Rule of Law in Latin America: The International Promotion of Judicial Reform

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CHAPTER 2

From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America

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These newly developing nations need our help — not only our money and machines and food, but also the great capital of knowledge accumulated by our professions... In the next decade there will be foreign law schools by the dozens that will need teachers of constitutional law. Governments of the newly emerged nations will need legislative counsel and legal advisors without number. American lawyers by training and tradition should be equipped for this public service. Refrigerators and radios can be easily exported — but not the democratic system. Ideas of liberty and freedom travel fast and far and are contagious. Yet their adaptation to particular societies requires trained people, disciplined people, dedicated people. It requires lawyers.¹

Thirty-seven years after Justice William O. Douglas made this statement, and following almost two decades after the demise of the law and development movement, there has been a significant² resurgence of the concept of foreign-sponsored legal assistance programmes in Third World countries.³ Several factors have contributed to the reemergence of the newly titled ‘Rule of Law’ (ROL) movement: the collapse of the former Soviet Union and the emergence of numerous new democracies; almost universal adoption of the free market economic model and its linkage to democratisation; the rise of multinational enterprises and globalisation; and the development of human rights movements throughout the world.⁴ At the core of this new law reform movement is a belief in the inevitability of global economic integration and the evolution of legal systems to meet the challenges of the new neo-liberal market economies.

Originally, law reform was solely a US enterprise, beginning with law and development and administration of justice. Today, governments, international organisations, private foundations, law firms and non-governmental organisa-

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² Since 1994 the World Bank, the Inter-American Development Bank and the Asian Development Bank have approved or initiated more than $500 million in loans for judicial reform projects in 26 countries while USAID has spent close to $200 million in the past decade. Richard E. Messick (1999) pp. 117–36. The Lawyers Committee for Human Rights reports that as of July 1999, the World Bank and the IDB ‘... had approved or had under consideration 30 judicial or legal reform projects in 17 countries in Latin America and the Caribbean. At that time, loan amounts approved by both banks for the region amounted to more than $302 million.’ Lawyers Committee for Human Rights (2000) p. 2.
⁴ For one of the best reviews in this area see: Julie Mertus (1999) pp. 1335–389.
tions are involved in a law reform effort that dwarfs the prior initiatives. Many of these programmes present the loftiest of goals but few, if any, take into account the lessons of the past.5

I. The Law and Development Movement

In the 1960s, US academics at leading law schools (Harvard, Wisconsin, Stanford and Yale) provided the ideological basis, and much of the manpower, of what became known as the law and development movement.6 The underpinnings for the movement could be found in the post-World War II ‘modernisation’ theory put forward by US economists, political scientists and sociologists.7 Development, under this model, was an inevitable consequence of a process of ‘social differentiation that would ultimately produce economic, political and social institutions similar to those in the West. The outcome of this process would be the creation of a free market system, liberal democratic institutions and the rule of law.’8

US legal scholars took their law reform message to developing countries in the belief that adoption of a US-style legal system would cure many of these countries’ ills. Both due to their own backgrounds as academics and their belief in the centrality of the legal profession to the reform effort, many of the law and development projects focused on the improvement of legal education by the incorporation of interdisciplinary courses and adoption of the US casebook method of law teaching.9 Projects were also designed to encourage the creation of legal services for the poor.10

Law and development projects were part of a broader US foreign policy democratisation agenda that included legislative reform, improvement of public administration and public safety. The most controversial democratic

5 For criticism of the current wave of projects, especially the World Bank, see: Patrick McAuslan (1997) pp. 25–44. See also Joseph Tome’s ‘Comment’ to the foregoing article on pp. 45–50.

6 Much has been written about the movement. Among the most important works are: Sammy Adelman and Abdul Paliwala (eds.) (1993); C.J. Dias et al. (eds.) (1981); Elliot M. Burg (1977); Anthony Cartry (ed.) (1992); James A. Gardner (1980); John H. Merryman (1977); Brian Z. Tamanaha (1995); David M. Trubek and Marc Galanter (1974); David M. Trubek (1990) pp. 4–55.


9 See, for example: Keith Rosen (1969); James A. Gardner (1980); Dennis O. Lynch (1981). Reform of legal education projects received support from the US government as well as private foundations. The Center for Study and Research in Legal Education (CEPED), for example, began in 1966 with the support of the US Agency for International Development (USAID) and sought to improve legal education in Brazil. Projects were developed in Costa Rica by USAID, and in Chile and Colombia by the Ford Foundation. The Staffing of African Institutions for Legal Education and research (SAILER) project was funded by the Ford Foundation, the Rockefeller Foundation and the Peace Corps and supported visits by US law graduates to African universities. See: James A. Gardner (1980); and David M. Trubek and Marc Galanter (1974).

10 Committee on Legal Services to the Poor in the Developing Countries (1974).
assistance project involved upgrading the capacity of foreign police agencies to combat crime and curb potential revolutionary movements. The ‘public safety programme’, as it became known, was active in numerous Third World countries with the financial support of USAID and usage of US police consultants.

Law and development had a short life and by 1974 David Trubek and Marc Galanter were announcing its demise. Critics focused on the naivety of reformers who placed too much trust in the impact of the US legal system; underestimated the opposition from an entrenched legal culture; ignored the economic and political impact that reforms might have on the interests of elites and were ethnocentric in their approach. The ethnocentricity of the law and development proponents was represented by their assumption that foreign legal models would inevitably evolve into a similar model to that found in the United States. As a result, projects avoided comprehensive reform and focused on limited systemic changes — for example, legal education, on the assumption that adoption of US-based legal education techniques would inexorably contribute to the aspired legal reforms. They thus focused on formal rules while ignoring informal justice systems or the impact of non-legal actors in dispute resolution.

While these factors justified much of the disillusionment of US academics, they do not totally explain the rationale for the donors’ abandonment of law reform as an integral part of development. Latin America, during the late 1960s and early 1970s was facing rising discontent, emerging revolutionary movements and harsh criticism of the USA from the left. Thus, it is not surprising that the law and development projects, often based in universities and staffed by US academics who openly advocated adoption of US legal models, would come under attack. Even in countries as moderate as Costa Rica the law reform project was criticised and ultimately expelled from the University of Costa Rica Law School by a vote of the faculty. Legislative reformers were also attacked for interfering in national political issues. Meanwhile, the democratization initiatives also came under attack by the press and the US Congress following revelations of human rights abuses directly arising from the public safety programme.

At the same time as the end of law and development, many of the predictions of modernisation advocates failed to materialise as countries turned to military regimes, with the stagnation or collapse of economies and a further expansion of the gap between rich and poor. The early 1970s saw the demise of modernisation theory and the political development it had promised.

Tamanaha summarised the results of the failure of modernisation theory and the collapse of the law and development movement as follows:

The demise of the modernization paradigm was followed by an embrace of its

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ideological opposite. Stated in the broadest terms, this led to (1) blaming all the ills of developing countries on the imperialism of the West; (2) touting socialism over liberalism; and (3) arguing that the cultures of developing countries had to be protected against the encroachment of Western values, especially by preserving local customs or ways of life from the expanding reach of state law. Among many scholars who focused on law and developing countries, this resulted in a ‘state law bad,’ ‘folk law good’ attitude.\textsuperscript{12}

With the passage of time, the outcomes of the law and development movement have been reconsidered. The goal of devising systems of law whose aim was primarily protection of the individual against abuses by the State was laudable, even if the strategies used were flawed. The law and development movement’s greatest contribution may well be in the lessons learned from the experience. Whether or not a learning process really occurred is a major challenge facing the current ‘rule of law’ reformers.

**II. Administration of Justice\textsuperscript{13}**

Following the demise of the law and development model, foreign donors (and primarily the Unites States Agency for International Development, USAID) abandoned justice reform as a tool of development. Agency leaders and field personnel were left with a sour taste in their mouths and rejected anything that harked back to the law and development and public safety programmes. Little did they know that justice reform would become a centrepiece of US democratisation policy,\textsuperscript{14} especially in Central America, by the mid-1980s.

The new justice reform initiative began in response to Congressional criticism of human rights abuses in El Salvador during the 1980s. State Department officials argued that the impunity that characterised the Salvadorean justice system was largely attributable to defects inherent in the legal system and could be remedied by its modernisation. In 1984, USAID funded the ‘El Salvador Judicial Reform Project’.\textsuperscript{15} This project marked the first time since law and development that the United States provided foreign assistance to a law reform and police project and faced a great deal of internal opposition from within USAID, which saw itself being dragged into the justice reform field in one of the most controversial countries in the region.

Pursuant to recommendations of the Kissinger Commission on Central America,\textsuperscript{16} and on the heels of the El Salvador programme, Congress funded a

\textsuperscript{12} Brian Z. Tamanaha (1985) p. 481.

\textsuperscript{13} For one of the best treatments of this period see: José E. Alvarez (1991).

\textsuperscript{14} For a review of US democratisation policy see: Thomas Carothers (1991).

\textsuperscript{15} Lawyers Committee for Human Rights (1989). Originally the project included: establishment of the Revisory Commission for Salvadorean Legislation (CORELESAL); establishment of a Judicial Protection Unit (IPU) to protect judges, witnesses and jurors in human rights cases; and creation of a Special Investigations Unit (SIU) to investigate important cases.

\textsuperscript{16} National Bipartisan Commission on Central America (1984).
Central American justice reform initiative, which later became known as the administration of justice programme. The original programme included Central American countries, with the exception of Nicaragua and the Dominican Republic. Later awards expanded the scope of the project to include Guatemala and to incorporate six South American countries (Venezuela, Colombia, Ecuador, Bolivia, Peru and Uruguay). A similar regional justice improvement effort was also funded to assist countries in the English-speaking Caribbean with a grant to the University of the West Indies.

By 1987, AID Missions began to develop their own bilateral projects. The most comprehensive and complex of these was the $16 million 'Strengthening Democratic Institutions' five-year project implemented by Georgetown University in Honduras. This was the first, and last, project to attempt to include a variety of diverse public sectors under one umbrella project. Other bilateral projects, targeting the justice system, were also implemented in Argentina, Bolivia, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Panama, Paraguay, Peru, Uruguay and Venezuela.

There were significant differences between the law and development programme and the administration of justice initiatives. First, law schools were not the primary implementers of the programmes. Instead, grants were awarded to Washington-based consulting agencies. Second, primary reliance was placed on the usage of non-US experts with Latin Americans eventually becoming the most prominent group of advisors. Third, projects stayed away from legal education and no assistance was provided to Latin American law schools. Fourth, law drafting, with minor exceptions, was avoided. Fifth, the United States government was alone in its reform strategy, with foundations and other foreign governments funding competing projects. Sixth, the US saw government agencies as the primary local partner in these projects and involvement of non-governmental organisations was severely limited. Seventh, public legal assistance was almost ignored by the early projects. Finally, US planners viewed reform of the justice sector as a systemic enterprise in which

18 The project included assistance in the electoral, legislative and judicial sectors.
20 Checci and Co. Consulting was the primary recipient of early grants through an 'unlimited quantity contract' for administration of justice. Chemonics International and the National Center succeeded Checchi for State Courts as primary project implementers.
21 The major exception was the CORELESAL project in El Salvador, which had the vague charge of reviewing all Salvadorean legislation.
22 Unlike the law and development programme which involved important partnerships with private foundations such as Rockefeller and Ford.
all of the actors in the system had to be included in the reform. Law reform, by itself, for example, was seen as a useless effort without a complementary reform of the institutions that implemented it.

Critics of the effort focused on the ‘meagre’ demonstrable results of these projects, especially given the large amount of funds expended. They paid special attention to the human rights record of these countries and were especially disparaging of the police assistance furnished by the International Criminal Investigative Training Programme (ICITAP). Subsequent analyses of country-specific projects also questioned results, with El Salvador being the focus of much of the criticism. Human rights issues were of primary concern as well as questions about the legitimacy that a justice assistance project awarded to judicial systems that were seriously under question.

Perhaps AOJ reformers most underestimated the number of political barriers that would be encountered, reinforcing the view that these reformers, like their law and development counterparts, were naïve. A clear example was the attempt to depoliticise judiciaries by establishing merit-based judicial selection processes. This was rightly viewed as a primary obstacle to the achievement of judicial independence and many of the projects sought to draft laws and regulations to create unbiased policies for the selection, promotion and removal of judicial personnel. In Honduras, for example, this was identified as a primary goal of each of several bilateral projects over more than a decade. Local justice officials gave lip service to the goal, requested resources for evaluation of personnel policies, engaged in numerous personnel studies and received substantial training and technical assistance to achieve the goal. Twelve years after the assistance began it is still far from being realised.

III. Rule of Law

The collapse of Communism in Europe, the economic reforms taking place in China and other Asian economies, along with the globalisation of economic markets, have spurred the renewal of the law reform movement, now under the title of Rule of Law. Even some of the most ardent critics of law and development jumped on the bandwagon of the new law reform initiative, concluding that these countries no longer have any alternatives to the adoption of a democratic neo-liberal market model.

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23 In a meeting sponsored by the Washington Office on Latin America the participants severely criticised the El Salvador, Colombia and Guatemala projects, claiming that there was no demonstrable improvement in the systems of these countries. Washington Office on Latin America (1990).
Governance

Much like law and development, the new law reform effort is not an isolated initiative and cannot be understood without relating it to international efforts to improve ‘governance’ and eventually to achieve democracy, all within the context of free market economies. Under this strategy, the emphasis of international agencies has shifted from simply improvement of governments to the much broader concept of governance. While the shift in terms may appear subtle, it is significant and affects how law reform is conceptualised.  

The prior emphasis on improvement of the public sector focused on the efficiency of government institutions. Under the broader concept, governance includes public and private actors who manage a country’s overall affairs at all levels. ‘It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences’.  

While there are subtle differences between all definitions of governance, all of them emphasise the participatory nature of the term and the necessity of public and private sector adherence to the rule of law. They all share a rejection of the rule of law as simply an adherence to established laws and refer to the term within the broader concept of democracy, differentiating between rule of law and rule by law. Rather than focusing on the powers that law awards to government’s ability to regulate conduct, ‘... It establishes principles that constrain the power of government and oblige it to conduct itself according to a series of prescribed and publicly known rules ... Adherence to the rule of law entails far more than the mechanical application of static technicalities: it involves an evolutionary search for those institutions and processes that will best facilitate authentic stability through justice’.  

Critics of the governance model point out that governance is very similar to the concept of democratisation since they both presuppose that the liberal economic model is a necessary component of democratisation. This new economic model rests on notions of privatisation of government assets, shrinking of the state, drastic reduction of the public budget and integration of the national economy into international capitalism. Since a primary objective of financial institutions is stabilisation, democratisation and governance require a peaceful transition from authoritarian rule, which can only be achieved by compromise with ruling classes and those responsible for the prior oppres-

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30 Ibid. p. 588.
The need to avoid conflict requires that authoritarian figures be protected and even included as key decision-makers in the transition. The legacy of authoritarianism 'contributes in making the "constitution of tyranny" an integral part of the new regime.'

**b) Rule of Law**

One of the problems of the new rule of law movement is to find some agreement between users of the term as to its precise meaning. In its most basic form, the rule of law can be defined as a system in which democratically elected governments set forth a set of laws that are clear, publicly known and applicable to everyone. In the case of criminal law, for example, it encompasses the principles of the presumption of innocence, non-retroactivity of laws, the right to a fair and speedy trial before an impartial arbiter and the right to counsel. Safeguarding these rights is a set of institutions, especially the judiciary, that exercise independence in their decisions and act in an efficient and impartial manner in accordance with the dictates of national norms. Of these, perhaps the most important is that '... (t)he government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law abiding.'

While there are some variations, there is fairly general agreement as to what variables should be examined to determine whether a particular country or a specific practice is in compliance with the rule of law. One of the most comprehensive catalogue of these variables was issued by the Organisation for Security and Cooperation in Europe (OSCE). They include: a representative democracy; governmental compliance with the requirements of the law; civilian control over the military and law enforcement; an independent judiciary; publication of all norms (in the case of legislation, after public debate); effective means of redress of grievances and review of administrative actions; protection of the freedom of lawyers to represent their clients; and a detailed set of procedural guarantees for criminal cases.

There are significant differences between prior justice reform efforts and the current initiatives. Unlike the law and development and administration of justice (AOJ) movements, the new rule of law reform is not dominated by the United States. Instead foreign donors (Canada, Spain, Germany, Japan, etc.) play a significant role.

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33 For some of the best works on the 'third wave', see: Charles E. Lindblom (1990); Samuel Huntington (1991).
37 The organisation was formerly the Conference on Security and Cooperation in Europe.
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Sweden) and international organisations (European Union, World Bank, Inter-American Development Bank, UNDP) are taking the lead in many reform initiatives. A major actor in the rule of law movement, almost totally absent from the AOJ and law and development periods, is the multinational law firm that is playing a significant role in law reform worldwide.

While there have been significant efforts to downplay ethnocentricity, it is almost inevitable that it creeps in as the bulk of implementing agencies and technical assistance consultants have their roots in Western legal thought, especially the USA. Naivety is also a feature common to all of these movements. Rather than simply technical factors, the main obstacle to achievement of the rule of law, as with political democracy, is the lack of political will of local leaders to subject themselves to the scrutiny of an independent court system.

IV. Implementation Strategies and Programmes

When the United States was the only international donor involved in law reform, the identification of strategies and law reform programme objectives were clearer. The large number of international agencies now involved in justice reform projects makes such a clear definition almost impossible. This section will outline some of the major law reform strategies and the problems inherent in each. They can be grouped into three types: normative; institutional development; and comprehensive reform.

39 Although the World Bank had funded some discrete projects, its first major justice project was the $60 million ‘Venezuela Judicial Infrastructure Project’ approved in 1992. The Bank was originally reluctant to enter into this field and the World Bank’s General Counsel restricted its participation in Rule of Law initiatives to activities that could be justified as having a direct and demonstrable implication for economic development. Thus, the World Bank’s earliest activities focused on improvement of court operations and strengthening legal frameworks that facilitated private investment and economic stability. For a review of the World Bank’s evolution in this field see: Lawyers Committee for Human Rights and Programa Venezolano de Educación-Acción en Derechos Humanos (Provea) (1995).

40 Counterpart regional banks, such as the Asian Development Bank, have similar, if not more aggressive, law reform programmes. The IDB began to fund justice reform projects in Latin America in 1994 and focuses on modernisation of laws; access to justice; alternative dispute resolution (ADR); administration; human resources and logistical support. It currently has projects in Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Paraguay and Peru.

41 The Regional Justice Project of the Bureau for Latin America and the Caribbean constitutes UNDP’s initiative in this area. The objectives of the project are to propose and implement coordination activities between UNDP and other international agencies; to foster the exchange of experiences at the national and international level; to support the design and implementation of regional and national justice policies; and to provide information in the areas of access to constitutional justice, legal security of investments, rehabilitation of juvenile offenders and access to justice for pretrial detainees. UNDP (1999). It has also begun to publish a journal that appears annually: UNDP, Justicia y Sociedad.

a) **Normative change and law drafting**

One of the most attractive reform endeavours for foreign donors has been law-drafting. The amount of foreign law that is currently being transplanted to ‘emerging democracies’ is overwhelming, often with little regard for the culture of the receiving country and its capacity to implement the reform — regardless of the fact that critics of past efforts of legal transplantation have focused on the failure of reformers to take into account the culture of the receiving country. While many US academics may have concluded that the finalisation of the law and development movement also signalled an end to legal transplants, they were wrong to start with and have become even more so since.

The primary donor impetus for Latin American code reform was provided by USAID. The priority of US-funded code reform efforts in Latin America has been modernisation of the codes of criminal procedure due to the negative impact that these antiquated codes had on human rights and a growing popular demand to combat rising crime rates. Other donors have attempted to reform commercial codes but none has yet involved itself in modernisation of civil procedure.

Reform of criminal procedure is now the rule rather than the exception in Latin America, with many countries shifting from an inquisitorial to an accusatorial model similar to those found in common law countries. Among the lessons learned thus far are that: 1) law reform must take into account local conditions, especially legal culture and prevailing vested interests; 2) wholesale reform of a country’s normative framework is foolhardy; 3) law reform must be part of a comprehensive justice reform strategy that relies on objective assessments; 4) implementation of the reform is as important as law reform, or more important; 5) law reform will never succeed in an environment in which

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43 Robert Brown, for example, predicted that the large amount of foreign law being imported into Russia will renew the debate over the law and development programme, Robert Brown, Jr. (1995). Ann Seidman and Robert Seidman (1996) commented on the ‘lawyers and legal academics, mostly from the United States, jetted hither and yon on drafting missions, their briefcases like pigskin treasure chests bulging with draft bills’.

44 See: David M. Trubeck (1990); Maria Dakolias (1995). For a review of the argument over the transferability of law see: Philip M. Nichols (1997) p. 1245. Nichols summarises current thought on the transplantability of law as follows: ‘Culture and law are closely intertwined; law can be transplanted, but there is a significant risk of rejection that is tremendously increased if the law does not comport with the culture of the recipient country’.

45 While the law and development movement devoted a great deal of effort to law reform, the administration of justice projects initially avoided it, fearing similar results of those of law and development. However, project planners failed to understand the emphasis of Latin Americans on law revision as the foundation of justice reform. By the late 1980s, criminal procedure and other law drafting reform became commonplace. For a review of USAID’s law reform experience see: Linn Hammergren (1998a).

46 This was attempted in El Salvador, through CORELESAL, and failed.
poorly educated and compensated judges are selected for political reasons and in which there is limited judicial independence and corruption.

(b) Institutional development and limited or sector-specific reforms

All development projects usually target specific reforms rather than focus on comprehensive reform strategies that address sector-wide issues. While court administration, improvement of infrastructure and information systems all remain high on the reform agenda, some new initiatives are being introduced while other areas of need remain largely ignored.

1) Public legal defence and access to justice

Although Rule of Law projects have provided substantial assistance to the improvement of courts and prosecutorial agencies, they have largely ignored initiatives to improve access to justice for the poor. Access to justice is a key theme in all development initiatives yet seldom does one find these lofty goals translated into actual project initiatives. In the few instances in which the problem of access, especially for the poor, has been addressed it has been in the form of assistance to legal services, especially the provision of a legal defence in criminal cases.

Even though USAID has targeted criminal justice reform as its main Rule of Law initiative in Latin America it has seldom focused on the right to counsel as a key project component. In those instances in which it has, it has encountered reluctance on the part of local officials to assume supervisory or financial responsibility for the establishment of such a service. In the extreme examples, El Salvador and the Dominican Republic, donors were compelled to even pay the salaries of public defenders for a period of time. Not unexpectedly, in both instances, the government failed to assume these costs once USAID assistance ended, although they eventually did so.

Recently, USAID has targeted public legal defence (in Nicaragua, for example) as a key component of justice reform projects, although these tend to be the exception rather than the rule. Other donors, on the other hand, have stayed almost totally out of this field. It is rare to find any projects or key components of major initiatives that support legal services for the poor or disadvantaged. Exceptions have been pilot projects to furnish legal services to women, small businesses and indigenous populations.

\[47\] Law enforcement assistance is the most controversial justice reform area. While governments (primarily the United States, Spain, Germany, Sweden and Taiwan) were leaders in this field, international lending agencies (primarily the IDB) have now become involved, as the question of preventing social violence has become more acute in the region.
2) Alternative dispute resolution

The introduction of alternative dispute resolution mechanisms (ADR) has become one of the most attractive Rule of Law Reform strategies for international donors ‘... because it offers alternatives to the delays and corruption that characterise the judicial system.’ Although the civil procedure codes of most Latin American countries have provided for arbitration and mediation, these have seldom been used.

While it is still too early to evaluate the success of these intervention strategies, the immediate results are mixed. In Costa Rica, a USAID programme introduced arbitration and mediation but after funding ended, the courts failed to assume operational costs while the juvenile agencies accepted its use for family law cases. In El Salvador, mediation was introduced in the juvenile delinquency code but was heavily criticised because it permitted conciliation between the victim and the offender and applied to all types of cases, regardless of the severity of the offence. The result was that in some cases involving violent offenders or gang members associates of the offender would threaten the victim and compel conciliation. In Honduras, an IDB San Pedro Sula Chamber of Commerce arbitration programme received a great deal of notoriety but after several months had failed to receive many cases. In Argentina, on the other hand, mediation has become institutionalised and is being administered by the Executive to handle a large number of civil cases.

Among the reasons for the failure of ADR to work in some countries is the reluctance of the bar to refer cases for fear of losing their fees, which usually depend on the number of pleas filed or appearances made. Judiciaries have also been reluctant to adopt ADR for fear of losing control over the cases and/or merely repeat the process due to a reluctance on the part of one of the parties to accept the result or the non-binding nature of the arbitration.

In many countries, donors have failed to gauge the legal culture and the reasons why ADR had not been used in the past, even though it was permitted. In others, donors have concluded that ADR may be used in any legal field without considering the appropriateness of the reform to the particular country. In almost all countries, donors have overestimated the degree of local support for the reform and underestimated the level of potential opposition or apathy toward such practices.

ADR is a fairly new initiative for developed countries. Donors have made this reform central to many Rule of Law projects due to the appeal of bypassing the traditional court system. However, given the weakness of Latin American judiciaries and a complementary effort to unify court systems by

49 The Ministry of Justice is now establishing ADR centres but it is too early to tell how successful these will be.
incorporating Executive-run alternative courts,\textsuperscript{50} ADR may have the effect of weakening judiciaries further and impeding the unification effort. The future of ADR is still to be determined, but further evaluation and review of experiments is needed before introducing these reforms on a broader scale.

c) Comprehensive reform issues

Development planners emphasise the need for preparation of reform policies within the context of an overall development plan for the sector based on assessments and evaluative data. Although all major international agencies favour such a planning process, it seldom takes place and specific reforms, sometimes grouped together without any linkages between component parts, are the rule rather than the exception.

In reviewing AID's administration of justice projects, the General Accounting Office criticised AID's over-reliance on specific technical reforms in lieu of addressing fundamental systemic flaws.\textsuperscript{51} Surprisingly, USAID had funded comprehensive assessments of the judicial sector in all countries eligible for assistance in the mid-1980s with the goal of using them as tools for identification of reform areas, analysis of facilitating and inhibiting factors, determination of political will and overall planning guidance. Nevertheless, project designers routinely ignored them in their drive to fund easily manageable projects with little risk and measurable objectives. Although the World Bank and the Inter-American Development Bank have both stressed the need for in-depth assessments, these have seldom been carried out or have been limited to quick trips by consultants. Thus it is not surprising that World Bank and IDB project designers have also ignored the existence of prior assessments funded by other international agencies and have chosen to place their faith on their own quick and suspect reviews.

The project preparation process does not end with the identification of problems and determination of a strategy to solve them. It is crucial that local authorities become stakeholders in the process and agree on the nature of the problems and the solutions. This requires extensive discussion and vetting of strategies. This is especially difficult in the justice sector since, unlike other areas of the public sector, there is no-one entity that can speak for the entire system and the primary counterpart, the judiciary, is often the least experienced public institution in project management or planning.

Any assessment of the state of the justice system in Latin America will conclude that achievement of judicial independence is central to the Rule of Law. While all projects identify this goal as primary in their projects, there is little

\textsuperscript{50} Latin American Executives have often tended to place politically sensitive legal areas (i.e. agrarian, labour, military, administrative, fiscal and others) outside the scope of the traditional court system by establishing exclusive jurisdiction in the Executive Branch.

\textsuperscript{51} US General Accounting Office (1993)
consensus on how it is to be attained. Technical reforms can go a long way to making the legal system more efficient or accessible but until national elites see a benefit in supporting a strong and independent judiciary, foreign assistance projects will have little long-term impact. Hundreds of judges may be trained, for example, but the training will come to naught if, following a national election, the victorious party removes them and new judges are selected based on party affiliation.

Although the history of Latin American judiciaries is characterised by subservience to the Executive, there are positive signs of change. In the Dominican Republic, for example, the public held the judiciary in low regard and blamed it for much of the weakness of democracy in that country. Following the 1996 national election, advocacy groups demanded that the new Supreme Court members be subjected to public review of their qualifications. As a result, hearings for their selection were televised before a wide audience and a public vote resulted in a Court with much popular support. USAID's support of some of the NGOs that participated in this process was instrumental in the success of this initiative. In Guatemala, the Constitutional Court ruled that the attempt by President Serrano to consolidate power in the Executive by abolishing the judicial and legislative branches was unconstitutional. Although these are exceptions, they offer positive signs for the region. Whether international agencies are wise enough to identify these openings or to support these initiatives is to be seen. The payoff, however, is much greater than any technical reform.

Peru provides an unfortunate example of an instance in which donors overlooked clear signs of a lack of commitment to judicial independence in favour of approval of a large justice reform initiative. In 1992, President Fujimori staged an 'autocoup' resulting in the elimination of the Congress and a purging of the judiciary. It was justified on the grounds that the judiciary and the legislature were corrupt and only radical change could overcome economic stagnation and terrorism. The autocoup was followed by several efforts at judicial reform yet critics have pointed out that none of them involved depoliticisation of the judiciary. The war against terrorism also

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53 For a review of the Peruvian justice system and efforts at its reform see: Linn Hammergren (1998).
54 See: Steven Levitsky (1999); Maxwell A. Cameron (1997); and Cynthia McClintock (1996).
55 One of the first involved the establishment of the Council of Judicial Coordination, with the goal of reforming the administration of justice, which Congress established under the leadership of a former naval officer. The appointment of a former military officer drew criticisms from the Supreme Court, concerned that the courts might be militarised and aware of the power of the Council to appoint or remove judges due to its close ties to the President. Charges were also levelled that the Executive stacked the Constitutional Tribunal in order to uphold legislation that permitted President Fujimori to run for a third term. Following the end of the hostage crisis
justified the maintenance of military tribunals, under the leadership of ‘faceless judges’, in which due process rights were seldom respected.56

International donors and lenders largely ignored the actions of the Peruvian government and continued to provide justice reform assistance. The United States, for example, donated over $8 million dollars during the period 1993-1998.57 The World Bank, on the other hand, in 1996, announced a $22.5 million dollar justice reform loan ‘... to help finance an innovative and far reaching project to reform the Peruvian judicial system’.58 This amount was added to $9 million from the Peruvian government and a $1.4 million dollar Technical Assistance Grant from the Inter-American Development Bank. In designing the project strategy, planners recognised ‘political interference and political instability in the project environment’ as one of five project risks.59 The strategy sought to overcome the politicisation issue by: 1) supporting the National Judicial Council’s (Consejo Nacional de la Magistratura) moves towards adoption of a merit-based system of judicial selection and removal;60 2) some project activities would be conditional on the establishment of judicial tenure; 3) training to further a culture of judicial independence; 4) support the development of a civil society constituency favouring judicial reform; 5) other project activities, for example, court administration, would indirectly contribute to eliminating political interference in the judiciary.

The rosy assumptions of the project designers61 appear to have been flawed from the start. For example, in 1998 of the country’s 1,531 judges, only 574 had permanent appointments, having been independently selected. The remaining 957, including 19 of the 33 judges of the Supreme Court, had provisional or temporary status only.62 In order to strengthen its hold on the Judiciary, the government created two specialised chambers of the Supreme

56 Maxwell A. Cameron (1998) analyses the autocoups and Fujimori’s judicial policies.
59 The others were: a) medium-term sustainability; b) a lack of inter-agency coordination; c) weak institutional project management experience; d) resistance to change from persons with vested interests in the current system. World Bank, Project Announcement, Project ID PEPA40107, November 15, 1996.
60 Project designers claimed that the Council members ‘enjoy widespread recognition in the legal community for their objectivity and transparency’.
61 We need only quote the words of Izumi Ohno, World Bank Task Manager of the Judicial Reform Project, who said: ‘There is a strong consensus in civil society in Peru on the importance of judicial reform and a corresponding interest and resolve to participate in its reform process. The project harnesses these positive forces and the firm commitment of the government of Peru’. World Bank (1997).
Court, staffed by provisional and temporary judges, to assume jurisdiction over some of the most sensitive cases. Congress then enacted legislation transferring the power to select and remove judges and prosecutors from the Council to the Judiciary and the Public Ministry respectively. All seven members of the Judicial Council resigned in protest, and disbursement of the World Bank loan was suspended pending the restoration of the Council's authority.

While the World Bank's decision to terminate this project is to be commended, the assumptions of political will and its assessment of the government's commitment to depoliticise the judicial system can only be characterised as naïve at best. At worst, it demonstrates ignorance of the most obvious political facts as regards funding a project.

Further instances of poor political judgement include a decision to award a multi-million dollar justice reform loan to the government of Carlos Andrés Pérez following an attempted military coup that invoked the politicisation of the judiciary as a primary justification. The World Bank relied on the Judicial Council even though it had been criticised for its degree of politicisation and lack of action in curbing judicial corruption. What it will do in the light of the recent resignation of the President of the Supreme Court following the Court's acceptance of the Constituent Assembly's assumption of a primary role in 'purging' what they claimed to a corrupt judiciary still remains to be seen.

V. Implementation issues and problems

While all project design documents support the loftiest of goals and set forth what appears to be a sound implementation strategy, it is in the implementation that the success or failure of a project is most often determined. This section analyses some of the most critical implementation issues faced by international agencies and national judiciaries.

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63 This chamber assumed control over tax, customs, and narcotics crimes previously under the jurisdiction of the tenured judges of the Lima superior court.

64 The Executive Committee of the Judicial Academy also resigned in protest. Their replacements extended the period of training for new judges from six months to two years, a move seen by some as ensuring the continued reliance on temporary judges.

65 The fact that the coup leader is now the President of Venezuela and is engaged in an overhaul of the Judiciary, through constitutional reform, is a curious coincidence.

66 In the first half of 1999 the Constituent Assembly declared a 'judicial emergency' and assumed extraordinary powers to review the conduct of all of the country's judges. Several judges have already been dismissed. Following the Supreme Court's acceptance of these extraordinary powers, the Supreme Court President resigned declaring that the rule of law had ended in Venezuela. Tim Johnson, 'Venezuelan panel takes control from Congress', Miami Herald, 31 August 1999; 'La presidenta del Supremo venezolano dimite y da por enterrado el Estado de derecho', El País, 25 August 1999; Irma Alvarez (1999) (1999a).
a) Transparency, corruption and ethics

All donor agencies have made impressive statements about their commitment to combat corruption, especially in the implementation of their own programmes at the same time that they have recognised the need to improve transparency in their transactions and to develop accountability measures to gauge programme success and financial correctness. Corruption, however, is not limited to financial gains but rather extends to a broad range of conduct. This section will deal with procurement practices, access to information and its impact on countries and civil society.

1) Project procurement

Rule of Law programmes are seldom, if ever, awarded to local NGOs and the bulk of projects are awarded to governments or to large institutional consultants whose long-term commitment to reform in this area is limited by the availability of funding. In the case of loans to countries, the implementing agencies are usually government or implementing units established by the lending institution. Local procurement rules are followed so long as overall lender regulations are also complied with. In instances of outright donations, with USAID being the primary actor, project implementation is usually the result of a procurement process. In either case, technical assistance, commodities and training support are usually components that are awarded to private firms through a complicated and often obscure procurement process that favours large multinational firms.

The initial stage of any project is the design stage in which a variety of critical technical and policy decisions are made. Donor agencies often contract technical experts to assist in this phase of project development and usually bar them from participating in future procurement bids in order to prevent the use of advantageous insider information and to avoid conflicts of interest. This, however, does not prevent the technical consultants from revealing insider information to potential future bidders or even from participating in future bids as individual consultants.

Once the programme is approved and funded, most agencies will publish notifications and invite potential bidders to participate, although in many instances closed bids are used and notifications are sent to a limited number of

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67 The World Bank has defined project-related fraud and corruption: (i) 'corrupt practice' means the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution; and (ii) 'fraudulent practice' means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Borrower, and includes collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, non-competitive levels and to deprive the Borrower of the benefits of free and open competition', para 1.15 of World Bank (1999a).
firms. USAID is the only major international agency to post solicitations on the internet,\textsuperscript{68} while the World Bank and IDB have bidders rely on poorly disseminated information, usually influenced by a firm's locus at the donor's home office, Washington. The World Bank, for example, places solicitations in a monthly United Nations publication ('Development Business') that monitors projects in the pipeline of the World Bank and publicises opportunities to bid as they arise.\textsuperscript{69} The cost of the subscription varies from $445 to $695. IDB, on the other hand, relies on its own monthly publication ('IDB Projects') to inform of upcoming procurement and business opportunities.\textsuperscript{70}

In addition to the difficulties in obtaining information on upcoming projects, potential bidders must meet demanding financial and project management requirements, which restrict bids to major international donors who have the financial capability and implementation experience to meet bidding requirements. In other instances, the donor agency restricts bidding to nationals or firms from the donor agency. For example, European Union contracts are usually awarded only to European firms or individuals while others establish de facto restrictions by placing language or other requirements that limit the field to nations from the donor country.

As can be seen above, most of these procurement processes are designed to favour large multinational contractors and often favour ease of contracting rather than technical expertise or merit. USAID, for example, has begun to rely more and more on issuing blanket Indefinite Quantity Contracts whereby one large firm bids on meeting future requests for services from the international donor for a specific period of time. This mechanism permits the local donor agency to bid contracts to a limited number of 'qualified' firms rather than sponsoring a costly and complicated open competition.

\textsuperscript{68} As well as placing their applications online USAID allows potential bidders to subscribe to a periodic update service that notifies them by email of upcoming opportunities (USAID-CBD-L).

\textsuperscript{69} Each month Development Business publishes the World Bank's Monthly Operational Summary (MOS), which is a summary of projects under consideration for financing by the World Bank as well as a description of recently approved Bank projects. It also includes a list of the categories of goods and services to be procured. UN Development Business is available by subscription in print or online. It is the only business publication providing comprehensive sources of information on opportunities to supply goods, works and services to projects financed by the world's leading development banks - the African, Asian, Caribbean, Inter-American, and North American Development Banks, the European Bank for Reconstruction and Development and the United Nations System, featuring the World Bank.

\textsuperscript{70} IDB Projects contains a listing of individual projects being considered for possible financing by the IDB (also known as the project 'pipeline'). Paragraphs describing each of these proposed operations are broken out by country and by sector. By checking these listings, interested suppliers can track the progress of projects as they move through successive stages of preparation. In many cases the executing agency contacts provided in each of these short descriptions prove to be the single most important piece of information the Bank can provide, affording a chance for prospective bidders to learn about the context in which tenders will be carried out and allowing for marketing of products and/or technical expertise.
Judicial systems in Latin America are usually ill prepared to manage their own budget, not to speak of meeting strict and complicated financial management and procurement guidelines of donors. In these instances, donors have resorted to establishing local implementing units and conditioning initial disbursement on meeting certain project management guidelines. Once these management and financial oversight guidelines have been met, conditionality usually ends and little implementation oversight is required by the donor. This is especially true in the case of international banks; due to the fact that the funds are the product of a loan to be repaid by the national government; a reluctance to offend governments with much larger loans in other sectors; and a lack of in-country technical staff to exercise quality control over projects.

Once a project has been awarded, it is rare to find any updated information about the progress of the project or to obtain copies of reports or evaluations. ICITAP, for example, arguably one of the largest recipients of USAID Rule of Law funds, has never published, or made available, any of its technical reports or evaluations. In other instances, even when projects have been terminated for political or other reasons, no subsequent information is supplied to the public. Availability of important publications is often restricted, except to the most persistent researchers, or its cost is prohibitive.

2) Preventing corruption in international agencies

It is only in the last few years that international development institutions have begun to focus on corruption, especially as it involves implementation of their own projects. One of the most publicised efforts has been that of the World Bank, which concluded that: ‘... we cannot hold our clients to a higher standard than we hold ourselves. Corruption in all its forms is a crippling tax on the poor. Is corruption within the institution a widespread problem? We do not think so. But in an organisation that disburses about twenty billion dollars annually, we would be naive to believe that there is none’.

Following Bank President James D. Wolfensohn’s call for greater internal oversight of projects, the World Bank established an Oversight Committee on Fraud and Corruption responsible for reviewing all allegations of fraud and corruption received by any member of the Bank Group and then determining

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71 When the Center for the Administration of Justice requested such reports from a former director, they were informed that much of the material was classified or simply not made public.
72 One of the most blatant examples are four monographs prepared by Linn Hammergren which lay out the experiences learned by USAID over its many years of managing Rule of Law Projects. Dissemination of these works has been poor, at best, they have not been publicised and can only be acquired by purchasing from a vendor.
73 Anti-Corruption Knowledge Resource Center, 'Preventing Corruption in Bank Projects and Keeping our House in Order'.
when and how an investigation should be conducted. To help facilitate the filing of complaints, the World Bank has also set up a twenty-four-hour telephone hotline that may be used by Bank staff and the public to denounce cases of fraud and corruption.\textsuperscript{75} In addition, an ‘Ethical Guide for Bank Staff Handling Procurement Matters in Bank-Financed Projects’ was issued although it apparently only applies to permanent staff during a period in which international donors are relying more and more on outside consultants.\textsuperscript{76} Other measures instituted by the World Bank are the hiring of additional procurement specialists, contracting independent projects audits (although only 20 audits were commissioned in between November 1998 and November 1999, a small number given the Bank’s portfolio), and instituting new procedures for debarring contractors from future World Bank projects (although they have only reported eight debarments during 1999).\textsuperscript{77} The World Bank has reported that since 1997 about 15 allegations of fraud and corruption were investigated by the Investigations Unit of the Internal Auditing Department, two staff members were terminated for misuse of $110,000 in trust funds, and one civil law suit resulted in recovery of funds from a former Bank member and an outside consultant.

USAID relies on its Inspector General’s Office, with an annual budget of $30 million to investigate cases of financial mismanagement as well as corruption and fraud. The USAID web page now includes information on how to contact this office and on filing complaints by mail, email or telephone.\textsuperscript{78} Unfortunately, the IDB offers little information to the public on the means of contacting their counterpart office or apparent encouragement to do so.

While the foregoing relate to issues of fraud in international agencies’ projects, donors and lenders have had a more difficult time in defining unethical conduct that does not amount to fraud. For example, donor agencies have relied on sitting judges, prosecutors and public defenders from Latin American countries as key technical assistance consultants in their projects. This presents

\textsuperscript{75} The telephone number in the United States and Canada is 1-800-831-0463. In other countries the free 800 number is accessible through the AT&T operator. They can be found on the World Bank’s home page. http://www.worldbank.org/publicsector/anticomrupt/fraud.htm.


\textsuperscript{78} USAID states that: ‘The purpose of the OIG Hotline is to receive complaints of Fraud, Waste or Abuse in USAID programmes and operations, including mismanagement or violations of law, rules or regulations by USAID employees or programme participants. Complaints may be received directly from USAID employees, participants in USAID programmes, or the general public. The IG Act and other pertinent laws provide the protection of persons making Hotline complaints. You have the option of submitting your complaint(s) via Internet electronic mail, telephone, or US mail. However, if you elect to submit your complaint(s) via Internet email you must waive confidentiality due to the non-secure nature of Internet electronic mail systems.’ http://www.info.usaid.gov/oig/hotline/hotline.htm
the unusual situation of having a sitting Supreme Court judge, for example, from one country being paid a fee, which often is much more than his/her public salary, to further the Rule of Law goals of another country. In some instances, extensive utilisation of these public officials has resulted in questionable practices within their own countries in regards of leaves of absence and double dipping in per diem or other benefits. Unfortunately, donor agencies have not addressed this and other grey ethical areas.

3) Anti-corruption projects

As well as preventing corruption in the award and administration of their own projects, international development agencies have made combating public sector corruption a primary goal of their overall development strategy. Donors are to be commended for undertaking anti-corruption programmes, but many initiatives are curbed by the lack of donor resolve to compel recipient countries to undertake fundamental political reforms to remove the causes of corruption, as this might jeopardise the relationship with host governments. This can even lead donor countries to bypass local governments with weak and/or corrupt regulatory agencies in order to implement projects.

For example, USAID chose to award all its Hurricane George relief funds to NGOs rather than to the Government of the Dominican Republic. The World Bank and IDB, however, issued a contract to an international procurement firm to handle all hurricane-related relief, and a separate auditing contract to an international accounting firm to conduct pre- and post-audits of their funds, rather than rely on government institutions. By doing so these agencies avoided corruption, yet failed to take advantage of an opportunity to exact commitment to a fundamental change of government oversight practices and, instead, further weakened local regulatory institutions.

In other instances, in their desire to fund projects or to reward local partners for compliance with other goals of the international development institution, agencies have been too quick to overlook corrupt practices of recipient institutions. In the case of Venezuela, for example, the World Bank issued a multimillion-dollar loan to the Government of Carlos Andrés Pérez to reform the judiciary at a time when he was being investigated for corruption and following two attempted military coups. Some argued that the loan was a reward for Pérez’s acceptance of extremely unpopular financial reforms imposed by IMF and the Bank. The loan was further complicated by the decision to award implementation to the Judicial Council, which was reputedly a highly politicised judicial body. Similar results were obtained when awarding another World Bank loan to the Bolivian judiciary.

b) Intra- and Inter-agency coordination

Implementation of Rule of Law programmes requires a great deal of inter-
agency coordination at both donor and national level. Latin American countries have little experience in inter- or intra-agency coordination and this historical pattern can become a substantial barrier to the success of Rule of Law initiatives. Cooperation among donors is a critical aspect of any justice reform strategy, especially given the proliferation of reform programmes. Coordination mechanisms are most developed when the donor's interest is linked to national security or domestic concerns, for example narcotics and organised crime.\textsuperscript{79} In these areas, donors have adopted international standards, established coordination mechanisms, supported the creation of regional bodies and entered into bilateral and multinational agreements.\textsuperscript{80}

In traditional Rule of Law programmes, however, cooperation among donors has been the exception not the rule.\textsuperscript{81} In Nicaragua, for example, more than eleven donors are involved in Rule of Law reform (See figure 2.1).\textsuperscript{82} Although many of these reform programmes overlap with other existing initiatives, there has been little effort to coordinate activities. This led, for example, the Supreme Court to require an inventory of training programmes and the development of a training plan that included all donors.

Possibly the most significant result of a lack of interagency coordination is the ignorance, conscious or not, of the experiences of other international agencies. Seldom, for example, do project planners take into account assessments conducted by other donors in their own project design. This is due to a

\textsuperscript{79} US Secretary of State Madeleine Albright referred to this when she said: 'Many threats to US interests are truly international in nature, whether from smuggling across our borders and shores, from distant safe havens around the globe, or via the borderless, technological web that harnesses the world's communications and financial systems. To respond to these threats, we must not only act in an efficient and effective way at home, but in bilateral and multilateral venues as well. Without effective law enforcement throughout the international community, criminals will continue to threaten US interests simply by conducting their activities from and through those jurisdictions where law enforcement is weak.' Statement of Madeleine K. Albright, 7 Jan. 1998.

\textsuperscript{80} In the area of criminal justice reform, the United Nations has been a leader, especially through the UN Crime Commission, a functional commission of the UN Economic and Social Council, and the related Centre for International Crime Prevention (UNCICP). UNCICP will move from a criminology centre engaged in research projects to providing technical assistance and institution building programmes addressing high priority criminal activities, such as organised crime and corruption. Another major coordinating body is the UN Drug Control Programme (UNDCP) and the related Commission on Narcotic Drugs (CND) to advance the goals of the 1988 UN Drug Convention.

\textsuperscript{81} The World Bank has admitted that 'in many countries legal technical assistance is provided from a variety of sources and often without proper coordination. This may lead to inconsistent legislation being drafted or inconsistent institutions being promoted.' World Bank Legal Department (1995) p. 9. cited in The Lawyers Committee for Human Rights and The Venezuelan Programme for Human Rights Education and Action (1995).

\textsuperscript{82} Some of the major ones are: USAID, IDB, the World Bank, UNDP, Spanish Cooperation Agency, European Union, Sweden, Nordic Countries, and others. The Supreme Court of Nicaragua has named an international assistance coordinator and assigned space to many of these agencies in what looks like a miniature United Nations.
lack of communication among international agencies, consultants who want to prove their worth and receive their honoraria, or inter-institutional jealousies. Most often, however, it is simply due to ignorance of the actions of other donors. It is surprising that donors stress the need to establish sophisticated information systems and databases for recipient judiciaries but fail to do so themselves. Inter-institutional databases and information systems would not only provide basic information to agency users but also to the public at large.

**Figure 2.1: Rule of Law Assistance Projects in Nicaragua**

- **Regional Training Programme**
  - UNDP-Spain, IDB
- **Mediation**
  - IDB, Spain & USAID
- **Police**
  - Sweden
- **Criminalistics**
  - Spain
- **Children's Code**
  - UNICEF, UNDP, EU, Nordic Countries
- **Corrections**
  - Japan & Spain
- **Narcotics Law**
  - USA
- **Procuraduría**
  - USAID
- **Infrastructure**
  - Local courts
  - UNDP Sweden
- **Infrastructure**
  - Court of Appeal
  - European Union
- **Forensic Medicine**
  - UNDP & Spain
- **Judicial Organisation Law**
  - USAID, Spain & IDB
- **Administrative Code**
  - USAID
- **Criminal & Criminal Procedure Codes**
  - USAID & IDB
- **Judicial Offices**
  - IDB
In other instances, different agencies of the same government, or different units of the same donor, have pursued different and sometimes conflicting Rule of Law reform strategies. For example, ICITAP has pursued the goal of removing police agencies from military control while narcotics' policies of other US agencies have militarised police units involved in the war against narcotics trafficking. Likewise, some US agencies have forcefully pushed for the enactment of white collar crime or narcotics legislation that establish special procedures, mostly inquisitorial and often violate fundamental rights, for the prosecution of these cases while other US agencies are seeking a more transparent and expedient procedural system. The most egregious example occurs when the foreign donor pushes for law reforms that would be unconstitutional in the country of origin. The most blatant example of this practice is the criminalisation of 'illicit enrichment', which compels the defendant to prove the source of his/her assets, thereby inverting the burden of proof. The US is a lead government encouraging this reform, which would be clearly unconstitutional in the United States.

Donors have often relied upon a division of legal areas among themselves as a coordination mechanism. For example, USAID is the primary donor involved in criminal justice reform in the region while the World Bank and the IDB have focused on commercial law, infrastructure and court organisation. These divisions have often failed to work due to the impact that any reform in one area can have upon another. Finally, in some instances too large or complex an inter-agency coordination group may impede programme progress as it introduces an additional layer of bureaucratic approvals.

**c) Conditionality**

One of the most important components of any reform project is a determination of the conditions that must be met by the recipient government prior to disbursement of funds. A first consideration is the ability of project managers to meet the donor's financial management, procurement and administration requirements. Since judiciaries have little experience in these areas, donors often create project implementation units within the recipient agency and hold up disbursement until minimum requirements are met.

A more difficult task is to determine critical fundamental changes that must be met by the local agency prior to disbursement. These may be in the form of laws that must be enacted, regulations that must be issued, budgetary commitments that must be made, or changes in institutional policies. Donors have tended to shy away from the imposition of such conditions for a variety of reasons. Project designers argue that achievement of some of these benchmarks is often outside the control of the implementing agency. For example,
legislative change is dependent on the legislative branch and may not be affected by any of the project components. Likewise, financial commitments must be approved by the executive and legislative branches and may be affected by other national needs more pressing than judicial reform.

Political benchmarks are the most difficult for the donor to establish or impose. They may, however, be the most important conditions for project success. Obliging national governments to meet agreed structural conditions may affect the relationship of the donor to the recipient government, and may affect other donor priorities, possibly viewed as more significant than justice reform. Thus, it is commonly seen that such conditions fail to be included in the initial agreement and, in those cases where they are set out, it is unusual for loans or grants to be terminated as a consequence of failure to meet them.

d) Targets of reform

In order to overcome some of the problems inherent in structural reforms, donors have sometimes focused on the personnel who administer the judicial system rather than the institution itself. This has been partially justified on the basis that a key component of any reform strategy is the judicial culture, shaped and maintained by lower level justice officials and not necessarily by their superiors.

Projects driven by this philosophy will target project resources on shaping a core group of judges who will "theoretically serve as the beginning point for the long-term transformation of the judicial culture from one subservient to political and economic influence to one in which the integrity and autonomy of the judicial branch is vigorously defended, regardless of the presence or absence of constitutional or legislative reforms "from above"."84

The strategy is first to develop a reform constituency within the judiciary. Thereafter, the donors and the new judicial change agents may advance legislative and other reforms. This participatory philosophy has often failed; first, because judicial superiors often fear that reform judges may assume an inordinate amount of power and may even engender the seeds of judicial unions. Secondly, judicial turnover is very high, especially in those countries in which judicial independence is most threatened. Thirdly, while the theory of changing judicial culture through internal change agents sounds plausible, it has seldom been thoroughly tested, especially in Third World settings.

Even when donors are successful in obtaining commitments from national governments, these agreements may evaporate when conditions change or leaders are replaced. In the El Salvador IDB-funded justice reform programme, for example, the priorities of the government changed to public

safety reform due to public demands to combat crime and a shift in the Executive leadership. A new Supreme Court in Honduras was reluctant, at first, to agree to implement a project that had been designed by the predecessor court. The World Bank’s multimillion-dollar loan to the Venezuelan government was delayed and jeopardised when President Pérez was removed from office for corruption and the incoming administration had serious misgivings about accepting the previously negotiated loan.

All of these, as well as many other examples, point to the need to reach out beyond the judiciary and the government. Too great a reliance on the commitment of government or judicial officials may not prove to be enough. Projects that have no popular base of support may find themselves tied to the coat tails of temporary political leaders.

**Conclusions**

All of the aforementioned justice reform efforts have much in common. Their goals were lofty in seeking to encourage the establishment of uniformly applied norms by a cadre of legal functionaries committed to compliance with the law. Today, however, after more than a decade of aid and millions of dollars later, the justice systems of Latin America are facing their gravest crisis.

Today people are genuinely afraid for their safety, but this time the cause is crime rather than civil war. Opinion polls in Latin America reveal that public safety and corruption are ranked among the top four social problems facing the countries. Surveys also reveal growing distrust in the capacity of the justice system to combat crime and even raise questions as to its complicity in criminality. The public’s fear is not unfounded. Latin America leads the world in violent crime. El Salvador, for example, has the most homicides per capita in the world and has been characterised as the most violent country in the world, overtaking even Colombia.

Concurrent with rising levels of violence and the increase in the public’s level of fear is the public’s lack of confidence in the ability of the justice system to provide an adequate response. One of the primary causes of the low regard in which the justice system is held is a widespread perception of corruption in the justice system as well as throughout the entire public sector. The inefficiency of the justice system, combined with perceived corruption, has led many to express growing distrust in justice system institutions.85

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85 In Central America, the United Nations Development Programme undertook national household surveys on the public’s trust in the justice system. Over 50% of the persons surveyed reported little trust in the police or judiciary. In Panama, 60.3% had no confidence in the Judiciary; distrust reached 50.6% in Guatemala; 50.5% in Nicaragua; 50% in Honduras; 31% in El Salvador; and 26.9% in Costa Rica. Public distrust in the police was similar with 59.5% of the persons surveyed in Guatemala reporting no confidence in the police; 48.6% in Honduras; 45.9% in Nicaragua; 41.8% in Panama; 37.3% in Costa Rica; and 33% in El Salvador. Laura Chinchilla (1998) p. 3
Progress toward the goal of judicial independence has been slow and setbacks common. In many countries judges are still appointed on the basis of political affiliation rather than merit and judicial decisions are still influenced by non-legal factors. Bar associations fail to support judicial reform and lawyers are often the primary opponents of modernisation of legal systems.

Legal education is at an all-time low. The number of law schools has grown out of control and the profession has failed to take any steps to regulate the quality of the education being offered by law faculties. More and more lawyers, with less and less education, are entering already saturated labour markets. Judicial schools have commonly become remedial legal education centres striving to fill the educational vacuum left by the law school education.

Even though modern legislation is being adopted, especially in criminal procedure, jails are still overpopulated and the amount of pre-trial detainees continues to grow as governments turn to more repressive measures to counteract the rise in criminality.

In the face of this crisis, international agencies make apparently significant pronouncements about the importance of the Rule of Law linking it to democratic development and the achievement of capitalist markets. At the same time that they impose draconian economic measures as a condition of aid, they have failed to require fundamental change from recipient governments in their Rule of Law projects.

One of the most difficult tasks for government donors as well as international agencies is the determination of when to award assistance and when it is time to withdraw it. Philip B. Heymann, a Harvard law professor who directed Harvard's Guatemala's Criminal Justice Project, in justifying Harvard's withdrawal from that project, stated that:

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\text{(i)It is not a useful expenditure of United States money to provide training or advice to the police, prosecutors or judges of any country whose political and military leaders are unwilling to support law enforcement efforts against every form of political violence, including that initiated by security forces or political/economic groups to which the government leaders may be sympathetic ... In any country where the President, the Minister of Defence and the Minister of the Interior are unwilling to create the conditions for a vigorous investigation of terrorist crimes, the United States should not be providing support for improvement in the more politically harmless areas of criminal justice. It will not work, for the people of the country...will come to hold the criminal justice system in contempt, leaving it deprived of the most valuable resource of any criminal justice system, citizen cooperation. And even if it did work, it would create a stunted, morally corrupted system of social control, not the rule of law.}^{86}
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Professor Heymann argued that the test for commencement or termination of

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a project is the level of and type of positive impact that it will have on critical problems facing the criminal justice system. This can only be determined by evaluating the level of political will to implement the reforms and to hold the recipient accountable for meeting fundamental conditions critical for long-term reform. The fact that many of these conditions have political implications, both for the international agency and the recipient government, forces both to make extremely difficult decisions. A determination that democratisation benchmarks are not being met has long-term consequences for both and it is often easier to avoid this determination, either by not placing these conditions in the funding document or by excusing a failure to achieve them on technical factors.

Conditionality is a two-way street and many of the recipients of the law and development, administration of justice and Rule of Law projects have often failed to question the motives of donors and have primarily focused on the amount to be received and less on the strings that were attached. The little criticism that was voiced often came not from governments but from civil society, which complained about the ‘imperialist’ nature of some projects. For example, some observers have commented on the possibility that the notion of setting ‘democratic’ or ‘rule of law’ benchmarks that precondition economic assistance or international recognition could continue previous patterns of ‘humiliating intervention by States bent on “civilising missions”.’87 This is of particular concern given the prior experience of these two preceding initiatives and the apparent recurring belief among some US academics in the exportability of the US political and legal system.

Developing countries may find themselves unable to resist the demands placed on them by foreign funding agencies and may adopt legal reforms implanted by developed countries with little public discussion or analysis. A troublesome characteristic of previous reform efforts was the lack of public participation in the design and implementation of projects. Unfortunately, this is being repeated once again. The World Bank was heavily criticised for the manner in which it developed a multi-million judicial reform effort in Venezuela.88 As a result, donors and 21 human rights organisations attended a meeting with the World Bank, the IDB and the Venezuelan government to

88 ‘... participation was not a recognised Bank policy in 1990, when discussions concerning the Venezuelan project began. Not surprisingly, many major actors in the judicial system – the Ministry of Justice and the Public Prosecutor most prominently – had very little input, and almost no actors in civil society – academia, bar associations, law faculties, NGOs – were contacted. More surprising is that only a handful of judges were consulted and the vast majority knew little of the contents of the Project other than that which they had read in newspapers as late as May 1995. In spite of the expressed willingness of Bank officials and the Judicial Council to begin to reach out to civil society, the Project is only slowly emerging from the cloak of secrecy which has covered it since its inception.’ The Lawyers Committee for Human Rights (1995) p. 9.
ensure broader future participation. A key finding of the initial review and the conference was the need for 'greater involvement of the non-governmental community in the judicial reform project development process. In particular, national and local non-governmental organisations (NGOs) with practical experience working with national legal systems and institutions have a contribution to make not only to the substance of the reform efforts but also to building a broad-based consensus for reform that is necessary for its success.'

While a great deal of lip service has been paid to the incorporation of civil society in the design and implementation of justice projects, the bulk of projects continue to be designed by foreign experts during brief visits, primarily consulting with government agencies and with little publicity. The projects are then awarded based on fairly closed bidding procedures with primary implementation responsibilities being awarded largely to foreign multinational consulting companies.

Although all ROL experts agree on the need for long-term reforms, many projects continue to be judged on the achievement of short-term indicators. Projects that have demonstrable short-term results are favoured over programmes whose success may only be revealed years later. For example, an area in which fundamental change is needed is in the improvement of the quality of new lawyers entering the legal profession. Law and development reformers were correct in assuming that the legal education of those who were to be the primary actors in the system should be a primary focus of any reform effort. Administration of justice and rule of law programmes overestimated the difficulties of such ventures by focusing on the political cost and cultural barriers of previous initiatives. On the other hand, they focused their initiatives on improving the operational efficiency of those actors that have the greatest impact on the application of the law; judges. A middle ground should be found. The experience of judiciaries throughout the region demonstrates that judicial schools can do little to create knowledgeable and efficient judges if the law graduates have serious basic deficiencies in their legal training. Thus, one finds that many judicial schools are primarily engaged in emergency basic legal training, trying to fill the educational vacuum that should have been filled by the law schools.

While the entry of new funding agencies into the justice reform field is commendable it presents new problems or aggravates existing ones. Local governments are often finding themselves recipients of competing or conflicting projects funded by different international agencies that seldom coordinate among themselves. The need for coordination of development programmes is not a new issue and has been a persistent problem.

International agencies long ago decided that significant legal problems in underdeveloped countries that affected the interests of developed ones could

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89 Ibid, p. i.
Rule of Law projects remain characterised by a lack of coordination among international agencies, an absence of common strategies and insufficient quality controls. Often the easiest development path is taken and hard choices avoided. While international agencies call for transparency in government operations, little is known about their Rule of Law projects or results. Procurement practices tend to favour multinational consulting agencies often staffed by former members of the funding agency. Despite growing calls for civil society participation in the design and implementation of reform projects, this is still limited and NGOs are often relegated to observer, rather than participant, status.

Lack of coordination is not limited to international collaboration and may also be found in programmes within the same international agency. For example, both the law and development and the AOJ programmes were primarily stand-alone initiatives with little linkage to other democratisation goals and initiatives. Programmes to improve the quality of journalists, to modernise legislatures, to promote elections or to improve the efficiency of legislatures had very little relationship to justice system reform projects. This pattern appears to continue under the current Rule of Law programmes and is not limited to USAID alone. For example, the Spanish Cooperation Agency is funding police training carried out by Spanish national police agencies while the Spanish Judiciary (Consejo General del Poder Judicial) is coordinating judicial assistance. In the case of the former, there appears to be encouragement towards a militarised model of policing while the latter attempts to bring about an opposite result. There does not seem to be coordination between these two agencies with disparate objectives and methodologies.

The inability of international agencies to take advantage of the current local conditions in the region is disturbing. Public opinion polls reveal a groundswell of support for justice reform among Latin Americans. Legal reform has now entered the political agenda of parties and is an electoral issue. Unfortunately, however, authoritarian forces have taken up the banner of legal reform and have called for ‘renovation’ of the judiciary. Concerns over crime have been addressed by increasing the size and power of police forces, militaries now patrol streets of Latin cities, criminal codes have become more repressive and due process rights are being curbed as reforms of criminal procedure are criticised as being too soft on crime. Although Rule of Law assistance cannot, in and of itself, turn the tide, a rethinking of the goals and practices of donors can at least furnish support to those who seek achievement of so lofty a goal as the Rule of Law.