

# **BUILDING ON QUICKSAND**

## **THE COLLAPSE OF THE WORLD BANK'S JUDICIAL REFORM PROJECT IN PERU**

**April 2000**

**Lawyers Committee for Human Rights**

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Lawyers Committee for Human Rights

Since 1978 the Lawyers Committee for Human Rights has worked to promote international human rights and refugee law and legal procedures in the United States and abroad. The Chair of the Lawyers Committee is William Zabel. Michael H. Posner is its Executive Director. George Black is Research and Editorial Director.

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## **PREFACE**

Since 1994, the Lawyers Committee for Human Rights has followed developments at two multilateral development banks (MDBs) related to human rights and the administration of justice: the World Bank and the Inter-American Development Bank (IDB). As bilateral aid levels in this area decreased, both Banks increased the number of loans for judicial sector reform, and the Lawyers Committee began to shift its focus from the United States Agency for International Development's (USAID) "Administration of Justice" projects to larger bank-financed judicial and legal reform initiatives. The Lawyers Committee has sought to assess the banks' progress toward the stated objectives of promoting proper judicial values through such projects.

The Committee's first detailed effort targeted the World Bank's "flagship" project, its first devoted solely to judicial reform, in Venezuela.<sup>1</sup> The Committee's analysis identified a number of fundamental flaws<sup>2</sup> in Venezuela's justice system that the reform, dedicated to improvement in administrative practices and information management, did not address. The Lawyers Committee and the *Programa Venezolano de Educación—Acción en Derechos Humanos* (Provea) convened a follow-up conference in Caracas in 1996 to bring 21 environmental and human rights lawyers from 10 countries in Latin America together with representatives of the Venezuelan government, the World Bank, and the Inter-American Development Bank to discuss the banks' justifications for and approach to judicial reform. The conference signaled to the banks the strong interest of non-governmental advocates in judicial reform as well as their frustration at being excluded from discussion of the shape of reform.<sup>3</sup>

Following the Caracas meeting, the Lawyers Committee sought to build on the remarkable degree of consensus between diverse groups of lawyers and NGOs about judicial reform priorities. Working with environmental advocates in Bolivia and Paraguay, the Lawyers Committee examined aspects of World Bank and IDB judicial reform efforts underway in both countries.<sup>4</sup> The Lawyers Committee also examined the World Bank's judicial reform project in Peru, approved in December 1997. This paper tells the story of the collapse of that project following maneuvers by Peru's Fujimori government that undermined judicial independence there.

This paper was written by Jeffrey A. Clark, with substantial contributions from Patricia Armstrong, Christine Pendzich and Robert O. Varenik. Robert O. Varenik edited the paper. We thank Ernesto de la Jara and his colleagues at the *Instituto de Defensa Legal* in Lima for providing

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<sup>1</sup> Lawyers Committee for Human Rights and Programa Venezolano de Educación—Acción en Derechos Humanos (Provea), *Halfway to Reform: The World Bank and the Venezuelan Justice System* (New York: 1996) [hereinafter *Halfway to Reform*]. See also Lawyers Committee for Human Rights, *The World Bank: Governance and Human Rights*, 2nd ed. (New York: 1995).

<sup>2</sup> Among the more obvious problems are rampant corruption, virtual control of judges by political parties, lack of access to justice, archaic laws, and virtual impunity for police.

<sup>3</sup> Growing out of the meeting, the involvement of Venezuelan NGOs in discussions about the shape of judicial reform in Venezuela increased. A coalition of NGOs and business groups, led by Provea, were invited to meet and discuss their views with President Caldera and thereafter developed a statement of principles regarding reform which has formed the basis of their continued advocacy.

<sup>4</sup> See generally Lawyers Committee for Human Rights, *IFIs Judicial Reform and the Environment: A Preliminary Assessment: Environmental Enforcement in Paraguay* (New York: 1998). See also Lawyers Committee for Human Rights, *Advancing Judicial Reform: An Environmental Case Study in Bolivia* (New York: 2000).

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## **I. INTRODUCTION**

Throughout Latin America, governments are undertaking the long-overdue task of modernizing their justice systems. Driven primarily by the desire to attract and hold foreign investment, these governments seek to enhance the protection of property and contract rights. Governments have attempted various tactics, including modernizing antiquated property registries, streamlining judicial procedures, establishing alternative dispute resolution systems, improving judicial training, and establishing career systems with performance incentives and sanctions. Taken together, these programs represent one of the region's most far-reaching and sustained efforts ever to address the limitations of national judicial sectors that have been largely neglected.

The World Bank and other multilateral development banks can play an important role in the funding and design of judicial reform projects. By offering both the financial resources and technical assistance, the World Bank can promote reforms that governments might otherwise be reluctant to consider. In Peru however, the World Bank found itself in partnership with a government that had repeatedly demonstrated its willingness to take steps that would set back the cause of judicial reform.

In late 1997, the World Bank approved the Peru Judicial Reform Project (“the Project”), with a loan of \$22.5 million. Only a few months after the Project’s inception, the government’s persistent and highly publicized interference in the judicial branch prompted the Bank to announce it would postpone loan disbursements pending the government’s restoration of conditions necessary for the Project to meet its goals. After the Peruvian government failed to correct the harm done, and facing a probably adverse decision by the Bank, it requested cancellation of the Project. The Bank formally terminated the Project in September 1998, before implementation ever began.

This paper examines the circumstances that led to this unusual outcome and the lessons they hold for future World Bank support of judicial reform efforts. The Peru experience raises three issues that are fundamental to the success of judicial reform initiatives, particularly those financed by external donors: 1) the degree to which executive interference in judicial matters offers a more accurate barometer of the government’s commitment to reform than any expressions of good will; 2) how and when donors should make the determination about whether a government’s commitment is sufficient to warrant the investment of time and resources in a reform project; and 3) what approaches optimize the chances for success and minimize the potential for wasted time and money.

The paper first briefly reviews the World Bank’s activities in the area of judicial reform and then describes the Peruvian judicial system, its recent problems, the government’s efforts to address those problems, and ensuing controversies. The decisions to postpone and then cancel the loan are reviewed and analyzed. We find that a conditionality framework permitted the World Bank to withhold support in the face of government action that, in undermining judicial independence and narrowing unacceptably the scope of legitimate judicial action, severely impaired the Project’s ability to meet fundamental objectives. We conclude with an assessment of the three issues raised above. We hope that the experience of the Peru Judicial Reform Project will be a cautionary tale for donors supporting judicial reform efforts in countries where a government fails to demonstrate meaningful and sustained commitment to judicial independence.

## II. THE WORLD BANK AND JUDICIAL REFORM IN LATIN AMERICA

The mid-1980s witnessed a growth of bilateral and multilateral development assistance devoted to reform of Latin America's justice systems.<sup>5</sup> USAID led the way with a series of administration of justice programs in Central America. The World Bank ("the Bank"), followed by the Inter-American Development Bank (IDB), took up these concerns in the early 1990s. As of July 1999, between them the Bank and the IDB had approved or had under consideration 30 judicial or legal reform projects in 17 countries in Latin American and the Caribbean. At that time, loan amounts approved by both banks for the region totaled more than \$302 million.<sup>6</sup> Although both the Bank and the IDB developed judicial reform projects in Peru, this paper focuses on the World Bank project.<sup>7</sup>

In contrast to USAID, which has made criminal justice its primary focus, the World Bank began its lending and technical assistance in the area of judicial reform with a narrow focus on commercial and related legal matters thought to be most relevant to economic development. In an effort to define the permissible scope of "governance" lending into which judicial reform falls, the Bank's General Council stipulated in 1990 that any Bank-financed reform initiative must have "direct and obvious" implications for economic development.<sup>8</sup> Pursuant to this interpretation, the Bank's early judicial reform activities were oriented toward improving the efficiency of the judiciary in ways that provided a more secure legal framework for private investment, including lowering the transaction costs associated with securing property and contract rights through the court system.<sup>9</sup> The Bank supported activities such as strengthening of member countries' key

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<sup>5</sup>For greater detail on the history of bilateral and multilateral involvement in judicial reform, as well as an analysis of the World Bank's changing scope of involvement, see *Halfway to Reform*, *supra* note 1, at 20-31.

<sup>6</sup>Information compiled by the Lawyers Committee for Human Rights based on various World Bank and IDB sources, including World Bank's Monthly Operational Summary, Project Information Documents and Staff Appraisal Reports; and IDB's Project Profiles and Project Proposals.

<sup>7</sup>The IDB's project in Peru—"Improving Access to the Justice System," with a loan of \$20 million—was approved in late November 1997, shortly before the World Bank Project. It won some praise for its orientation to basic justice issues, and did not engender the same amount of attention or controversy as the World Bank Project. However, many human rights NGOs still oppose the IDB project on the ground that it is connected to the government's broader judicial reform enterprise, which is strongly opposed by the NGOs. Interview with Miguel Huerta, Legal Advisor, *Coordinadora Nacional de Derechos Humanos* [National Human Rights Coordination Office], Lima, Peru (May 18, 1999) [hereinafter Huerta interview]. Some IDB officials are of the view that because their project takes a relatively "grass roots" approach, offering improved access to justice in marginalized areas, it should not be subject to political conditionality of the sort discussed in this report. Lawyers Committee interview with Pablo Alonso, IDB Task Manager for Peru Judicial Reform Project (February 11, 1998).

<sup>8</sup>Memorandum of Vice President and General Counsel, "Issues of Governance in the Governing Members: The Extent of Their Relevance under the Bank's Articles of Agreement," (World Bank, December 21, 1990), at 38, quoted in *Halfway to Reform*, *supra* note 1, at 25. The memo states that Article IV of the Bank's Articles of Agreement restricts Bank judicial reform support to projects related to the development of a legal framework appropriate to a market economy.

<sup>9</sup>For detailed background on the evolution of the World Bank's involvement in judicial reform, see *Halfway to Reform*, *supra* note 1, at 25-31. For a discussion of legal reform in Latin America generally, see Joseph R. Thome, "Searching for Democracy: The Rule of Law and the Process of Legal Reform in Latin America," draft paper prepared for the Workshop on *Reforma Judicial, Motivaciones, Proyectos, Caminos Recorridos, Caminos por Recorrer* [Judicial Reform, Rational, Initiatives, Roads Traveled and Roads not Traveled], *Instituto Internacional de Sociología Jurídica*, April 6-7 1998, Oñati, Gipuzkoa, Spain (available at <http://www.uoregon.edu/~caguire/thome.htm>).



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judicial and related administrative agencies (including supreme courts and judicial councils) through funding to enhance their planning, budgeting, and general management capacities; reorganization and streamlining of courtroom management systems; training for judges and improvement of the buildings housing judicial offices. The Bank avoided aspects of the judicial system that did not fall within the narrow definition of its mandate, and therefore did not address issues related to judicial independence, access to justice, constitutional law, criminal law, or the protection of human rights.

Despite the initial predisposition toward a narrow technical focus,<sup>10</sup> the Bank came to recognize the demand for a more comprehensive view of judicial systems and the need to address some of the thornier problems such as judicial independence. A 1996 Bank study identified measures to guarantee judicial independence, enhancing the public's access to justice, and incorporating gender issues in the reform process as among the "main elements necessary to ensure an equitable and efficient judiciary."<sup>11</sup> Judicial independence was deemed an "imperative feature of any judicial reform project."<sup>12</sup>

The Bank's emerging acknowledgment concerning judicial independence followed from its recognition of a more general principle: that project success required "ownership" of a project by a borrower government.<sup>13</sup> Implicit in "ownership" is a commitment to reforms necessary to make the project successful, which presents challenges in the case of judicial reform projects. In the case of legal reform work, the Bank has conceded that "[u]nless a country is committed to reforming its legal regime... legal technical assistance may be a waste of resources."<sup>14</sup> Perhaps the most significant measure of such a commitment is concrete governmental support for judicial independence. Ideally, such an assessment should be made early in project planning, before project approval. The challenge in practice is how to make that determination. In the case of the Peru Judicial Reform Project, the Bank was apparently satisfied with the government's position. However, this conclusion was called into question very soon after the Project was approved.

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<sup>10</sup> *Halfway to Reform*, *supra* note 1, at 27, Appendix B.

<sup>11</sup> Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform*, Technical Paper No. 319 (World Bank, 1996) [hereinafter *Elements of Reform*], at 7.

<sup>12</sup> *Id.*, at 7.

<sup>13</sup> In 1994, in an examination of its experience with governance concerns, the Bank stated: "Legal reform cannot be successful without the full conviction and political commitment of the government concerned." World Bank, *Governance—The World Bank's Experience* (World Bank, 1994), at 24. In 1995, the same principle was expressed in a review of legal reform projects: "In order for legal technical assistance to bring about the desired results, the recipient governments need to demonstrate a clear commitment to legal reform and take full ownership of the legal reform process." Legal Department, *The World Bank and Legal Technical Assistance—Initial Lessons*, Policy Research Working Paper No. 1414 (World Bank, 1995) [hereinafter *Initial Lessons*], at 18-19.

<sup>14</sup> See *Initial Lessons*, *supra* note 13, at 11.

### III. THE JUDICIAL SECTOR IN PERU

#### A. President Fujimori's Dismantling of the Decrepit Justice System

Peru's justice system entered the 1990s discredited and in crisis. For decades, it had been “increasingly characterized as corrupt, incompetent, inefficient, or simply irrelevant.”<sup>15</sup> Attempts at reform by the military government that came to power in 1968<sup>16</sup> and some subsequent civilian governments<sup>17</sup> did little to restore flagging public confidence. There was no credible attempt by the judiciary to purge its ranks of corrupt judges. Poorly managed courts resulted in enormous case backlogs and inordinate delays. Judges were insufficiently educated, and infrastructure was crumbling.<sup>18</sup>

Police investigations and criminal prosecutions were often ineffective, and judges appeared to a skeptical public to dwell on irrelevant formalities and miss the point of the cases before them.<sup>19</sup> The spread of the Shining Path and MRTA guerrilla movements and the growth of drug trafficking brought an onslaught of particularly difficult and politically charged cases into the courts, which were seen as too weak to resolve tough cases impartially.<sup>20</sup> For example, public outrage followed the Supreme Court's not guilty verdict in the *in absentia* trial of Shining Path leader Abimael Guzman.<sup>21</sup> By the 1990 elections that brought Alberto Fujimori to power, the state of the entire legal system, including the judiciary, was dire.

Short of resources, riddled with corruption, constrained by archaic procedures designed for an epoch long past, beset by conflicts between and within its major institutions, disdained by the public opinion and by the more talented professionals who formerly might have joined its ranks, the justice system was widely acknowledged to represent the worst of the public institutions in a

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<sup>15</sup> Linn A. Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* 135 (Westview Press: Boulder, CO: 1998) [hereinafter *The Politics of Justice*].

<sup>16</sup> After the military took power by coup in 1968, the military government replaced the entire Supreme Court and thereafter replaced hundreds of other judges. The government justified its actions “with a series of speeches and declarations stressing the corruption and inefficiency of the traditional system and its lack of political independence.” *Id.*, at 143-144.

<sup>17</sup> *Id.*, at 147-50.

<sup>18</sup> The problems plaguing Peru's judiciary are extensively documented elsewhere and will not be discussed in detail here. See *The Politics of Justice*, *supra* note 15. See also World Bank, Peru: Judicial Sector Assessment, Public Sector Modernization and Private Sector Development Division, Report No. 13718-PE (November 30, 1994) [hereinafter *Judicial Sector Assessment*] for an extensive analysis of administrative and access to justice issues. Important complementary analyses, focusing on issues of judicial autonomy, can be found in *ideele*, the Spanish-language magazine of the *Instituto de Defensa Legal* [Institute of Legal Defense] (IDL), Lima, Peru. See in particular Special Issue #100 of August/September, 1997.

<sup>19</sup> See *The Politics of Justice*, *supra* note 15, at 155.

<sup>20</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy, Addendum: Report on the mission to Peru*, U.N. Commission on Human Rights, 54th Sess., Agenda Item 8, at I A, ¶ 3, U.N. Doc. E/CN.4/1998/39/Add.1 (1998) [hereinafter *Report of the Special Rapporteur*].

<sup>21</sup> See *The Politics of Justice*, *supra* note 15, at 154.

country where the entire public sector was in crisis.<sup>22</sup>

An electorate disillusioned with traditional political parties swept little-known Alberto Fujimori to a surprise victory in the 1990 presidential campaign. President Fujimori's attempts to put emergency powers in place resulted in conflict with Congress,<sup>23</sup> leading him to rely increasingly on authoritarian measures.<sup>24</sup> In an April 5, 1992 *autogolpe* (“self-coup”), President Fujimori dissolved Congress, suspended the 1979 Constitution, and proceeded to rule by decree. Part of Fujimori’s justification for the *autogolpe* was that exceptional powers were needed to reform the judiciary and win the battle against terrorism.<sup>25</sup> Decree Law 25.418 of April 5 accordingly promised the “reorganization” of the judicial branch.<sup>26</sup> The Decree Law “abrogated the scheme set out in the 1979 Constitution for nominating, confirming, removing and promoting judicial personnel and, in effect, ceded to the Executive the virtually unchecked exercise of these prerogatives.”<sup>27</sup> Through a series of further Decree Laws issued in the next three weeks, the Fujimori government embarked on a sweeping purge of the judiciary, firing 13 Supreme Court Justices, all members of the Constitutional Tribunal, all members of the National and District Councils of the Judiciary, and the Attorney General. Likewise, “130 judicial personnel in the Lima and Callao district were fired, including superior court judges, chief prosecutors, judges in court districts, provincial prosecutors and juvenile court judges.”<sup>28</sup> The government named new members and President of the Supreme Court, which was then empowered to fill vacancies in the superior courts. Now dominated by members appointed by the Fujimori government, the Supreme Court began evaluating all remaining Peruvian judges; the majority were thereafter dismissed.<sup>29</sup> Another evaluation process implemented by decree in September 1992, which involved a one-day questionnaire/exam, led to the dismissal of some 166 prosecutors and 646 administrative personnel.<sup>30</sup> Fired judges and prosecutors were replaced by provisional appointees, subject to dismissal and transfer at any time, without cause.<sup>31</sup>

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<sup>22</sup> *Id.*, at 151-152.

<sup>23</sup> Some accounts of the period indicate that Congress was willing to allow President Fujimori great latitude in light of the nation’s crisis, and after delegating extraordinary lawmaking powers to the President, approved all but a few of the most radical of the proposals contained in Fujimori’s emergency package. These dealt mainly with the antiterrorism measures decreed by Fujimori after the *autogolpe*, which would become notorious among the legal changes wrought by the creation of the “faceless courts.” See Maxwell A. Cameron, *Self-Coups: Peru, Guatemala and Russia*, 9 *J. Democracy* 125 (1998) [hereinafter *Self-Coups*] at 127; see *supra* note 8 for additional sources.

<sup>24</sup> See *The Politics of Justice*, *supra* note 15, at 58.

<sup>25</sup> See *Self-Coups*, *supra* note 23, at 125-126.

<sup>26</sup> Decreto Ley 25418, *Ley de Bases del Gobierno de Emergencia y Reconstrucción Nacional* [Decree Law 25418, Framework Law of the Government of Emergency and National Reconstruction] (April 5, 1992). Excerpt cited in Judicial Sector Assessment, *supra* note 18, at 67.

<sup>27</sup> *Report of the Commission of International Jurists on the Administration of Justice in Peru*, November 30, 1993, at 29 [hereinafter *Report of the Commission of International Jurists*].

<sup>28</sup> *Id.*, at 29. In total, 22 of the 28 Supreme Court judges and all four Supreme Court-level prosecutors either resigned or were dismissed. United States Information Service, *Peruvian Judicial Sector*, background paper, June 1993 [hereinafter *Peruvian Judicial Sector*].

<sup>29</sup> See *Report of the Commission of International Jurists*, *supra* note 27, at 29. The Commission was organized by the U.S. government with the knowledge and consent of the Peruvian government, which nonetheless appeared unprepared for the breadth and depth of the legal criticism. The Fujimori government rejected the report and its conclusions, a posture it has assumed consistently in the face of adverse reactions to its intervention in the legal systems.

<sup>30</sup> See *Peruvian Judicial Sector*, *supra* note 28.

<sup>31</sup> Human Rights Watch, *Peru: The Two Faces of Justice* (1995) [hereinafter *The Two Faces of Justice*], at 6.

The result was that virtually all judges and prosecutors were denied even minimum job security.<sup>32</sup>

While these conditions of uncertainty may have temporarily created a more honest Supreme Court and perhaps reduced corruption at other levels, it soon became evident that susceptibility to political interference of the Supreme Court and Public Prosecutor's office was higher than ever.<sup>33</sup> Many Peruvians initially welcomed the President's extreme measures to tear down a thoroughly discredited legal system,<sup>34</sup> but both domestic and international criticism followed. A commission of prominent jurists from Argentina, Italy and the United States that visited Peru in September 1993 to review key features and projected reforms of the justice system in Peru concluded that the effect of these measures "has been to grievously erode, if not eliminate, the institutional independence of the civilian judiciary."<sup>35</sup>

## **B. President Fujimori's Rebuilding Process**

President Fujimori claimed that his *autogolpe* was intended not to eliminate democracy but to strengthen it.<sup>36</sup> Reforming and fortifying the judiciary was to play a major role in that effort. In response to the perceived weakness of the judiciary in dispensing justice in cases of terrorism, in 1992 Fujimori established by decree a system of anonymous ("faceless") courts,<sup>37</sup> both civilian and military, to prosecute and try a range of broadly defined crimes relating to terrorism. Military judges, predominantly career military officers with no legal training, were empowered to try civilians for some of these crimes.<sup>38</sup> Disregard for due process led to "a breath-taking record of human rights violations,"<sup>39</sup> including many wrongful convictions as well as unacceptably long pre-trial detentions.

In 1993, the Fujimori government adopted a new Constitution that provided for independent courts and the re-establishment of the legislature. However, it became clear early on that the new legislature would not create a meaningful counterbalance to the power of the executive. To the contrary, the new arrangements created an obsequious legislature,<sup>40</sup> which passed "surprise laws" at

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<sup>32</sup> See *The Politics of Justice*, *supra* note 15, at 177.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See *Report of the Commission of International Jurists*, *supra* note 27, at 29. The Commission was set up under an understanding between the governments of Peru and the United States.

<sup>36</sup> See *Self-Coups*, *supra* note 23, at 125.

<sup>37</sup> The measures provided for secret trials by judges and prosecutors who were not identified.

<sup>38</sup> For more detail, see Lawyers Committee for Human Rights, *Lawyers Committee Concerns Regarding Anti-Terrorism Courts and the Administration of Justice since April 1992* (1993), and *The Two Faces of Justice*, *supra* note 31.

<sup>39</sup> See *The Two Faces of Justice*, *supra* note 31, at 7.

<sup>40</sup> The 1993 Constitution turned the old bicameral legislature, which provided significant regional representation given that the seats in the House of Representatives were divided by department, with a unicameral legislature and a single district. Seats were shared on the base of all the votes in the nation allowing significant control based on political campaigns focussed on heavily populated urban centers. See Cynthia McClintock, *Resucitando la designacion de regimen autoritario? Peru bajo Fujimori, 1995-1998* [Reviving the designation of authoritarian regime? Peru under Fujimori] to be published in Fernando Tuesta, *La Politica Bajo Fujimori* (1999). Strengthened by about 70 votes he

the behest of the executive, including a 1995 law giving amnesty to armed forces personnel for human rights abuses.<sup>41</sup>

The government's rebuilding of the judicial system began in earnest in November 1995, when Decree Law 26.546 established an Executive Commission composed of three Supreme Court justices who chose retired Admiral José Dellepiane to be the Commission's Executive Secretary.<sup>42</sup> The Commission was mandated to undertake internal judicial reforms including administrative reorganizations and improvements.<sup>43</sup> After a series of cosmetic changes implemented with great fanfare, it became clear by mid-1996 that the Fujimori government's goals for the judiciary were more ambitious. In June, at the executive's behest, Congress passed a controversial Law 26.623 providing for the future creation of the Judicial Coordinating Council to oversee judicial reform. Pending the establishment of this entity, the legislation set up an interim commission, also chaired by Dellepiane, with a broad mandate, including power to reorganize external entities responsible for judicial appointments and training.<sup>44</sup> The law also further bolstered the Dellepiane-headed Executive Commission,<sup>45</sup> to which it transferred control over further reforms from the Supreme Court and senior prosecutors. The newly empowered Executive Commission and the interim commission were all closely allied to President Fujimori, providing him with greater control over judicial reform. The initiative was opposed by several Supreme Court justices and senior officials of the Public Ministry<sup>46</sup> who lost control over reforms to the President's point man, Dellepiane. He was given great leeway to spearhead what was to become the country's most ambitious judicial reform effort: a three-year, \$100 million plan, \$40 million of which was to be provided by the government. Foreign donors were expected to contribute the balance.<sup>47</sup>

Some observers suggested that one of the motivations for the development of this judicial reform plan was to prepare the ground work for assistance from international donors such as the World Bank, the Inter-American Development Bank, and USAID. The World Bank had already begun preliminary work and discussions on a possible reform program,<sup>48</sup> and interest from other major donors soon followed. The Bank enthusiastically backed the Fujimori government's dramatic

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could always count on, Fujimori used the legislature as a rubber stamp. Since only a single reading of a bill was required, legislation could go through in as little as 24 hours without significant deliberation or debate. *See Self-Coups, supra* note 23, at 129.

<sup>41</sup> *See Self-Coups, supra* note 23, at 129. This law granted amnesty from prosecution to those who committed human rights abuses during the war on terrorism from May 1980 to June 1995 and cleared the records of security force personnel who had already been convicted of human rights abuse. *See also The Two Faces of Justice, supra* note 31. The legislation attracted the condemnation of human rights NGOs in Peru and abroad. *See e.g., ideele*, No. 77 (July 1995), in which contributors from Peru and abroad criticize the “*ley de amnistía*” [amnesty law] from a wide range of perspectives. Of even greater concern from the perspective of judicial independence was subsequent legislation divesting the courts of any right to review the amnesty law. *See infra* notes 66-67 and accompanying text.

<sup>42</sup> *See The Politics of Justice, supra* note 15, at 180. Admiral Dellepiane had a background in administrative but not judicial reform.

<sup>43</sup> *Id.*, at 180.

<sup>44</sup> *Id.*, at 185.

<sup>45</sup> *Id.*, at 185, fn 21.

<sup>46</sup> *Id.*, at 185.

<sup>47</sup> *Id.*, at 185.

<sup>48</sup> *Id.*, at 181.

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economic liberalization policies and its efforts to integrate Peru's economy into the global economy.<sup>49</sup> From the Bank's perspective, sustaining the economic growth that these reforms were expected to achieve required changes in the role of the State that would "increase the government's capacity to govern" and "provide the appropriate environment for private sector led development."<sup>50</sup> In this view, an appropriate framework for the administration of justice was a vital ingredient of market-driven economic progress. Accordingly, judicial reform was a focus of Bank attention for several years leading to the approval of the Project in 1997.

On December 4, 1997, the Bank's Board approved a US\$22.5 million Judicial Reform Project for Peru. Its stated purpose was to "provide better justice in civil and commercial dispute resolution by improving the access, efficiency, quality, integrity and independence of the justice system."<sup>51</sup> The loan was to help finance consulting services, training, equipment, and physical infrastructure improvements. According to Bank documents, the Project was to focus on three areas that overlapped significantly with the Fujimori government's existing reform initiative: administration of justice, access to justice, and judicial selection, training, and evaluation. The administration of justice component would concentrate first on strengthening the general management capacities of the Supreme Court and the Superior Courts, through management training and a new management information system. It also would contribute to improving the performance of lower courts through training, better information systems and physical improvements. The access to justice component would provide training to justices of the peace, reform the justice of the peace system, create a fund for NGO involvement,<sup>52</sup> and would supply funding to the Office of the Public Defender (a national ombudsman's office responsible for the defending fundamental rights of citizens).<sup>53</sup> The judicial selection, training and evaluation component would support key activities of the National Council of the Judiciary (NCJ) (responsible for the selection, periodic ratification or removal of judges and prosecutors), the Judicial Academy (responsible for judicial and prosecutorial education and training), and the Office of Judicial Supervision (responsible for judicial discipline), respectively.

The Project was to be carried out by two judicial branch entities as well as three external agencies. The internal entities were Dellepiane's Executive Commission and the Office of Judicial Supervision. The three external agencies were the Office of the Public Defender, the National Council of the Judiciary, and the Judicial Academy.

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<sup>49</sup> World Bank, *Peru: Country Assistance Strategy* (June 1997) [hereinafter *Country Assistance Strategy*], at i.

<sup>50</sup> See Judicial Sector Assessment, *supra* note 18, at 1.

<sup>51</sup> World Bank Project Information Document, Peru: Judicial Reform Project, Project ID PEPA40107 (October, 1996) [hereinafter Project Information Document] at ¶ 7. The funds provided by the Bank were to be complemented by an additional U.S. \$8 million of the Government's own resources.

<sup>52</sup> This is an "Access Fund" for non-governmental organizations that would identify and propose projects in the areas of alternative dispute resolution mechanisms, public education on judicial reform issues or civil society activities to monitor the performance of courts and individuals judges (such as "court watch").

<sup>53</sup> The funding would be provided "to refine its organizational structure, norms and procedures, carry out baseline and follow-up analyses/workshops on issues related to native communities, environmental protection, and the relationship between citizens and the public/judicial sector institutions." See Project Information Document, *supra* note 51, at ¶ 8, C.

#### **IV. JUDICIAL REFORM AND THE INDEPENDENCE AND AUTONOMY OF THE JUDICIARY**

The Bank's Project was beset with controversy long before it was approved. The entrenched public mistrust of the justice system was not assuaged by President Fujimori's judicial reforms, as the judicial system in Peru appeared to become more, not less, politicized. Several controversial moves by the Fujimori administration, described in more detail below, attracted intense criticism within Peru from human rights and other non-governmental organizations, scholarly observers, and the media. These moves, and the behavior of the Peruvian Congress, fueled suspicions that the "reform" was primarily intended to solidify executive control of the judiciary rather than improve the administration of justice. Growing doubts about the government's reform program<sup>54</sup> became closely linked to the Project: to many, it appeared inappropriate for the Bank to partner with a government whose own judicial reform initiative lacked credibility, and futile for it to attempt to improve a judiciary that was subject to such pervasive political interference.

##### **A. Judicial Appointments**

One of the few potential enhancements of judicial independence after the *autogolpe* was the 1993 constitutional provision giving the National Council of the Judiciary (NCJ) sole authority to select, dismiss and ratify or confirm the country's judges and prosecutors. Prior to 1993, the NCJ's role had been largely advisory. The revival and strengthening of the NCJ was seen as a rare positive government initiative to promote judicial independence in Peru.<sup>55</sup> Subsequent efforts to scale back new powers of the NCJ became the lightning rod for resistance to the Project and led directly to the Bank's decision to withhold loan disbursements.

As in many countries in Latin America and beyond, the Peruvian executive and legislature traditionally played a significant role in the appointments of judges and public prosecutors.<sup>56</sup> However, particularly after the *autogolpe*, Peru was an extreme case. Even as late as August 1997, "the overwhelming majority" of the replacements for judges purged during the *autogolpe* had only provisional appointments.<sup>57</sup> The government exploited this situation for political purposes,

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<sup>54</sup> The Andean Commission of Jurists indicates that since the *autogolpe*, there has been a general deterioration in the rule of law so severe that it sets Peru apart from other Andean countries. See *Comisión Andina de Juristas: A Paso Lento* [Andean Commission of Jurists: *At a Slow Pace*] (1999) [hereinafter *A Paso Lento*].

<sup>55</sup> See *Report of the Commission of International Jurists*, *supra* note 27, at 42.

<sup>56</sup> See *The Politics of Justice*, *supra* note 15, at 70-71.

<sup>57</sup> As of August 1997, there were 16 permanent Supreme Court judges and 16 judges who had been appointed by the emergency government on a provisional basis; 247 High Court judges are permanent and 113 are provisional, with an additional 25 who are alternate judges; 119 first instance judges are permanent, 90 are provisional and 474 are alternate judges; ... In addition, it is alleged that outside of Lima, all of Peru's judges and prosecutors serve on a provisional basis, and are thus more vulnerable to government interference." See Report of the Special Rapporteur, *supra* note 20, at III.B. 3.5. The U.S. Department of State, *Peru Country Report on Human Rights Practices for 1998* states: "Of the country's 1,531 judges, only 574 have permanent appointments, having been independently selected. The remaining 957, including 19 of the 33 judges of the Supreme Court, have provisional or temporary status only." United States Department of State, *Peru Country Report on Human Rights Practices for 1998*, Bureau of Democracy, Human Rights, and Labor (1999) [hereinafter *1998 Peru Country Report*] at Sec. 1, e.

frequently “punishing” judges who issued rulings unfavorable to the government or the military by transfers or outright removal. The strengthening of the NCJ in 1993 was seen as a step towards the depoliticization of an inadequate appointment process that had “plagued Peru for years.”<sup>58</sup> The NCJ, which already had an important practical role in the Project as one of its four executing agencies, accordingly took on an important symbolic role as well.

By 1996, the NCJ began to exercise the powers vested in it by the 1993 Constitution by confirming or “ratifying” the appointments of provisional judges, particularly at Supreme and superior court levels,<sup>59</sup> thereby providing them with greater security of tenure. This led to optimism among critics of President Fujimori's judicial reform plans, as it appeared the process would effectively end the problem of provisional judges.<sup>60</sup> As it sought to continue that ratification process with the bulk of the judiciary, which sat in the lower courts, it clashed with Admiral Dellepiane. Dellepiane's group suggested that the NCJ postpone this activity for a year, “pending further decisions on the judicial career and requirements for appointment to it.”<sup>61</sup> Soon after, on December 3, 1996, a new law was passed suspending the NCJ's authority to name tenured judges until the Judicial Academy was able to develop and provide adequate training to judicial candidates. This seemingly innocuous initiative, which received little media coverage, effectively suspended indefinitely the NCJ's appointments.<sup>62</sup> The NCJ never fully recovered.

## **B. Judicial Review**

The power to review the legality of executive and legislative actions and to pass judgment on the applicability of legislation is inherent to an impartial and independent judiciary. After the *autogolpe*, judges who sought to define an independent role for the judicial branch would struggle with the Fujimori government.<sup>63</sup> Apart from the purge of the judiciary itself, the first direct blow to judicial review following the *autogolpe* was Decree Law 25.454 of April 28, 1992, by which the government prevented judicial personnel from challenging the legality of their dismissals.<sup>64</sup> Thereafter, President Fujimori's emergency government, under the guise of reform, transferred the leadership of the Public Ministry (under the Attorney General), which had begun to establish a degree of autonomy prior to the *autogolpe*, to an ally of the President.<sup>65</sup> Empowered to challenge

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<sup>58</sup> See *Report of the Commission of International Jurists*, *supra* note 27, at 42.

<sup>59</sup> See *The Politics of Justice*, *supra* note 15, at 184.

<sup>60</sup> Furthermore, there was consensus that the Council's members were rigorously evaluating candidates prior to selection. See Ernesto de la Jara, “*Reforma de la Justicia: Cuánto tiene de ruido y cuánto de nueces?*” [Justice Reform: How much is just noise and how much is substantial], *ideele*, No. 84 February-March 1996 [hereinafter *Reforma de la Justicia*], at 4.

<sup>61</sup> *The Politics of Justice*, *supra* note 15, at 184.

<sup>62</sup> The complicated reasons for this are explained in an interview with Róger Rodríguez shortly after his resignation from the presidency of the NCJ. “*Entrevista con Roger Rodriguez Iturry: Cuestión de Principios*” [Interview with Róger Rodríguez Iturry: A Question of Principles], *ideele*, No. 106 (April 1998) [hereinafter *Cuestión de Principios*], at 7-11.

<sup>63</sup> Interview with Hugo Rodríguez, Legal Advisor, Comisión Nacional de Derechos Humanos [National Human Rights Commission] (a non-governmental human rights organization), Lima, Peru (May 18, 1999).

<sup>64</sup> See *Report of the Commission of International Jurists*, *supra* note 27, at 29.

<sup>65</sup> The Public Ministry, or *Fiscalía de la Nación*, a body present in many Latin American countries, is responsible for upholding citizens' rights. It has a role in judicial review. While the burden of the work of the Public Ministry and thus



the constitutionality of laws, the Public Ministry was well positioned to initiate a review of the 1995 amnesty law. Instead, the new Attorney General, Nérida Colán, did not hesitate to remove a prosecutor who filed a challenge to that law.<sup>66</sup>

After the amnesty law finally reached the courts, judicial review was further undermined when in 1995 Congress passed controversial legislation purporting to prohibit the judiciary from reviewing the constitutionality of the amnesty law.<sup>67</sup> Congress passed this “interpretive statute” in response to a split Supreme Court ruling that the amnesty law did not protect those accused of the notorious 1991 *Barrios Altos* massacre, in which a military death squad killed 15 people, including an eight-year-old child, even though the ruling upheld the constitutionality of the amnesty itself.

Perhaps the highest profile attack on judicial review involved the Constitutional Tribunal,<sup>68</sup> which was closed after the *autogolpe* but revived in June 1996. The revived Constitutional Tribunal was hampered from the start by structural impediments that had the effect of undermining its independence. Its seven members, elected by two-thirds vote of the Congress, would serve five-year terms with no immediate reelection permitted. The five-year term coincides with legislative and presidential elections, making candidates vulnerable to influence by political trends.<sup>69</sup> More troubling was the requirement of a majority of six (out of seven possible votes) to find a law or governmental action unconstitutional.<sup>70</sup> Since three of the seven original appointees were closely allied with the President and his party,<sup>71</sup> the six-vote rule allowed the executive considerable control over the Court. Accordingly, when opponents of the Fujimori government lodged a constitutional challenge in 1996 to an interpretive law passed by Congress that appeared to permit President Fujimori to run for a third term despite constitutional provisions to the contrary, a bitterly divided Tribunal<sup>72</sup> was unable to muster the six votes necessary to rule the law unconstitutional. Three judges who had voted against a third presidential term held a press conference to announce their

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of the majority of *fiscales* is that of representing the prosecution in criminal cases (see *The Politics of Justice*, *supra* note 15, at 85), it has the power to challenge the constitutionality of laws, to introduce legislation, and to investigate any member of the governments. See *Self-Coups*, *supra* note 23, at 131, fn 12.

<sup>66</sup> See *Self-Coups*, *supra* note 23, at 131.

<sup>67</sup> Department of State, *Peru Country Report on Human Rights Practices for 1995*, Bureau of Democracy, Human Rights, and Labor (1996) [hereinafter *1995 Peru Country Report*], at Sec. 1, e.

<sup>68</sup> The Constitutional Tribunal was established under the 1979 Constitution to review constitutionality of legislation as well as to hear both procedural appeals of *habeas corpus* (to address illegal detention) and *amparo* (to address infringement of all other constitutionally guaranteed rights). See *The Politics of Justice*, *supra* note 15, at 95.

<sup>69</sup> See *The Politics of Justice*, *supra* note 15, at 96 and 179.

<sup>70</sup> In addition, the constitutionality of a law may be challenged only during a six-month period immediately following its enactment. See Department of State, *Peru Country Report on Human Rights Practices for 1997*, Bureau of Democracy, Human Rights, and Labor (1998) [hereinafter *1997 Peru Country Report*], at Sec. 1, e.

<sup>71</sup> The government had “stacked the Constitutional Tribunal with enough jurists linked to military intelligence or the executive to give the President and National Intelligence Service a veto over constitutional challenges to legislation.” See *Self-Coups*, *supra* note 23, at 131. Furthermore, in 1996, judges in this Court expressed concern at the serious lack of financial resources for the administration of the Court. See Report of the Special Rapporteur, *supra* note 20.

<sup>72</sup> The State Department's 1997 *Country Report* on Peru describes the events: “In August 1996, despite vocal opposition both in and out of Congress, President Fujimori's controlling congressional majority interpreted the constitutional provision limiting presidents to no more than two consecutive terms in office to permit him to run for a third consecutive term in 2000, claiming that it would be only his second term under the 1993 Constitution.” See *1997 Peru Country Report*, *supra* note 70, at Sec. 3, e.

non-binding opinion that the interpretive law, although not necessarily unconstitutional, did not permit the President to run for a third term. In May 1997, Congress dismissed these three judges, “thereby emasculating one of the few constitutional constraints on the government.”<sup>73</sup> The action prompted protests across the nation and strong objections from the judiciary, the Office of the Public Defender and the Catholic Church. The head of the Tribunal resigned in protest and it effectively ceased to function, not having the quorum necessary to review constitutional matters.<sup>74</sup>

### **C. Endemic Interference: Other Examples**

Political interference in the judicial system was endemic.<sup>75</sup> For example, in late December 1996, a Lima criminal judge, Elba Minaya, granted a *habeas corpus* petition in favor of General (ret.) Rodolfo Robles, and ordered his immediate liberation two weeks after a military judge had ordered him detained and charged for military offences including “insulting the armed forces.” Three years earlier, General Robles had publicly accused a special detachment of the Army Intelligence Service of abducting and killing a professor and 10 students from La Cantuta University in July 1992. The military judge who had originally ordered Robles detained denounced Judge Minaya's ruling.<sup>76</sup> On the Monday after the weekend ruling, Judge Minaya, was unexpectedly transferred to another court.<sup>77</sup> After a storm of press coverage, Judge Minaya was restored to her position by the President of Lima's Superior Court.<sup>78</sup> However, three civilian judges of a Lima appeals court that upheld this and other *habeas corpus* decisions were relieved of their duties by a controversial June 1997 Supreme Court panel ruling on a disciplinary complaint lodged by military judges. The complaint accused the three appeals court judges of improper interference in the military's sphere of jurisdiction. The three judges were subsequently transferred to other Lima courts at the instruction of Dellepiane's powerful Executive Commission.<sup>79</sup> These actions sent a strong warning to judges who were in a position to decide cases involving the military justice system, which continued to try civilians in Peru for an increasingly broad range of matters even as the situation of insurgency and terrorism they were allegedly created to address ebbed significantly.<sup>80</sup> The appearance was given that judges who decided jurisdictional battles between military courts and civilian courts in favor of the latter would be removed from their posts, effectively undermining judicial independence in these politically sensitive cases.

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<sup>73</sup> See *Self-Coups*, *supra* note 23, at 131.

<sup>74</sup> The firing of the magistrates roused public opinion to a degree unprecedented up to that point under Fujimori's presidency. For the first time since he came into office, Fujimori faced protest marches in several major universities around the country. His action contributed to a sharp, albeit short-lived, decline in public approval ratings. See Report of the Special Rapporteur, *supra* note 20.

<sup>75</sup> The State Department report for the year 1997 states that Peru's courts are “not fully independent of the executive branch, and therefore often compromised.” See *1997 Peru Country Report*, *supra* note 70, at Sec. 1, e.

<sup>76</sup> *La República*, December 3, 1996, at 3.

<sup>77</sup> *Id.* Judge Minaya met a similar fate in 1991 after granting a *habeas* petition against the Supreme Court security chief who had detained striking court workers. After that ruling she was immediately transferred for over a year to a justice of the peace position outside Lima.

<sup>78</sup> *Expreso*, December 4, 1996, at 4.

<sup>79</sup> See Report of the Special Rapporteur, *supra* note 20, at III, B, ¶3, 6.

<sup>80</sup> Interview with Gino Costa, Acting Ombudsman for Human Rights, Lima, Peru (May 14, 1999).

Political interference reached the point of arbitrary closings and creation of courts in transparent attempts to influence the outcomes of proceedings.<sup>81</sup> For example, in mid-1996, the judicial branch created a two-level specialized counter-narcotics court in an effort to bolster the justice system's capacity to deal with counter-narcotics cases. The judges of the new court soon gained a reputation for honesty and objectivity. In particular, the chief justice of this court, Judge Inés Villa, was known to resist improper influence, even in politically sensitive cases. In early 1997, there were rumors that politically sensitive drug trafficking cases were about to reach her court,<sup>82</sup> and, over the objections of opposition members of Congress, the court was suddenly closed and replaced by a three-level specialized arm of the Supreme Court. The official rationale was that the link to a higher Court would further strengthen the struggle against the production and trafficking of illegal narcotics. However, none of the judges from the former anti-drug court were named to the new court, and no explanation was given for the failure to transfer the judges.<sup>83</sup>

In subsequent months, in a move that would have an impact on several sensitive cases, such as the customs fraud prosecution against broadcaster Baruch Ivcher,<sup>84</sup> Dellepiane's Executive Council created specialized chambers of the Supreme Court, which proceeded to assume control over customs and other crimes, including Mr. Ivcher's case. Although by that time many sitting Supreme Court judges had obtained the stability of permanent tenure, these new specialized chambers were staffed by untenured judges. These cases had previously been under the jurisdiction of tenured judges of the Lima superior court.<sup>85</sup> Once again, in cases in which the government was a party, the Fujimori government gave the appearance that it was seeking to control the outcome by arranging favorable judicial decision-making.

## **V. THE PREPARATION OF THE PROJECT**

By the time the Bank's Board voted on the loan, President Fujimori's targeting of the judicial system had already raised concerns among many Peruvian NGOs.<sup>86</sup> The Bank carried out

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<sup>81</sup> See "Reforma Judicial: *Arbol que Crece Torcido*," [Judicial Reform: A Tree that Grows Crooked] *ideele*, Special Edition, No. 100 (August-September 1997), at 53.

<sup>82</sup> Jaime de Althaus, "Nuevamente Montesinos?" [Montesinos again?], *Expreso*, March 21, 1997 [hereinafter *Nuevamente Montesinos?*], at 6A. It was rumored that the closure may have been related to a previous accusation by a notorious drug trafficker that National Intelligence Service chief and close Fujimori ally Vladimiro Montesinos had received improper payments. See Jaime de Althaus, "La Jueza Minaya y la credibilidad de la Reforma" [Judge Minaya and the Credibility of Reform], *Expreso*, December 4, 1996, at 4A. For more on the alliance between Montesinos and Fujimori, see *Self-Coups*, *supra* note 23, at 127.

<sup>83</sup> See *Nuevamente Montesinos?*, *supra* note 82.

<sup>84</sup> Ivcher had been in legal difficulty with the government since 1997 after broadcasting sensitive information such as accusations of torture by the Army Intelligence Service. See *1997 Peru Country Report*, *supra* note 70, at Sec. 2, a.

<sup>85</sup> See *1998 Peru Country Report*, *supra* note 57, at Sec. 1, e.

<sup>86</sup> For example, a major 1996 judicial reform initiative was roundly criticized by the Peruvian human rights NGO coalition "Coordinadora Nacional de Derechos Humanos" [The National Human Rights Coordination] as representing an attempt to further erode judicial independence. See declaration of *Coordinadora Nacional de Derechos Humanos*, Peru (August 7, 1996). For a still earlier NGO critique of judicial reform initiatives in Peru, see *Reforma de la Justicia*, *supra* note 60, at 2.

two “pre-appraisal” missions to Peru in 1996 regarding the Project, one of which included meetings with NGOs and other civil society groups.<sup>87</sup> NGO members have mixed feelings about the consultations. One NGO representative reported that the design of the Project was largely in place by the time NGOs were involved, and suggested that meetings held by the Bank were primarily informative rather than consultative. Another stated that the Bank met with large numbers of NGOs on various occasions, but that the requirement of confidentiality the Bank instituted as a condition of participation in the meetings troubled some of them.<sup>88</sup> At that time, many human rights NGOs opposed any international support for the Fujimori government in the area of judicial reform.<sup>89</sup> As the Project took shape, Peruvian NGOs began to coordinate activities with international NGOs through which they opened channels of communication to the Bank, which strengthened their advocacy efforts.<sup>90</sup>

Because of well-known NGO critiques of the government’s actions,<sup>91</sup> Bank personnel were well aware of the controversial nature of the Project early on. The loan was apparently contentious within the Bank itself, with some staff concerned about the wisdom of supporting the reform of a judicial branch whose independence was already deeply compromised,<sup>92</sup> especially after members of the Constitutional Tribunal were removed by the executive-controlled Peruvian Congress in May 1997.

Notwithstanding the controversy, the Project was approved by the World Bank’s Board of Executive Directors under a “streamlined procedure” on December 4, 1997. The streamlining meant that no vote was taken on the Project, as it was consistent with the Country Assistance Strategy<sup>93</sup> and none of the Executive Directors requested full consideration.<sup>94</sup>

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<sup>87</sup> Perhaps understanding the controversial nature of judicial reform in Peru, Bank staff had also sought the assistance of some international NGOs in the early stages of the Bank’s thinking about judicial reform needs in Peru. Interview with Coletta Youngers, Senior Associate for the Andes, Washington Office on Latin America (April 8, 1999) [hereinafter Youngers interview].

<sup>88</sup> See Huerta interview, *supra* note 7; written communication with Ernesto de la Jara, Director, Institute of Legal Defense, Lima, Peru (November 22, 1999)

<sup>89</sup> Interview with Ernesto de la Jara, Director, *Instituto de Defensa Legal* [Institute of Legal Defense], Lima, Peru (April 28, 1999) [hereinafter de la Jara interview].

<sup>90</sup> See Huerta interview, *supra* note 7. The U.S.-based groups were able to provide useful information to the Peruvian NGOs on Bank policy and activity on judicial reform that supported their advocacy efforts.

<sup>91</sup> During a visit to the Bank in late 1998, Peruvian NGO representative Ernesto de la Jara was shown a Bank file bursting with material he and his colleagues had been sending over many months. See de la Jara interview, *supra* note 89.

<sup>92</sup> See Youngers interview, *supra* note 87.

<sup>93</sup> The CAS stated: “For many years in Peru, the judiciary has been one of the weakest and least respected areas of the public sector. The resolution of disputes through the judicial system has been uncertain, lengthy, costly, and frequently corrupt and/or subject to political influence, thus raising the costs and risk of economic transactions and weakening property rights, particularly of the poor.” See *Country Assistance Strategy*, *supra* note 49, at 13.

<sup>94</sup> The Lawyers Committee, the Washington Office on Latin America and Human Rights Watch/Americas called the streamlined procedure inappropriate for the consideration of the Peru loan, arguing that given the circumstances in Peru, a full discussion by the Board was warranted. Joint letter dated December 3, 1997 from the three groups to Jan Piercy, U.S. Executive Director (on file at the Lawyers Committee for Human Rights).

## **VI. THE PROJECT'S CONDITIONALITY FRAMEWORK**

While judicial independence is not an explicit condition of the Peru Judicial Reform Project loan, it is clear from Project documents that a fundamental goal of the Project was the strengthening of judicial independence and autonomy. In particular, its implementation would depend upon the independence of existing institutions, particularly the National Council of the Judiciary. The Project design allowed the Bank to consider the subsequent attacks on the independence of the NCJ to be inconsistent with the nature and structure of the Project and to take suitable steps in response that ultimately led to the termination of the Project.

Early in Project planning, the Bank acknowledged the lack of judicial independence as a problem in Peru. A 1994 judicial sector assessment noted a number of positive developments in the aftermath of the *autogolpe*, but also stated that the events of April 5, 1992 (the date of the *autogolpe*) were “seen by many outside legal observers as a severe blow to judicial independence.”<sup>95</sup> At project approval, the Staff Appraisal Report (SAR), the most comprehensive description of the Project’s objectives and plan of action, emphasized the importance of an independent judiciary. The SAR asserts that “a modern State requires an effective rule of law,” expressed through a “solid and respected justice system capable of guaranteeing in practice security of person and property.”<sup>96</sup>

The SAR recognized that the Peruvian judicial system fails to meet “basic standards and principles of independence and accountability, access, efficiency, and professional competence and integrity” resulting in “very low public trust and confidence” after a decades-long downward trend.<sup>97</sup> Specifically, it indicated that judges are frequently corrupt or subject to political influence. The SAR identified as a risk to the Project “political interference and potential instability in the project environment,”<sup>98</sup> which could undermine the objective of promoting the independence of the judiciary. In light of these concerns, the Project’s orientation and design targeted the strengthening the rule of law through an independent judiciary. Independence and accountability were placed at the head of the list of issues to be addressed in the Project, with judicial appointment, compensation and evaluation, including tenure, as well as discipline and resources, also at the forefront. Several of the eight Project objectives related to promoting judicial independence and autonomy. The objectives included strengthening the NCJ and consolidating and improving its merit-based system of appointment, advancement and removal of judges.

Loan agreement provisions explicitly allowed the Bank to suspend payment in the event that powers of the NCJ or other implementing agencies were tampered with, or if “an extraordinary situation” arose after the date of the loan “which shall make it improbable” that the NCJ or other

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<sup>95</sup> See Judicial Sector Assessment, *supra* note 18, at 6.

<sup>96</sup> World Bank, Staff Appraisal Report, Peru Judicial Reform Project, Report No. 17137-PE (October 27, 1997) [hereinafter Staff Appraisal Report], at 1-2.

<sup>97</sup> *Id.*, at 3. While the documentation focuses on the civil and commercial side of the justice sector—the Bank’s principal area of concern—it indicates that many comments apply to other parts of the sector, including criminal law. *Id.*

<sup>98</sup> *Id.*, at 33.

implementing agencies would be able to carry out their respective duties under the agreement.<sup>99</sup> Recall that several entities, including the NCJ, were named to implement the Project in addition to the Executive Council mandated by the Fujimori administration to lead Peru's judicial reform effort. The Bank saw the NCJ as a key mechanism to assure the independence of the judiciary, and stated that by supporting it, the Project would “build a stronger, depoliticized, and merit-base system of selection, appointment, advancement and removal of judges.”<sup>100</sup> By linking the future of the Project to the survival of the NCJ, the Bank effectively conditioned the loan on the continuing autonomy of an entity that was developing into a cornerstone of judicial independence in Peru.

A lengthy policy declaration was included in the Project documentation that further sought to insure the Project against the risk of political interference. In Bank projects, such declarations, also known as “policy letters,” are intended to demonstrate that the loan arrangement is consistent with the recipient government’s policies and positions.<sup>101</sup> The policy letter acknowledges the commitment of these agencies to the Project, explicitly recognizes the importance of constitutional measures designed to guarantee the independence of the judiciary, and sets out the parties’ commitment to related objectives, policies, and actions. For example, it notes that the Judicial Academy shall examine candidates for the judiciary in a “transparent and rigorous manner” in order to create a pool of candidates from which the NCJ would select appointees to the judiciary “in a transparent, independent, merit-based and objective” fashion.<sup>102</sup> The policy letter was signed by the heads of the implementing agencies: the NCJ, the Judicial Academy, the Office of the Public Defender, and, significantly, the President of the Executive Commission of the judiciary, of which Dellepiane was formally the executive secretary and effectively its leader. While the policy letter did not commit executive branch or executive-controlled legislature to respect judicial independence and autonomy, it represented an important statement of commitment on the part of the implementing agencies to bring about the conditions necessary for judicial independence. The Bank undoubtedly sought out the policy letter to encourage explicit agreement from the key implementing agencies as to the conditions necessary for successful implementation of the Project. It helped established limits which, when exceeded, led to the termination of the loan.<sup>103</sup>

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<sup>99</sup> Loan Agreement between Republic of Peru and International Bank for Reconstruction and Development, December 17, 1997, Article V, Sections (d) and (e).

<sup>100</sup> Staff Appraisal Report, *supra* note 96, at 32.

<sup>101</sup> While such policy letters are technically not a requirement in the loan application process, they are not uncommon. Interview with David Varela, Senior Counsel, Latin American and the Caribbean Region, Legal Vice Presidency, World Bank (April 19, 1999) [hereinafter Varela interview].

<sup>102</sup> Staff Appraisal Report, *supra* note 96, at 45.

<sup>103</sup> The policy letter notes some of the limitations already in place. Highlighting the “situation of provisionality and substitutes in judicial posts that reach more than 80%,” the letter notes that the NCJ has “not been able” to confirm the appointments of provisional or substitute judges. See Staff Appraisal Report, *supra* note 96, at 44, ¶8. This inability to carry out its functions was undoubtedly due to the clash with Dellepiane’s reform plan, discussed above.

## VII. THE TERMINATION OF THE LOAN

The Project was approved by the World Bank's Board of Executive Directors on December 4, 1997,<sup>104</sup> and the Loan Agreement dated December 17, 1997. The “effective” date of the loan, *i.e.* the date when disbursements would begin, was originally scheduled for January 1998.<sup>105</sup> However, no monies had yet been disbursed when on March 11, 1998, at the behest of the Fujimori administration, the Peruvian Congress again passed highly controversial legislation truncating the NCJ’s authority (which had already been sharply reduced by Congress in 1996). Law 26933 transferred disciplinary power over judges and prosecutors from the NCJ to Executive Commissions of the Judicial Branch and Public Ministry, respectively. Notably, Congress acted just as the NCJ was making progress in an investigation of two tenured and four provisional Supreme Court judges allegedly involved in improperly softening a substantial monetary judgment against Peru's Central Reserve Bank that was unfavorable to the government.<sup>106</sup> Many observers suspected the timing of the move was aimed to shield the subjects of the investigation from further scrutiny of a vigorous NCJ, which had shown its capacity and willingness to take its dismissal powers seriously.<sup>107</sup>

Two days after the legislation passed, all seven members of the NCJ resigned and released a joint statement declaring that the new law undermined the NCJ's constitutional mandate, and deviated from the constitutional intent. The statement also noted that the new law was the last step in a long process of limiting the powers of the NCJ.<sup>108</sup> The legislative attack on the NCJ galvanized broader public opposition to President Fujimori's Bank-supported reforms. Prominent jurists such as Lima Bar Association head Delia Revoredo vigorously denounced the legislation and declared their solidarity with the resigning members of the NCJ.<sup>109</sup> Representatives of Peru's prestigious Catholic University denounced the legislation, calling it an attack on judicial security and on the rule of law.<sup>110</sup> The legislation was particularly bitter news for NGOs and others who had believed that the NCJ held promise for increasing judicial independence. Róger Rodríguez Iturry, the outgoing head of the NCJ, later said: “We are facing an authoritarian government ... that has a specific, concrete plan to hold on to power...,” adding that an independent NCJ was not part of that plan.<sup>111</sup>

The attack on the NCJ's powers caused significant discomfort within the Bank. On March 19, the Bank notified the Peruvian government that the deadline for the “effectiveness” of the loan

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<sup>104</sup> The Lawyers Committee strongly objected to the project approval, particularly the use of streamlined procedures. *See supra* note 94.

<sup>105</sup> World Bank, Memorandum and Recommendation, Report No. P-7053-PE (Oct. 27, 1997). Disbursements in Bank projects normally begin some six months after loan approval.

<sup>106</sup> “*Renuncian los siete integrantes del Consejo Nacional de la Magistratura*,” [Seven Members of the National Council of the Judiciary Resign] *La República*, March 14, 1998 [hereinafter *Renuncian los siete integrantes*].

<sup>107</sup> “*CAL acudirá a la Comisión Interamericana de DDHH*,” [The Lima Bar Association will resort to the Inter-American Commission on Human Rights] *La República*, March 14, 1998 [hereinafter *CAL acudirá a la Comisión Interamericana de DDHH*].

<sup>108</sup> *See Renuncian los siete integrantes, supra* note 106.

<sup>109</sup> *See CAL acudirá a la Comisión Interamericana de DDHH, supra* note 107.

<sup>110</sup> DESCO, *Resumen Semanal XX* # 960 (Lima, Peru).

<sup>111</sup> *See Cuestión de Principios, supra* note 62, at 7.

(i.e., its start date) would be postponed until September 17, pending a review of the implementing framework of the loan. Press reports indicated that the Bank saw NCJ involvement as critical to the Project's moving ahead and had given the government six months to fill the void left by the mass resignation.<sup>112</sup> The Bank's concerns appear in a confidential letter to the government, which was leaked to the press. The Bank indicated that disbursements would be postponed because the resignation of the members of the NCJ rendered impossible a required subsidiary agreement to be signed by the NCJ. The Bank stated that the extension until September 17 was intended to allow enough time for the NCJ to resume its functions, and complete the activities envisioned in the August 22, 1997 policy letter.<sup>113</sup>

The Bank's action was widely seen as a condemnation of the most recent attacks against judicial independence as well as the Fujimori administration's authoritarian tendencies.<sup>114</sup> A Bank official stated the decision related to the need to be assured of project effectiveness given changed circumstances.<sup>115</sup> While the Peruvian government suggested at the time that the suspension was a technicality resulting from the resignation of the members of the NCJ,<sup>116</sup> it is clear that Bank sought a responsible legal basis for taking needed steps to defer the starting date for disbursements in a context of rapidly deteriorating prospects for an independent judiciary.

During the six-month postponement period, there were three World Bank missions to Peru, the purposes of which are not known but undoubtedly included discussions about the Project.<sup>117</sup> On September 10th, 1998, days before the expiration of the period, the Peruvian Congress, in an apparent effort to convince the Bank to initiate disbursements, passed Law 26973 to restore some of the powers removed by the March legislation.<sup>118</sup> Human rights NGOs denounced the new law as inadequate, arguing that it did little to restore the NCJ's powers.<sup>119</sup> The Bank did not initiate disbursements. Instead, it granted a 30-day extension beyond the September 17th deadline, suggesting that although the Bank's review had started, it needed further time to be completed.<sup>120</sup>

By now, the loan's considerable support within the Peruvian government and judiciary had evaporated. Even President Fujimori was no longer publicly supporting the loan, preferring to

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<sup>112</sup> DESCO, Resumen Semanal XX # 961.

<sup>113</sup> "Peor, Imposible," [It couldn't be worse] *Caretas*, March 26, 1998.

<sup>114</sup> For example, a Peruvian newspaper columnist stated: "The decision of the World Bank to suspend its financial support for the controversial judicial reform plan of this government is very important. It is the first time the Bank has disassociated itself with the authoritarian politics of Alberto Fujimori—something the Bank did not do even after the 1992 *autogolpe*...." Mirko Lauer, "Problemas en la ventanilla judicial" [Problems in the judicial window], *La Republica*, March 24, 1998.

<sup>115</sup> See Varela interview, *supra* note 101.

<sup>116</sup> See de la Jara interview, *supra* note 89.

<sup>117</sup> See Varela interview, *supra* note 101.

<sup>118</sup> "Sólo modifica artículos de la Ley 26933: Promulgan ley que restituye parte de facultades al CNM" [It only modifies articles of Law 26933: legislation to restore some of the NCJ's powers], *La República*, September 12, 1998.

<sup>119</sup> See de la Jara interview, *supra* note 89. The new law did little to restore to the NCJ the power to investigate, sanction, and dismiss judges. DESCO, Resumen Semanal XX # 985 (Lima, Peru).

<sup>120</sup> See Varela interview, *supra* note 101.



focus his public statements on inefficiency and corruption in the judiciary.<sup>121</sup> In late September 1998, the government apparently reached the conclusion that the Bank would not be moved by minor adjustments to the NCJ's powers. Members of Congress in charge of judicial reform announced that the government intended to withdraw from the loan. NGOs saw the government's voluntary withdrawal from the Project as a face-saving move calculated to avoid the embarrassment of outright rejection by the Bank, though there was no doubt about the real reason for the withdrawal.<sup>122</sup> In late September, the Minister of Finance wrote the World Bank requesting withdrawal from the loan, indicating the intention of the Peruvian government to pursue judicial reform with its own resources. The Bank accepted the request and terminated the Project. It now considers the matter closed.

## VIII. CONCLUSION

The World Bank, in part due to its recognition of the importance of good governance and the negative effects of corruption on economic development and growth, has put institutional reform high on its agenda. Within this broad rubric, judicial systems and the independence of the judiciary are justifiably key areas of emphasis. However, as Bank President James Wolfensohn stated in his 1999 address at the World Bank's Annual Meeting, governments must take the lead in these efforts if they are to succeed.

What would it really take to move from powerlessness to a democratic culture? What would it take to move from weakness to capacity for action? What would it take to move from violence to peace and equity? First and foremost it will take the real commitment from the leadership of each country—both elected leaders and those with financial power and influence. It will take a willingness to reform systems of government, regulations and institutions....<sup>123</sup>

A 1996 report by the Lawyers Committee and the Venezuelan NGO Provea suggested that:

[g]overnment commitment should be assessed before the Bank agrees to finance a judicial reform proposal. This assessment should be one of the most important issues in the Bank's initial appraisal of the climate for reform in a given state. Judicial independence is the most important measure of commitment—the willingness of the government to take concrete steps to reduce political influence in judicial appointments and court operations...<sup>124</sup>

While few working in the field, including the World Bank, would disagree with the importance of government commitment, the adequacy of this commitment may be hard to determine. Governments generally are of more than one mind; particular individuals or departments

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<sup>121</sup> See de la Jara interview, *supra* note 89.

<sup>122</sup> *Id.*

<sup>123</sup> Address by James D. Wolfensohn, President of the World Bank Group, to the Board of Governors of the World Bank Group, Joint Annual Discussion (September 28, 1999), at 6.

<sup>124</sup> See *Halfway to Reform*, *supra* note 1, at 102.

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may be supportive of change and others may not. The locus of support is also important, and needs to include champions in both political and administrative sectors as well as senior officials and those who will have responsibility for implementation. Lastly, commitment may not be easily reflected in public events, especially where a government lacks the resources and the political clout to act decisively *before* the Bank's money and institutional weight have been brought to bear on the issue.

However, Peru is an indisputably clear case of a government that actively demonstrated its disdain for some of the essential ingredients for reform: the judiciary had been a frequent target of the Fujimori administration and the executive-controlled Congress before the approval of the Project. It is of course possible to argue that at the time the Project was initially conceived, Bank support was justified by both the manifest need for reform (an obviously necessary but insufficient condition) and indications from the Fujimori administration of an appreciation that the rule of law could encourage investment and development. Indeed, the creation—on paper—of a potentially robust National Council of the Judiciary raised the prospect that appropriately appointed, tenured judges could break the cycle of political intervention that had plagued the Peruvian judicial system for so long.

Nonetheless, by the end of the Project's preparation stage, well prior to approval, any misperceptions about actual governmental support for increased judicial independence should have been banished. For those within the Bank and familiar with the Project's history, the more recent attacks should have been seen as a culmination of similar concerns that had caused several of the Bank's member countries to question loans to Peru since the *autogolpe*. Under the circumstances, the decision to push forward to approval was not only unjustified but also *unjustifiable*—except as a necessary precursor to the Bank's invoking of the nuanced conditionality which led ultimately to the loan's termination.

In hindsight, precisely because of the extreme circumstances attendant in Peru, the Bank's experience sheds relatively little light on the calculus underlying an assessment of official commitment to reform. Peru should have represented an "easy" case, one not suited for the Bank's investment under any conceivably credible criteria for entry. However, the answer to the first question posed in the Introduction—about the best bellwether of commitment—is unmistakable. Peru's actions spoke loudly and consistently in opposition to a healthy and vibrant judiciary; no official statements could or should have been allowed to obscure their clear meaning. Whatever the purported rationale for the Bank's approval of the Project, it was in error. Responding again to our introductory queries, in this case as in others, an early (pre-approval), comprehensive, and frank assessment of environment in which reform is to occur is essential. As the Lawyers Committee has said in other contexts, an early assessment of the suitability of a judicial reform project, including the government commitment to judicial independence, ought to include gathering and vigorously exchanging views with a wide range of societal actors including the academic community, non-governmental organizations, opposition figures, professional associations, etc. This could help reduce risks of project failure—and the waste of resources that entails—by exposing any faulty assessment of government commitment early in the project development process.

We are not privy to why the World Bank decided to go forward with the Project even in

such a negative environment.<sup>125</sup> Indeed, the Bank's approval of the Project may have strengthened those in the Peruvian government who opposed, rather than supported, true reform built on judicial independence. This may have been one of the reasons that the Fujimori government supported the loan. In future projects in which judicial independence is a concern, the Bank must honestly assess the degree to which a borrower government has taken unmistakably concrete and consequential actions, without steps backward, toward reform that is rooted in judicial independence.

In contrast to the World Bank's decision to go forward with the Peru Project, its reaction to events after approval was appropriate and forthright. After the March 1998 legislation reducing the NCJ's powers was passed, the Bank put a six-month hold on the Project and spoke publicly about its decision to do so. While the Bank did not characterize its response as one addressing a significant inroad to the independence of the judicial system, the delay—an unusual step, particularly so soon after project approval—spoke volumes. The Bank publicly justified its action with reference to the policy letter signed by the four implementing agencies. The Bank pointed out that as a result of the March 1998 legislation, one of those agencies, the NCJ, had been left with no members by the ensuing resignations and therefore could not carry out its obligations under the loan agreement.

The Bank remained steadfast when the Peruvian Congress subsequently passed purportedly remedial legislation that made insignificant changes to the March law. Faced with a clear signal that the Bank would insist on a restoration of the NCJ's powers, and apparently believing that the Bank would terminate the Project in the absence of such action, the Peruvian government acted to avoid this embarrassment by withdrawing from the loan. The Bank's refusal to be swayed by a transparent government contrivance was obviously interpreted by the government as an indication of the gravity of the Bank's concerns, and its will to stand firm.

Several elements of the Bank's response to post-approval events are worth highlighting. First, the Bank's monitoring of an evolving situation, and its responses, reflect an understanding that the Bank's decision to partner with a government is more of a process than a singular event; it demands continuing oversight and a flexible set of responses. Second, the Bank came to acknowledge, at least implicitly, that the government's deeds were the most significant determinant of its suitability as a partner. Third, by obtaining the policy letter the Bank built certain values into the Project's approval procedure, laying an intelligent foundation for a subsequent decision that led to termination. Notably, the Bank achieved this by consensus, obtaining the signed commitments of all implementing partners to respect the values set forth in the letter. Fourth, the Bank afforded the government a window of opportunity to demonstrate, once the stakes of non-compliance were clear, that it would take effective steps to salvage the Project. Lastly, when it took what was ultimately the decisive step of postponing the Project, the Bank maintained an appropriately diplomatic face while conveying an unmistakable message about the negative impact of Peruvian government attacks on

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<sup>125</sup> The principal justification in project documentation was the acute need for judicial reform to support the full transition to a liberalized economy. While there is no doubt of Peru's need for judicial reform for this and other reasons, initiatives should be undertaken with appropriate regard to surrounding circumstances. Even World Bank literature on judicial and legal reform is adamant that “[u]nless a country is committed to reforming its legal regime ...legal technical assistance may be a waste of resources.” See Initial Lessons, *supra* note 13, at 11. Unfortunately, the Project documentation offers little clarity as to how (or whether) the Bank came to the conclusion that the commitment existed to match the need. One can only speculate as to possible bases: inaccurate information or assessments, ill-judged political compromises, unrealistic hopes or expectations, or a failure to address the issue at all.

## **BUILDING ON QUICKSAND**

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judicial independence. Taken together, these elements offer hopeful examples, and perhaps models, of how the Bank might prepare and execute a reasoned response to a government that fails to meet the required standard of commitment.

Since 1978, the Lawyers Committee for Human Rights has worked to protect and promote fundamental human rights. Its work is impartial, holding all governments accountable to the standards affirmed in the International Bill of Human Rights. Its programs focus on building the legal institutions and structures that will guarantee human rights in the long term. Strengthening independent human rights advocacy at the local level is a key feature of its work.

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