first one, it introduced an important educational component, organizing forums in different parts of the country to discuss the role of the Constitutional Court. During this campaign, aspiring candidates linked to organized crime and impunity for human rights crimes were publicly identified.

The Movement's third campaign focused on the selection of the Attorney General (*Fiscal General*) in 2001-2002.⁶⁷ For this campaign, the Movement prepared an analysis of the prosecutor's office, which focused on the deficiencies of the institution and the main obstacles that impeded its ability to coordinate with other institutions in the justice sector. The paper called on aspiring candidates to present a substantive work plan and proposals for institutional reform. Many candidates incorporated their work plans into their campaigns. This campaign featured a broader presentation of the issues and a press strategy to investigate the backgrounds of aspiring candidates. The Pro-Justice Movement was at the forefront of public insistence that the slate of candidates be vetted to exclude jurists of whose backgrounds were particularly questionable. Ultimately, the slate of six candidates submitted to the president did not include any of the lawyers whose reputations had been seriously questioned.

⁶⁶ The electoral bodies are: (1) the San Carlos University, a public institution, (2) the Supreme Court of Justice, (3) the Executive, (4) the Legislature, and (5) the bar association (*Colegio de Abogados*).

⁶⁷ The Attorney General or chief prosecutor is appointed by the President of the Republic from a slate of six candidates submitted by a nominating committee made up of the President of the Supreme Court, the President of the Bar Association, the President of the Honor Tribunal of the Bar Association, and the deans of university law schools.

The Pro-Justice Movement has been successful in generating public debate about the selection processes and the qualification and skills of the candidates, something that was unheard of prior to 1999.

Honduras: Civil Society's Role in Developing a Transparent Supreme Court Selection Process

During 2001, civil society organizations in Honduras came together to work on two advocacy objectives related to the justice system: a constitutional reform that would establish a more participatory, more transparent, and less politicized mechanism for the selection of Supreme Court justices; and the adoption and implementation of a new Criminal Procedure Code.⁶⁸ Based on the existing constitutional provisions, the Honduran Supreme Court had been chosen through a much-criticized and highly politicized process that coincided with presidential elections.

The Coalition to Strengthen Justice originally consisted of the Federation of Private Development Organizations in Honduras (FOPRIDEH), the Catholic Bishops Conference, the Foundation to Promote Exports, the Association of Honduran Municipalities, and the National Commissioner for Human Rights. The constitutional reform, which had to be passed in 2000 so that it could be ratified by the subsequent legislature in 2001, called for the establishment of a nominating board (*junta nominadora*) to propose candidates. The Coalition drafted proposed implementing legislation for the nominating board, obtained support from social organizations for a lobbying campaign, organized media campaigns and direct appeals to legislators. The Coalition's efforts were strengthened by the great public credibility of its members, led by Cardinal Oscar Andrés Rodríguez.

As soon as Congress passed the Nominating Board Law in September 2001, the Coalition's advocacy focus shifted to civil society and the need to organize a citizen assembly that would elect representatives to the Nominating Board. Reaching agreement among the civil society groups proved highly complex because of power struggles, sector-based interests, and a lack of consensus. Ultimately, by focusing on areas of agreement rather than their many differences, the eight participating organizations were able to form the Nominating Board in October 2001. Once the Board of Directors was sworn in, they initiated a complex process for the selection of 45 candidates, from which the National Congress would select 15. The broad-based Nominating Board includes representatives of the Honduran Bar Association, NGOs, the law faculty of the National Autonomous University of Honduras, the Honduran Private Enterprise Council, the Supreme Court, union and peasant organizations, and the National Commissioner for Human Rights. On January 25, 2002, the National Congress appointed the new 15-member Supreme Court based on nominations from civil society. Nine of the 15 justices named are women, including the president of the Supreme Court.

⁶⁸ Information about the Coalition's efforts comes from José León Aguilar, "Key Elements of the Citizen Experience in Justice Reform in Honduras," in Due Process of Law Foundation, *Civil Society Initiatives for Transparency in the Justice Sector*.

The experience with civil society involvement in Supreme Court selection is widely seen in Honduras as an important advance in the effort to have a more transparent and participatory selection system. Some in Honduras, however, perceive the Coalition as overly dependent on donor support. It remains to be seen whether these diverse civil society organizations will be able to consolidate and sustain a participatory and transparent system for Supreme Court selection that focuses on the professional qualifications and moral integrity of the candidates.

Peru: Strengthening Civil Society Participation in Justice Reform

Following the departure of former president Fujimori, Peruvians have sought to strengthen judicial independence and undertake a more comprehensive and equitable justice reform effort. In 2003, a consortium comprised of the Instituto de Defensa Legal (IDL), the Catholic University's law faculty and the Association of Judges for Democracy won a USAID competition to carry out a project that would involve citizen participation in and monitoring of justice reform in Peru. *Consortio Justicia Viva* constitutes an unprecedented initiative in Peru, bringing together for a common purpose an NGO (IDL) with a history of providing legal defense and education about human rights issues, one of the most prestigious universities in the country, and a judges' association (also something novel in Peru).

Justicia Viva has become very involved in the issue of judicial selection, encouraging citizens to learn about the backgrounds of candidates and to raise objections when these may be necessary. The consortium also engages in intense academic activity, including assessments, studies and proposals and the organization of seminars and workshops, publications, etc.

A new official commission for justice reform in Peru, CERIAJUS, has brought together representatives of civil society with officials such as the president of the judiciary, the attorney general, the president of the national judicial council, in order to reach consensus proposals for reform that take into account all aspects of the justice system.

Costa Rica: Developing a National Judicial Reform Agenda

Despite a widely perceived need for further judicial reforms in Costa Rica, particularly to ensure a swifter and more technically consistent justice, advances have been limited by a lack of consensus among branches of government and within different government bodies. Civil society had not been effectively incorporated into this discussion. To address this situation, the Costa Rican Bar Association (*Colegio de Abogados*), has spearheaded an effort to develop a national judicial reform agenda that would define the model of justice desired; establish the central aspects of judicial reform; and establish a "strategy to accelerate the process of reform in an atmosphere of inter-institutional and inter-party cooperation, with the participation of civil society."⁶⁹

⁶⁹ Colegio de Abogados de Costa Rica, *Foro Agenda Nacional de Reformas al Poder Judicial* (San José, Costa Rica: Instituto Costarricense de Ciencias Jurídicas, 2003), p. 16.

Through publication in two of the country's leading newspapers in August 2002, the Bar Association invited all sectors interested in the improvement of the Costa Rican justice system to submit their opinions about the justice system's problems, their causes, and proposed solutions. This initiative also involved a consultation with selected experts through an in-depth interview. An opinion survey provided additional information. Based on these inputs, the Bar Association prepared preliminary documents, which were then discussed and validated with three groups made up of 15 people from different sectors. The final document is to be the subject of discussion in a series of workshops, which are to determine which branch of government (the legislature or the judiciary) is to carry out specific reforms, the procedures and timeline.

Ecuador: Building a National Coalition for Justice Reform

In Ecuador, the recently formed National Coalition for Justice comprises a range of individuals from different sectors who can constitute an independent voice in favor of certain key principles. The Coalition has opposed some proposals for a complete reorganization of the Supreme Court, and has successfully pushed for the development of regulations to control the Supreme Court's cooptation process. Current efforts include working on monitoring of judicial appointment processes and a campaign to have the three existing vacancies on the Supreme Court filled by women (there are no women currently on the 31 member Supreme Court). The Coalition is also developing a justice observatory that will monitor selected indicators.

Lessons Learned and Challenges for the Future

Recent civil society transparency initiatives have shown that strategic and organized public participation in judicial appointment processes can have a significant impact on the outcome of these processes and also serve as a mechanism for civic education about the importance of the judiciary. Successful campaigns have relied on a comprehensive approach that includes: advocacy, publicity, education, technically viable proposals, making citizens aware of the importance of institutional reforms and the benefits they will provide. Civil society involvement will have more impact if it is ongoing and constructive, which implies engaging with the issues and institutions in the justice sector and taking the initiative to present proposals for the development of transparency mechanisms or other mechanisms designed to improve the justice system. It also means developing the ability to follow up on such efforts as an institutional evaluation carried out by civil society in order to monitor the implementation of recommendations. Without follow-up, however, this kind of involvement runs the risk of allowing an institution to claim that it is implementing these recommendations, without any outside monitoring to assess the extent to which this is actually being done. Similarly, simply incorporating civil society representatives into aspects of justice sector functioning does not in itself guarantee greater transparency and accountability.

Recent experiences have shown that civil society organizations need to be able to engage in dialogue, not just confrontation, with key players in the legal and political spheres. Coalitions that include diverse groups that have established reputations and

credibility are likely to have greater impact. Spearheading these efforts requires an organization with the ability to convene a broad spectrum of public opinion, with technical capacity, and able to establish constructive relations with justice sector institutions.

Judicial selection processes provide a particular opportunity for civil society organizations to develop a strategy to implement, strengthen, and preserve reforms, and to prevent consolidation of anti-reform sectors. In several countries, civil society coalitions for transparency in judicial selection processes have been unusually broad, and have been successful in engaging selected media outlets, politicians, and judges who are open to change. In some countries, civil society organizations have begun to work closely with reform-minded judges' associations, building promising alliances. Successful efforts provide models that may be useful in other countries, as suggested by the initiative of *Poder Ciudadano* and INECIP to develop a program for monitoring judicial councils in Bolivia and Peru.

These experiences have demonstrated the need to institutionalize transparent practices so that they do not depend on the good will of a particular council member or the action of a specific civil society organization. Another hard lesson from these experiences is that one successful transparency campaign does not guarantee that the next selection process will be carried out in an equally transparent fashion. Or to put in another way, civil society organizations cannot rest on their laurels after completing a successful campaign. Ingrained non-transparent practices have a tendency to reassert themselves. In general, it has proven easier for transparency campaigns to prevent the appointment of the most blatantly politicized and corrupt candidates, but much more difficult to ensure the appointment of the most qualified individuals.

While some judiciaries, justice sector institutions, executives, and legislatures welcome civil society involvement, others prefer to maintain their prerogative to make decisions behind closed doors. Nonetheless, and depending on the specific political context and their own appreciation of the importance of civil society participation, justice sector and government officials are increasingly looking to civil society for reform proposals.

Donors have an important role to play in supporting these civil society initiatives, which requires sufficient donor flexibility to support initiatives that may arise in different windows of opportunity. On the other hand, these processes need to be autonomous and sustainable: they should not be overly dependent on donor initiatives or financial support.

As the examples cited above suggest, civil society organizations are currently involved in a variety of initiatives related to justice reform. Promising efforts are now underway to share experiences at a regional level and to develop mechanisms to evaluate and monitor the implementation of reforms. Because both evaluation and monitoring mechanisms are so complex, more effort needs to be dedicated to their design and refinement. In many cases, this also involves developing the technical capacity to monitor and evaluate effectively the functioning of justice sector institutions and the

implementation of reforms. Developing this technical capacity should contribute to the preparation of reliable empirical studies of justice system functioning and the impact of reforms. Ongoing oversight mechanisms need to be developed or strengthened, to ensure that legal and institutional reforms are properly carried out and have the intended effects. Thus, mechanisms need to be developed to monitor the implementation of laws and the impact of initiatives designed to improve access to effective justice (e.g., criminal procedure reforms, domestic violence laws, *amparos*) to detect problems – or advances – and to make well-founded recommendations. This implies the development of adequate indicators to measure the functioning of the system in different areas. Ideally, evaluations should be carried out before and after reforms are implemented and oversight mechanisms should involve both state institutions and civil society organizations.

The impact of alternative dispute resolution mechanisms, which have proliferated greatly in recent years, need to be evaluated carefully, taking into consideration whether they ensure respect for fundamental rights, are appropriate for the communities in which they are established (based on community participation in the decision to establish them and the definition of their mandate, personnel, etc.), and adequately define their relationship with the state justice system.

As in other areas, successful – and unsuccessful – experiences need to be shared so that civil society organizations in different countries – and sometimes within the same country – can learn from each other, and so that justice sector and other branches of government can appreciate the potential benefit of greater transparency and civil society involvement. A variety of initiatives in recent years have provided opportunities for greater exchange among civil society organizations and among justice sector institutions in countries throughout the region. The Justice Studies Center of the Americas has played a key coordinating role in creating opportunities for greater inter-change and the development of indicators that can be used in countries throughout the region.

A key challenge is determining how to involve civil society more broadly and in a more sustained fashion in reform processes, including the development of analyses (*diagnosticos*), the proposal and implementation of reforms, and evaluation and monitoring of reform impact. In several countries, including Ecuador, efforts are currently underway to consolidate a broad coalition of individuals and/or institutions who can serve as an independent voice, reach consensus in key areas, and thus be able to have a real impact on justice sector reforms. Despite the important initiatives in different countries, in most countries in the region there is not yet a consistent and constructive effort, proactive, and capable of presenting viable and well-founded proposals and developing permanent mechanisms for monitoring, dialogue and advocacy. To ensure that justice reform truly benefits those who use the justice system – and those who have traditionally been excluded from it – and is sustainable over time, a wide variety of organized civil society groups will need to become involved in these issues in a serious and ongoing manner.